

RENDERED: SEPTEMBER 3, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002174-MR

TIMOTHY FANCHER

APPELLANT

v. APPEAL FROM METCALFE CIRCUIT COURT
HONORABLE PHIL PATTON, JUDGE
ACTION NO. 93-CR-00001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AND ORDER
AFFIRMING IN PART
AND
DISMISSING IN PART

** ** * * * * *

BEFORE: MOORE AND WINE, JUDGES; HARRIS,¹ SENIOR JUDGE.

¹ Senior Judge William R. Harris, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

MOORE, JUDGE: Timothy Fancher, proceeding *pro se*, appeals the Metcalfe Circuit Court's order denying his RCr² 11.42 and CR³ 60.02(e) and (f) motion to vacate, set aside, or correct his sentence or, in the alternative, for a new trial. After a careful review of the record, we affirm the circuit court's order to the extent it denied Fancher's CR 60.02 motion, because the motion alleges claims that could have been presented in a timely-filed RCr 11.42 motion, and because the CR 60.02 motion was not filed within a reasonable time. We also dismiss the appeal to the extent Fancher appeals from the circuit court's denial of his RCr 11.42 motion, because we lack jurisdiction over that matter.

Following a jury trial, Fancher was convicted of murdering David L. Burdick. Fancher was sentenced to life imprisonment. He then appealed from the judgment against him, and the Kentucky Supreme Court affirmed the circuit court's judgment on April 25, 1996.

At some point, Fancher filed a motion to obtain copies of court records,⁴ and this motion was denied by the circuit court. Fancher appealed from the denial of that motion and, in 2002, while his appeal was pending in this Court, he filed another motion in the circuit court for modification of his sentence, pursuant to CR 60.02. The circuit court denied that motion, as well. On appeal, this Court held that Fancher did not properly appeal from the order denying his CR

² Kentucky Rules of Criminal Procedure.

³ Kentucky Rules of Civil Procedure.

⁴ A copy of this motion is not in the record, but in the record there is an opinion from this Court affirming the circuit court's denial of Fancher's motion for copies of court records.

60.02 motion and affirmed the denial of his motion to obtain copies of court records. In that opinion, this Court noted that Fancher had “failed to file a motion to vacate his judgment under RCr 11.42 within three years of the date his conviction was final.” (Footnote omitted). The Court also stated that Fancher made

no claim that during the three years that RCr 11.42 relief was available to him that he was unaware of the grounds he now claims entitle him to relief or that these grounds could not have reasonably been presented in an RCr 11.42 proceeding. Indeed, all issues raised by Fancher were either decided by the Supreme Court on direct appeal, reasonably could or should have been raised on direct appeal or could or should have been raised in a motion for RCr 11.42 relief. As such, these issues have been waived.

Therefore, this Court reasoned that because Fancher did not have any claims pending in the courts at that time, his “only need for trial records would be to search for new grievances,” and “he was not entitled to copies of court records at the Commonwealth’s expense for that purpose.” Thus, this Court affirmed the circuit court’s denial of Fancher’s motion to obtain copies of court records.

Subsequently, in December 2008, Fancher filed a motion to vacate, set aside, or correct his sentence or, in the alternative, for a new trial, pursuant to RCr 11.42 and CR 60.02(e) and (f). In that motion, he raised sixteen claims, most of which alleged he had received the ineffective assistance of counsel. The circuit court denied Fancher’s motion without holding a hearing.

Fancher now appeals, contending that the circuit court erred in denying his RCr 11.42 and CR 60.02(e) and (f) motion without first holding a hearing on his claims.

I. ANALYSIS

Fancher brought his claims in the circuit court under both RCr 11.42 and CR 60.02(e) and (f). We will address his claims under each rule, in turn.

A. RCr 11.42 ASPECTS OF FANCHER'S CLAIMS

“It is not the purpose of RCr 11.42 to permit a convicted defendant to retry issues which could and should have been raised” on direct appeal, nor those that were actually raised on direct appeal. *Thacker v. Commonwealth*, 476 S.W.2d 838, 839 (Ky. 1972). Fancher alleges that the circuit court should have granted his request for an evidentiary hearing concerning his RCr 11.42 claims. Pursuant to RCr 11.42(5), if there is “a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing. . . .”

In this Court’s previous order affirming the circuit court’s denial of Fancher’s motion to obtain copies of court records, this Court noted that Fancher had “failed to file a motion to vacate his judgment under RCr 11.42 within three years of the date his conviction was final.” (Footnote omitted). Pursuant to RCr 11.42(10),

[a]ny motion under this rule shall be filed within three years after the judgment becomes final, unless the motion alleges and the movant proves either:

(a) that the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence; or

(b) that the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

The judgment against Fancher became final in 1996, following the Kentucky Supreme Court's decision on direct appeal affirming his conviction and sentence. Fancher does not allege that the facts upon which his RCr 11.42 claims are predicated were unknown to him and could not have been ascertained by the exercise of due diligence, and he also does not allege that the fundamental constitutional rights he presently asserts were not established within the three-year period after his judgment became final. Therefore, the exceptions to the timeliness requirement set forth in RCr 11.42(10) do not apply to Fancher's case.

This Court has previously held that when an RCr 11.42 motion is filed after the three-year period for filing such motions has expired, the trial court does not have jurisdiction to adjudicate the motion, and "this Court is similarly without jurisdiction to hear any appeal therefrom." *Bush v. Commonwealth*, 236 S.W.3d 621, 623 (Ky. App. 2007). Consequently, Fancher's appeal from the denial of his RCr 11.42 motion is dismissed.

B. CR 60.02(e) AND (f) ASPECTS OF FANCHER'S CLAIMS

On appeal, we review the denial of a CR 60.02 motion for an abuse of discretion. "A movant is not entitled to a hearing on a CR 60.02 motion unless

he affirmatively alleges facts which, if true, justify vacating the judgment and further allege[s] special circumstances that justify CR 60.02 relief.” *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000) (internal quotation marks and citation omitted).

In his motion brought in the circuit court, Fancher alleged that he was entitled to relief under CR 60.02(e) and (f), which state as follows:

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: . . . (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. . . .

“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 v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997) (internal quotation marks omitted). Civil Rule 60.02 “is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings.” *Id.* In the present case, because Fancher could have raised his claims in a timely-filed RCr 11.42 motion, his CR 60.02 motion fails.

Moreover, even if the motion did not fail for that reason, it would fail because it was not filed within a reasonable time, as the rule requires. *See* CR 60.02. Fancher’s present CR 60.02 motion was filed twelve years after his

judgment became final, and that is not a reasonable time within which to file such a motion. *See Ray v. Commonwealth*, 633 S.W.2d 71, 73 (Ky. App. 1982).

Accordingly, we affirm the Metcalfe Circuit Court's order to the extent it denied Fancher's CR 60.02(e) and (f) motion. We also dismiss Fancher's appeal to the extent that he appeals from the Metcalfe Circuit Court's order denying his RCr 11.42 motion because we lack jurisdiction over that matter.

ALL CONCUR.

ENTERED: September 3, 2010

/s/ Joy A. Moore
JUDGE, COURT OF APPEALS

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