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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-002489-MR

DALE BROWN — APPELLANT

v.

APPEAL FROM LARUE CIRCUIT COURT
HONORABLE LARRY D. RAIKES, SPECIAL JUDGE
ACTION NO. 88-CR-00038

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, NICKELL, AND TAYLOR, JUDGES.

NICKELL, JUDGE: Dale Louis Brown ("Brown") appeals from the LaRue Circuit Court's denial of his second motion for relief from judgment pursuant to CR[1] 60.02. We affirm.

[1] Kentucky Rules of Civil Procedure.

The relevant facts and proceedings were previously summarized[2] as follows:

> On June 5, 1988, the LaRue County Grand Jury indicted Brown on charges of murder, first-degree arson, second-degree criminal mischief, and second-degree criminal trespass. The charges arose from the Sheriff's investigation which determined that Brown went to the home of Jerry Thomas Howard where he shot Howard in the abdomen with a shotgun. Howard died as a result of the wound. It was alleged that Brown then set fire to Howard's house and left the scene. A few hours later, Brown told his uncle that he had killed Howard, and evidence was found connecting Brown to the killing.
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> The matter proceeded to trial on the murder and arson charges. The jury returned the verdict of guilty as to each count, and Brown was sentenced to a total of 300 years in prison. A judgment was entered reflecting the verdict and sentence.
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> Brown filed a direct appeal to the Kentucky Supreme Court, which affirmed the conviction on September 6, 1990. During the pendency of the appeal, Brown filed a petition for writ of habeas corpus in the United States District Court. The petition subsequently was voluntarily dismissed.
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> On January 11, 1991, Brown filed a motion with the LaRue Circuit Court seeking to vacate the sentence pursuant to RCr[3] 11.42. Brown appealed the denial of that motion to this Court. On June 26, 1992, a panel of this Court affirmed the circuit court's denial of the motion to vacate. On January 13, 1993, the Kentucky Supreme Court denied discretionary review.
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> Brown filed a second petition for writ of habeas corpus on April 16, 1997. The petition was dismissed the following year, and Brown appealed to the United States Court of

[2] *Brown v. Commonwealth*, 2004 WL 2676342, not-to-be-published (November 24, 2004).

[3] Kentucky Rules of Criminal Procedure.

> Appeals for the Sixth Circuit. That appeal was denied on March 17, 1999, whereupon Brown sought discretionary review before the United States Supreme Court. The motion for discretionary review was denied on October 4, 1999.
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> On November 5, 2003, Brown filed a pro se motion pursuant to CR 60.02(f) and RCr 10.26 seeking relief from judgment. As a basis for the motion, he argued that the trial court improperly allowed evidence at trial of an illegal search and arrest; that a juror should have been disqualified; that another juror had improper contact with witnesses; that palpable error was committed when the court refused to honor the jury's request for parole eligibility records; and, that he was denied effective assistance of counsel due to a conflict of interest.

On March 3, 2004, Brown appealed the denial of his motion seeking relief from judgment pursuant to CR 60.02 and RCr 10.26 to this Court. On November 24, 2004, in an unpublished opinion, we held the circuit court's rationale and conclusions were proper. CR 60.02 is not an avenue for relitigating issues that could have been presented on direct appeal or in prior collateral attacks; and a claim of palpable error under RCr 10.26 may be considered only when reviewing a new trial motion. Even if properly before the trial court, Brown's broad assertions of palpable error were bald and unsupported. Our Supreme Court denied discretionary review April 13, 2005.

On October 28, 2005, Brown filed the instant motion to vacate his 300 year sentence – his second pursuant to CR 60.02 – and now claims pursuant to KRS[4] 446.110[5] he is entitled to avail himself of the mitigating sentencing provisions of

[4] Kentucky Revised Statutes.

[5] KRS 446.110 states in relevant part: "If any penalty, forfeiture or punishment is mitigated by any provision of the new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect."

KRS 532.110.[6] The trial court denied the motion on three grounds finding: application of KRS 532.110 is exclusively prospective; the claim could and should have been raised in Brown's prior collateral attack on the judgment; and, the motion was not filed within a reasonable time. On appeal Brown claims this was an abuse of discretion. We disagree.

To amount to an abuse of discretion, a trial court's denial must be "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007) (*citing Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)). We will affirm the decision unless there is a showing of some "flagrant miscarriage of justice." *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

First, Brown's substantive contention is without merit. Brown asserts that pursuant to KRS 446.110 he may elect to retroactively apply KRS 532.110 as amended in 1998. However KRS 446.110 is not retroactive, but exclusively prospective; it "may . . . be applied to any judgment pronounced *after the new law takes effect.*" (Emphasis added). Our Supreme Court has consistently interpreted KRS 446.110 to require courts to sentence a defendant in accordance with the law which existed at the time of the commission of the offense unless the defendant specifically consents to the application of a new law which is 'certainly' or

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[6] KRS 532.110 states in relevant part: "When multiple sentences of imprisonment are imposed on a defendant for more than one (1) crime . . . . In no event shall the aggregate of consecutive indeterminate terms exceed seventy (70) years."

'definitely' mitigating." *Lawson v. Commonwealth*, 53 S.W.3d 534, 550-551 (Ky. 2001). Clearly, Brown could not specifically consent to the application of KRS 532.110 as amended, ten years prior to adoption of the amendment.

Second, a motion pursuant to CR 60.02 is not an additional opportunity for Brown to relitigate issues that could have been presented on direct appeal or prior collateral attacks on the judgment. *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). CR 60.02 is available to Brown only if he exercised reasonable diligence in discovering the grounds and still was not, and could not have been, aware of them in time to have otherwise presented them to the court. *Barnett v. Commonwealth*, 979 S.W.2d 98, 101 (Ky. 1998).

The trial court properly ruled Brown lacked standing to bring the sentencing issue before the court. In 1998, KRS 532.110 was amended to limit consecutive terms to a maximum of seventy years. H.B. 455, 1998 Reg. Sess. (Ky. 1998). Although Brown could not have raised the sentencing issue in his attacks on the judgment prior to 1998, he had the opportunity to do so in the first CR 60.02 motion he filed five years after KRS 532.110 was amended. Brown had ample experience attacking the judgment against him, years to study the applicable law, but only one opportunity to present his claim to the court pursuant to the rule. He chose to exercise that opportunity on November 5, 2003, and now lacks standing to bring a second motion pursuant to CR 60.02 unless the grounds were not previously discoverable. We decline to give Brown a "second bite at the apple." *Alvey v. Commmonwealth*, 648 S.W.2d 858, 860 (Ky. 1983). What constitutes a

reasonable time in which to move to vacate a judgment under CR 60.02 is a matter that addresses itself to the discretion of the trial court." *Gross, supra,* 648 S.W.2d at 858. Five years was determined to be unreasonable in *Gross*; twelve years was deemed unreasonable in *Ray v. Commonwealth,* 633 S.W.2d 71, 73 (Ky.App. 1982). Ignorance of the law on which his claim is based does not excuse his delay. After all, everyone is presumed to know the law. *Oppenheimer v. Commonwealth*, 305 Ky. 147, 151, 202 S.W.2d 373, 375 (1947). Under the circumstances of this case we cannot say any of the circuit court's grounds for denying Brown's motion were "arbitrary, unreasonable, unfair, or unsupported by sound legal principles" as required for relief under *Gross*, *supra*, 684 S.W.2d at 858.

For the foregoing reasons Brown is not entitled to the extraordinary remedy afforded by CR 60.02 and the trial court's denial of relief is hereby affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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