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NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2010-CA-001453-MR

PAUL ANTHONY PERKINS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JAMES M. SHAKE, JUDGE  
ACTION NO. 98-CR-003245

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, CHIEF JUDGE; COMBS AND LAMBERT, JUDGES.

ACREE, CHIEF JUDGE: Paul Anthony Perkins appeals the Jefferson Circuit Court's denial of his post-conviction motion. Finding Perkins failed to timely raise his post-conviction challenges, we affirm.

## **I. Facts and procedure**

Perkins was indicted on one count each of murder and first-degree robbery in late December 1998, following the armed robbery of a Louisville liquor store and the shooting death of the store's clerk, Charles Robinson. This combination of charges made Perkins eligible for the death penalty. The Commonwealth offered Perkins a plea deal, which he accepted. In exchange for Perkins' guilty plea to murder and first-degree robbery, the Commonwealth would recommend sentences on the two charges of life without the possibility of parole for twenty-five years and twenty years, respectively. The circuit court accepted the plea and sentenced Perkins on July 21, 1999.

More than ten years later, on February 26, 2010, Perkins mounted a collateral attack of his conviction. Citing Kentucky Rule of Civil Procedure (CR) 60.02, CR 60.03, and Kentucky Rule of Criminal Procedure (RCr) 10.26, he sought to vacate his sentence. The circuit court summarily rejected Perkins' motion, and this appeal followed.

On appeal, Perkins contends the circuit court should have granted his motion for two reasons: (1) the conviction was void because the circuit court failed to enter written findings pursuant to Kentucky Revised Statute (KRS) 532.025; and (2) he was denied due process because he was denied his right to jury sentencing in violation of RCr 9.84.<sup>1</sup>

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<sup>1</sup> Although Perkins contends his sentence should be vacated because he did not make a "voluntary and intelligent" waiver of his right to jury sentencing, he does not cite RCr 11.42, *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), or any other applicable authority which typically accompanies claims of ineffective assistance of counsel.

## II. Standards of review

We will first consider Perkins' claim that his judgment is void. Void judgments may be collaterally attacked under CR 60.02(e); a truly void judgment may be reversed at any time, and an appellate court owes no deference to the ruling of the trial court on the matter. *Foremost Insurance Co. v. Whitaker*, 892 S.W.2d 607, 610 (Ky. App. 1995). If the judgment is merely voidable, however, the collateral attack is based on CR 60.02(f), and the ordinary CR 60.02 time restrictions and standard of review apply.

CR 60.02 authorizes relief from a judgment when any of the following grounds is present:

- (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.

CR 60.02.

A motion based on CR 60.02 (a)-(c) must be filed within one year of the judgment; all other motions under the rule must be made “within a reasonable time[.]” *Id.* Such a motion is untimely if the delay in bringing it is substantial and

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Rather, Perkins' challenge appears to be purely to the validity of his sentence in absence of an express waiver of the right to be sentenced by a jury. We therefore do not perceive his argument to be one of ineffective assistance, and our discussion will proceed accordingly.

unexplained. *Graves v. Commonwealth*, 283 S.W.3d 252, 257 (Ky. App. 2009) (unexplained delay of seven years before bringing motion is unreasonable).

A circuit court's denial of a motion for CR 60.02 relief is reviewed for abuse of discretion. *Commonwealth v. Bustamonte*, 140 S.W.3d 581, 583 (Ky. App. 2004).

Similarly, denial of a CR 60.03 motion will be disturbed only where the trial court has abused its discretion. *See Elkins v. Gilliam*, 255 S.W.2d 645, 646 (Ky. 1952) ("This Court, on review of an equity action, may reverse fact findings of the lower court, but there must be more than a doubt as to their correctness before the finding of the chancellor will be disturbed.").

### **III. Discussion**

Perkins claims the judgment is void because it does not contain a written finding that aggravating circumstances existed, as required by KRS 532.025. However, a judgment is void only when "the trial court lacked jurisdiction of the subject matter or the parties or entered a judgment that was not within the powers granted to it by law." 7 Kurt A. Philipps, Jr., *Kentucky Practice*, CR 60.02 (6th ed.2005); *see Baze v. Commonwealth*, 276 S.W.3d 761, 767 (Ky. 2008); *Hisle v. Lexington-Fayette Urban County Government*, 258 S.W.3d 422, 430 (Ky. App. 2008); *Engle v. Caudill*, 288 S.W.2d 345, 346 (Ky. 1956). A mere error or omission, even one reversible on direct appeal, does not render a conviction void. The failure complained of here does not make the judgment void, but, at most, merely voidable.

According to KRS 532.025, a “sentence to imprisonment for life without benefits of probation or parole until the defendant has served a minimum of twenty-five (25) years of his sentence,” is not permitted absent a finding of one of a series of statutorily enumerated aggravating factors. KRS 532.025(3). First-degree robbery is one of them. KRS 532.025(2)(a)(2). When a judge, rather than a jury, determines the defendant’s sentence, that judge must designate in writing what the aggravating circumstance was. KRS 532.025(3).

Following Perkins’ indictment, the Commonwealth offered him a plea bargain, and he accepted. According to the terms of the deal, Perkins was required to admit guilt to murder and first-degree robbery; in exchange, the Commonwealth would recommend a sentence of life without parole for twenty-five years. The court accepted the plea and sentenced Perkins as agreed. The Commonwealth’s written offer, Perkins’ motion to enter a plea of guilty, the circuit court’s order accepting the plea, and the judgment all clearly provided that Perkins’ charges included murder and first-degree robbery. First-degree robbery was not explicitly identified as an aggravating factor, but it indisputably is. KRS 532.025(2)(a)(2).

Under these circumstances, we are convinced the judgment of conviction and accompanying sentence were not void. Although first-degree robbery is not specifically labeled an aggravating factor in the judgment, it is apparent that such charge is the basis of the sentence. *Askew v. Commonwealth*, 768 S.W.2d 51, 55 (Ky. 1989) (“[T]he trial court stated the basis for [its] finding in such a manner as to exclude any doubt that [it] found the existence of an aggravating factor.”). This

is an oversight that could have been corrected on a motion to amend the judgment, and perhaps it would have been better for the circuit court to do so. *Id.* Technical noncompliance with KRS 532.025(3), however, did not render the sentence void rather than voidable.

Therefore, Perkins' motion to vacate the sentence as void under CR 60.02(e) was properly overruled because the judgment was not void. We turn now to the possibility that the motion should have been granted because the sentence was voidable, pursuant to KRS 532.025(3) and CR 60.02(f): "any other reason of an extraordinary nature justifying relief."

As we stated previously, collateral attacks under CR 60.02(f) are properly denied when they are not brought within a reasonable time. Here, the circuit court's failure to designate an aggravating factor was apparent on the date the order was entered in 1999. Perkins failed to bring this matter to the court's attention until more than ten years after the judgment was entered. This delay was unreasonable, and the circuit court did not err in overruling his motion on this basis.

Neither does CR 60.03 offer Perkins relief from the judgment. That Rule provides that "[r]elief shall not be granted in an independent action if the ground of relief sought has been denied in a proceeding by motion under Rule 60.02, or would be barred because not brought in time under the provisions of that rule."

Perkins next argues the circuit court erred in failing to vacate his sentence on the basis that entry of his guilty plea was not intended to "waive" his right to a trial

by jury on the sentencing phase of trial. We presume this argument is also brought under CR 60.02(f), as a “reason of an extraordinary nature justifying relief.”<sup>2</sup>

The rule Perkins cites in support of this argument, RCr 9.84, does not require that a defendant explicitly “waive” his right to a trial by jury for sentencing in order for sentencing by the court to be proper; rather, the relevant portion of the Rule provides, “When the defendant enters a plea of guilty the court may fix the penalty, except that in cases involving offenses punishable by death *the defendant may demand* that his or her punishment be fixed by the jury.” RCr 9.84(2) (emphasis added). In other words, the defendant must assert his right to sentencing by jury if he wishes to exercise it. *See Commonwealth v. Johnson*, 910 S.W.2d 229, 231 (Ky. 1995) (citations omitted) (“participation by a jury in [sentencing in a death penalty case] has been regarded as indispensable except upon concurrence of all involved.”). If the defendant fails to take any action whatsoever to invoke his right to be sentenced by a jury, then the right is waived. Perkins has not identified where in the record he insisted on jury sentencing, and indeed our review has found no such demand. He was properly sentenced.

Furthermore, Perkins did not timely raise the matter; like the alleged error under KRS 532.025(3), the fact that Perkins was not sentenced by a jury was apparent on the date of entry of the sentence in 1999. He waited nearly eleven

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<sup>2</sup> Even if Perkins intended to argue that the judgment was void because he was not sentenced by a jury, he cannot succeed on that basis. *Hicks v. Commonwealth*, 388 S.W.2d 568, 568 (Ky. 1965).

years to contest his sentence on these grounds, and that is not a reasonable time as contemplated by CR 60.02.

#### **IV. Conclusion**

The circuit court properly overruled Perkins' motion for post-conviction relief from his sentence for murder and first-degree robbery because he failed to timely raise the alleged defects in the judgment. Furthermore, there was no error in the court's imposition of Perkins' sentence because the defendant failed to request that he be sentenced by a jury.

ALL CONCUR.

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