

RENDERED: NOVEMBER 9, 2012; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2011-CA-001291-MR

DAVID WAYNE WISE

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT  
HONORABLE BETH LEWIS MAZE, JUDGE  
ACTION NO. 04-CR-00147

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, KELLER, AND LAMBERT, JUDGES.

LAMBERT, JUDGE: David Wise appeals from the Montgomery Circuit Court's June 27, 2011, order denying his motion to vacate under Kentucky Rules of Civil Procedure (CR 60.02). Because we agree with the trial court that the motion was untimely, and for other reasons stated herein, we affirm.

Wise was indicted for robbery in the first degree on August 10, 2004, and was appointed counsel. On August 31, 2004, the Commonwealth offered Wise a plea agreement in which it would recommend a seventeen-year sentence. The case continued forward; however, and on February 11, 2005, a superseding indictment was entered charging Wise with robbery in the first degree and persistent felony offender in the second degree (PFO II).

On August 22, 2005, Wise's co-defendant pleaded guilty to an amended charge of robbery in the second degree, and he ultimately was sentenced to ten years' imprisonment. Shortly thereafter, Wise accepted the Commonwealth's offer to dismiss the PFO charge on a plea of guilty. The Commonwealth recommended a sentence of fifteen years' imprisonment. Wise's sentence was to run consecutively with sentences previously imposed in Estill, Pulaski, and Lyon counties.

On May 23, 2011, almost six years later, Wise filed a CR 60.02 motion alleging that the superseding indictment did not properly charge the persistent felony offender count. The trial court denied Wise's motion, but the Commonwealth filed a response and requested that the trial court vacate its previous order to allow both it and Wise to respond. On June 21, 2011, the trial court vacated its previous order denying Wise's CR 60.02 motion. Subsequently, the trial court entered another order, which is the order at issue in this appeal, denying the CR 60.02 motion as untimely and as not justifying the extraordinary relief provided under the rule. This appeal now follows.

The standard of review concerning a trial court's denial of a CR 60.02 motion is whether the trial court abused its discretion. *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996). Wise argues that the trial court abused its discretion when it failed to state what prior convictions were being used to enhance his sentence for the PFO II charge. Further, Wise also contends that a guilty plea waives all defenses except that the indictment fails to charge an offense. *Bush v. Commonwealth*, 702 S.W.2d 46, 48 (Ky. 1986).

While Wise's arguments may have merit, Kentucky law mandates that an issue that should have been raised in a Kentucky Rule of Criminal Procedure (RCr) 11.42 motion is precluded from being raised in an CR 60.02 motion. *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). The above arguments could have been made in a RCr 11.42 motion, and therefore are not appropriate under CR 60.02.

Further, Wise waited almost six years after his conviction before filing his CR 60.02 motion. Wise makes no effort in his brief to explain this undue delay. Kentucky law mandates that CR 60.02 motions are to be filed within a reasonable time, and six years is not a reasonable length of time to wait before raising an argument of which Wise should have been aware at the time of his guilty plea.

Discerning no abuse of discretion, we affirm the Montgomery Circuit Court's June 27, 2011, order denying Wise's CR 60.02 motion to vacate his conviction and sentence.

ALL CONCUR

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