

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2009-CA-000897-MR

DWAN M. PATTON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE IRV MAZE, JUDGE  
ACTION NO. 02-CR-000153

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \*\* \* \*\* \*

BEFORE: DIXON AND KELLER, JUDGES; LAMBERT,<sup>1</sup> SENIOR JUDGE.

DIXON, JUDGE: Appellant, Dwan M. Patton, appeals *pro se* from an order of the Jefferson Circuit Court denying his motion for relief pursuant to Cr 60.02. Finding no error, we affirm.

---

<sup>1</sup> Senior Judge Joseph Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

In May 2002, Appellant pled guilty in the Jefferson Circuit Court, Division Twelve, to charges of second-degree escape and second-degree persistent felony offender under Indictment 02-CR-0153. Appellant received an enhanced sentence of ten years imprisonment that was probated for a period of five years. In July 2003, Appellant pled guilty in the Jefferson Circuit Court, Division Six, to charges of flagrant non-support and PFO II under Indictment 03-CR-0944. Appellant was sentenced to five years on the non-support charge enhanced to ten years by virtue of the PFO II charge. However, rendition of the judgment of sentence was withheld and Appellant was placed on probation for a period of five years subject to numerous conditions.

On March 16, 2005, Probation and Parole reported that Appellant had violated the terms of his probation by assaulting a police officer, assaulting his seven-year-old daughter, failing to pay both child support and supervision fees, and failing to report to his probation officer. As a result, on March 28, 2005, the Commonwealth filed a motion to revoke probation. Although the motion contained both docket numbers and was filed in both divisions, it sought to “revoke probation granted herein on the 17<sup>th</sup> day of June, 2002, on the charges of Escape II, Persistent Felony Offender II.”

At an April 27, 2005, hearing, the Division Twelve trial judge noted that all parties had agreed to continue the revocation proceedings to allow

Appellant to retain counsel. The trial judge specifically noted in the docket that the hearing would be continued until after a revocation hearing scheduled in Division Six.

Following a hearing in Division Six,<sup>2</sup> the trial court revoked Appellant's probation and sentenced him to a period of "ten (10) years on Indictment 02-CR-0153 and five (5) years on Indictment 03-CR-0944 to be served consecutively for a total of **fifteen (15) years . . .**" Appellant did not file a direct appeal from the trial court's judgment. However, in March 2009, Appellant filed a *pro se* CR 60.02 motion arguing that the Division Six trial judge lacked jurisdiction to revoke his probation in Case No. 02-CR-0153 because the case was presided over by the Division Twelve trial judge. Appellant also requested the appointment of counsel. In an order dated April 21, 2009, the trial court denied Appellant relief, finding that the issue could have been raised via direct appeal or in an RCr 11.42 motion and, notwithstanding the procedural deficiency, Appellant's jurisdictional argument was without merit. Appellant thereafter appealed to this Court.

As he did in the trial court, Appellant maintains that he was denied due process during the revocation hearing because it was held in a division of the circuit court that lacked jurisdiction. Appellant believes that even though the Division Six court had subject matter jurisdiction, it lacked the authority to revoke

---

<sup>2</sup> It is unclear from the record on what date the hearing actually occurred. The docket notation indicates it was scheduled for May 16<sup>th</sup>, Appellant claims it was held on May 23<sup>rd</sup>, and the trial court's final order states the hearing was conducted on January 12<sup>th</sup>. It is clear however, that the final order revoking probation in both cases was entered on May 31, 2005.

his probation in Case No. 02-CR-0153 because the case was originally assigned to Division Twelve.

Our standard of review in a denial of a CR 60.02 motion is abuse of discretion. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000). The test for abuse of discretion is “whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). After reviewing the record herein, we find that the trial court did not abuse its discretion in denying Appellant's CR 60.02 motion.

CR 60.02 provides:

On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.

Application of the Civil Rules is required in criminal cases by RCr 13.04. This allows CR 60.02 motions to be used by criminal defendants to present additional

issues not specifically available through direct appeals or RCr 11.42 motions. *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). However, CR 60.02 motions are limited to afford special and extraordinary relief not available in other proceedings. *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997), *cert. denied*, 521 U.S. 1130 (1997). The rule is not intended to provide an avenue for defendants to relitigate issues which could have been presented in a direct appeal or an RCr 11.42 proceeding. *Id.* Further, a movant must demonstrate why he is entitled to this special, extraordinary relief. Finally, before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.

Appellant sought relief under CR 60.02(e)-(f), which requires any motion to be brought within a “reasonable time.” Yet, Appellant did not file his CR 60.02 motion until almost four years after the trial court revoked his probation. Under these circumstances, we agree that motion was not timely filed.

Furthermore, Appellant’s claim is not cognizable under CR 60.02 because it could have been raised on direct appeal from the probation revocation, *See e.g. Robinson v. Commonwealth*, 86 S.W.3d 54 (Ky. App. 2002), or in an RCr 11.42 motion. “Civil Rule 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could ‘reasonably have been presented’ by direct appeal or RCr 11.42 proceedings.” *McQueen*, 948 S.W.2d at 416 (citations omitted). Appellant’s arguments are not of the extraordinary nature

as is contemplated by CR 60.02. As such, the trial court properly denied his motion for post-conviction relief.

The order of the Jefferson Circuit Court denying Appellant's CR 60.02 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Dwan M. Patton, *Pro Se*  
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

Heather M. Fryman  
Assistant Attorney General  
Frankfort, Kentucky