

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-000224-MR

THOMAS E. STEWART

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 98-CR-00001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CAPERTON AND THOMPSON, JUDGES; LAMBERT,¹ SENIOR JUDGE.

CAPERTON, JUDGE: Thomas Stewart appeals from the denial of his Kentucky Rules of Civil Procedure (CR) 60.02 motion by the Hardin Circuit Court. On appeal he argues that the denial was in error; in addition he argues that he was

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

entitled to appointment of counsel as an indigent person and that he was entitled to a full evidentiary hearing. Finding no error, we affirm the Hardin Circuit Court.

Stewart was convicted on January 25, 1999, of manslaughter in the second degree, burglary in the first degree, robbery in the first degree, and assault in the second degree and was sentenced to fifty years' imprisonment; all sentences were to run consecutively. On appeal, on October 17, 2002, the Kentucky Supreme Court reversed in part, vacated in part, and remanded. Following an evidentiary hearing held pursuant to the opinion of the Kentucky Supreme Court, the trial court on March 10, 2003, reinstated the convictions for burglary in the first degree and robbery in the first degree and their corresponding thirty-year sentence.

On July 28, 2003, following retrial on the murder and assault charges, Stewart was convicted of manslaughter in the second degree and assault in the fourth degree. He was sentenced to ten years' imprisonment consecutive to the previously entered thirty-year sentence for a total of forty years' imprisonment. This judgment was affirmed by the Kentucky Supreme Court on August 25, 2005, in *Stewart v. Commonwealth*, 2005 WL 2044534 (Ky. 2005)(2003-SC-0602-MR).

Stewart then began his post-conviction relief requests on his conviction and sentence. In February 2007, Stewart filed a Kentucky Rules of Criminal Procedure (RCr) 11.42 motion which was denied. On June 23, 2009, Stewart filed his first CR 60.02 motion which was denied. No appeal was taken.

Stewart then filed this CR 60.02 motion on January 3, 2011, which was denied. Specifically, Stewart argued that he was entitled to have the second

jury on retrial make a recommendation on concurrent or consecutive sentencing with respect to the sentences on the counts which were not reversed as a result of his first appeal. The trial court denied the motion because Stewart had previously had a direct appeal and two post-conviction motions. Additionally, the trial court denied the motion as untimely because the current CR 60.02 motion was not filed within a reasonable time. As to the merits, the trial court noted that Stewart was not entitled to have a jury in his second trial reconsider the consecutive sentencing of that part of his case which was not reversed.

In his second trial, the court did permit the jury to recommend whether the sentence he received on those charges should run consecutively or concurrently with the sentence imposed as a result of his first trial. This was the correct procedure. Accordingly, the trial court denied Stewart's motion a full evidentiary review and appointment of counsel. It is from this denial that Stewart now appeals.

On appeal Stewart presents three arguments, namely: (1) that the trial court erred in denying his CR 60.02(f) motion because on retrial the jury should have been able to make a recommendation on concurrent or consecutive sentencing with respect to the sentences on the counts which were not reversed as a result of his first appeal; (2) he was entitled to a full evidentiary hearing; and (3) he was entitled to appointment of counsel. With these arguments in mind we turn to our applicable law surrounding a CR 60.02 claim.

We review the denial of a CR 60.02 motion under an abuse of discretion standard. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky.App. 2000); *Brown v. Commonwealth*, 932 S.W.2d 359, 361 (Ky. 1996). 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) (citing 5 Am.Jur.2d *Appellate Review* § 695 (1995)).

Therefore, we will affirm the lower court's decision unless there is a showing of some “flagrant miscarriage of justice.” *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

Stewart seeks relief on appeal pursuant to CR 60.02(f). Relief may be granted under CR 60.02(f) for any reason of an extraordinary nature justifying relief. A CR 60.02(f) motion must be made within a reasonable time. See CR 60.02 and *Gross* at 858. An evidentiary hearing is not required to assess the reasonable time restriction inherent in CR 60.02 motions because such is left to the discretion of the Court. *Id.*

The burden of proof falls squarely on the movant to “affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.” *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997), citing *Gross* at 856. To justify relief, the movant must specifically present facts which render the “original trial tantamount to none at all.” *Brown* at 361.

Moreover, CR 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 an RCr 11.42 proceeding. *See McQueen*, 948 S.W.2d 415. Indeed, as RCr 11.42(3) makes clear, the movant shall state all grounds for holding the sentence invalid of which the movant has knowledge. Thus, final disposition of a movant's RCr 11.42 motion shall conclude all issues which could reasonably have been presented in the same proceeding. *See Gross*, 648 S.W.2d 853.

In the case *sub judice*, we agree with the trial court that Stewart's CR 60.02 motion was untimely brought. Stewart's second trial and the resulting conviction were affirmed by the Kentucky Supreme Court in 2005; Stewart presented the trial court his second CR 60.02 motion approximately six years later. He has not adequately explained the delay; thus, the trial court did not abuse its discretion in finding that the motion was not brought in a reasonable time. *See Stoker v. Commonwealth*, 289 S.W.3d 592 (Ky.App. 2009) (Trial court properly denied Appellant's CR 60.02 motion, his second post-conviction motion, which was brought approximately eighteen years after conviction).

Additionally, Stewart has not adequately explained to either this Court, or the court below, why this subsequent CR 60.02 motion justifies relief. Stewart has previously brought a direct appeal, an RCr 11.42 and a prior CR 60.02 motion. As noted, CR 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 an RCr 11.42 proceeding. *See McQueen*. The trial court was not in error in denying the current CR 60.02 motion on such grounds.

Lastly, Stewart has failed to “affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60 .02 relief.” *McQueen* at 416, citing *Gross* at 856. We agree with the trial court that Stewart was not entitled to have the jury at his retrial make a recommendation on concurrent or consecutive sentencing with respect to the sentences on the counts which were not reversed as a result of his first appeal. Accordingly, the trial court did not err in denying the motion.

In light of the aforementioned, we affirm the Hardin Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas E. Stewart, Pro Se
Central City, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Todd D. Ferguson
Assistant Attorney General
Frankfort, Kentucky