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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-002338-MR

ERSKIN THOMAS — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 97-CR-01069

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE, NICKELL, AND THOMPSON, JUDGES.

NICKELL, JUDGE: Erskin Thomas appeals the denial of his second CR[1] 60.02(f) motion by the Fayette Circuit Court. Upon review of the record, the briefs and the law, we affirm.

[1] Kentucky Rules of Civil Procedure.

As revenge for the $25,000.00 robbery of an associate, Gerald Young —a drug dealer—hired Thomas to kill Osama Shalash—another drug dealer. During a jury trial, Young's girlfriend—Johnetta Girard—testified that in June of 1997, Young flew Thomas from Alabama to Lexington, Kentucky, paid for his motel room, and arranged for him to be driven to a particular restaurant, where Thomas shot and killed Shalash in the parking lot. Danny Craddock, a jailhouse informant, testified that while incarcerated with Young in the Scott County Detention Center, Young told him he had paid $25,000.00 to have Shalash killed, but did not identify who received the payment. Thus, Craddock's testimony did not directly implicate Thomas.

Young, Thomas and a third man, Darrell Morbley, were indicted and tried together for Shalash's murder. The jury convicted Young of complicity to commit murder and sentenced him to death. Thomas was convicted of murder (as the principal) and sentenced to life in prison without benefit of probation or parole for twenty-five years. Morbley was convicted of facilitation and sentenced to serve five years in prison.

Direct appeals by all three men were consolidated and heard by the Supreme Court of Kentucky in *Young v. Commonwealth,* 50 S.W.3d 148 (Ky. 2001). Young's death sentence was vacated and remanded for a new penalty phase with a maximum penalty of life imprisonment[2] because the Commonwealth failed

[2] On remand, Young received a sentence of life imprisonment, which the Supreme Court affirmed in *Young v. Commonwealth*, 129 S.W.3d 343 (Ky. 2004).

to prove Young participated in the murder of Shalash to garner profit—the only potential aggravating circumstance. The final sentence in the majority opinion reads, "[i]n all other respects, the judgments of conviction and sentences imposed by the Fayette Circuit Court with respect to all three Appellants are affirmed." *Id.,* at 172.

In October 2001, Thomas filed a *pro se* CR 60.02(f) motion claiming he was not the shooter. The motion was denied by the trial court and affirmed by a panel of this Court in *Thomas v. Commonwealth,* 2001-CA-002476-MR, 2003 WL 22025020 (Ky. App. 2003, unpublished). Discretionary review was denied by the Supreme Court on February 11, 2004.

Also in 2004, Thomas alleged ineffective assistance of counsel under RCr[3] 11.42. The *pro se* motion was denied by the trial court and affirmed by a panel of this Court in *Thomas v. Commonwealth,* No. 2009–CA–001242–MR, 2010 WL 4137367 (Ky. App. 2010, unpublished).

On September 6, 2011, Thomas filed a successive *pro se* CR 60.02(f) motion raising two grounds—the Commonwealth did not prove an aggravating circumstance beyond a reasonable doubt and the Commonwealth failed to adequately investigate Craddock's testimony. The trial court denied the motion on December 6, 2011. It is from this order that Thomas appeals.

ANALYSIS

[3] Kentucky Rules of Criminal Procedure.

The trial court denied relief to Thomas on the aggravating circumstance issue because the Supreme Court had already addressed the topic on direct appeal. CR 60.02 is not a "second bite at the apple[;]" it exists only "to provide relief that is unavailable by either direct appeal or RCr 11.42." *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). Thomas has not demonstrated extraordinary circumstances justifying CR 60.02 relief. *Sanders v. Commonwealth*, 339 S.W.3d 427, 437 (Ky. 2011).

The claim Thomas now seeks to assert should have been raised on direct appeal or via motion to vacate, set aside or correct sentence. CR 59.05. Thomas did neither. His co-defendant, Young, raised the issue on direct appeal. Therefore, the claim was also available to Thomas on direct appeal. However, raising the issue would have been fruitless because Girard and Craddock provided proof Thomas killed for money.[4]

Sentences of death and life without benefit of probation or parole for twenty-five years may be imposed only if a jury finds at least one statutory aggravating circumstance exists beyond a reasonable doubt and designates it in writing. KRS[5] 532.025(2)(a). Here, the parties agreed KRS 532.025(2)(a)4 —"[t]he offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value, or for other

[4] There was proof of a money transfer in the amount of $670.00 being sent to Thomas's wife on June 9, 1997, the same day Thomas flew from Alabama to Lexington.

[5] Kentucky Revised Statutes.

profit"—was the only statutory aggravating circumstance applicable to these facts. *Young,* 50 S.W.3d at 155. In analyzing the issue, the Supreme Court wrote:

> [T]he instruction parroted the language of KRS 532.025(2)(a)4, and **Thomas does not assert on appeal that there was insufficient evidence to warrant application of the aggravating circumstance to him.** The jury was instructed that it could impose capital punishment upon Young, who hired Thomas to kill Shalash, only if it believed from the evidence beyond a reasonable doubt that:
>
> > The defendant committed the offense of Complicity to Murder and the murder was committed by Erskin Thomas, for the purpose of receiving money or any other thing of monetary value, or for other profit.
>
> Of course, the jury had already found Young guilty of complicity to murder; and there was no evidence that Young's motive in hiring Thomas to kill Shalash was "for the purpose of [Young] receiving money or any other thing of monetary value, or for other profit." **The instruction authorized the imposition of capital punishment upon Young if the jury believed that Thomas killed Shalash "for the purpose of [Thomas] receiving money or any other thing of monetary value, or for other profit."**

Id. at 156 (emphasis added). While Young's death sentence required reversal for a new penalty phase, Thomas did not challenge the sufficiency of proof on direct appeal, even though he clearly could have—and should have—if he believed error had occurred. He now claims the testimony of Girard and Craddock was suspect. But, "[d]eciding whose version to believe and weighing witness credibility is entirely within the jury's discretion." *Robinson v. Commonwealth*, 325 S.W.3d 368, 370 (Ky. 2010). Just because Thomas viewed the testimony differently does

not mean the jury reached the wrong result. Thomas's claim of insufficient evidence of an aggravator is too late and without merit. From our review of the record, we discern no abuse of discretion in the trial court's denial of the CR 60.02 motion. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000).

Thomas's second claim is that the trial was marred by prosecutorial misconduct because the Commonwealth—neither before nor during trial—adequately investigated Craddock's testimony that Young, while the two men were incarcerated in the same facility, had confessed to hiring someone to kill Shalash. Called by Young at trial, Captain Agnus Reeves of the Scott County Detention Center testified Craddock was housed in maximum security area cell 231 and Young was housed in cell 123. Thomas characterizes Reeves' testimony as "clear and irrefutable evidence" that Craddock's testimony was false. However, Captain Reeves also testified Young and Craddock could have talked during Alcoholics Anonymous meetings, church, or the GED program. Thus, while Thomas claims it was "virtually impossible" for Young and Craddock to interact, there was testimony from which jurors could have believed the two men had talked. As with the first issue, the testimony from both Craddock and Captain Reeves was known to Thomas prior to return of the jury's verdict. Both Thomas[6] and Young[7] have

[6] On direct appeal, Thomas argued Craddock's testimony was "incredible as a matter of law" because it was contradicted by testimony from Captain Reeves. In his failed RCr 11.42 motion, Thomas claimed Craddock's testimony was false and the Commonwealth offered it knowing it was false.

[7] Young raised a similar claim in a subsequent CR 60.02(f) motion. A panel of this Court recently affirmed denial of Young's claim for the same reasons we express today. *Young v. Commonwealth,* Case No. 2011-CA-001577, 2013 WL 1844727 (Ky. App. 2013, unpublished).

previously raised this issue unsuccessfully. As stated earlier, CR 60.02 does not afford Thomas a "second bite at the apple." *Gross.*

While Thomas frames the issue as one of prosecutorial misconduct, as the Commonwealth points out, it is really a claim of perjury. A motion for relief due to "perjury or falsified evidence" must be brought "not more than one year after the judgment, order, or proceeding was entered or taken." CR 60.02(c). Thomas was tried in June of 1998, and the contradictions in Craddock's testimony and Captain Agnus Reeves were clear at that time. Defense counsel tried to refute Craddock's words with vigorous cross-examination of Craddock and testimony from Captain Reeves. Thomas's current motion, incorrectly filed under CR 60.02(f)—perhaps to avoid the one-year limitation on filing a claim of perjury—was not filed until September 2011—more than a decade outside the window allowed by CR 60.02(c). The trial court did not abuse its discretion in denying the successive CR 60.02 motion since the claim was repetitive and, it was untimely.

In a final claim, Thomas argues the trial court (and this Court) should consider his allegations even though they were not raised at the appropriate time—a fact he admits. He lays responsibility for the failure to raise the issues at trial and on direct appeal on his attorneys. Even if that were true, Thomas filed his post-conviction pleadings *pro se.* Thus, he has exercised full control over the

allegations he has made, and continues to make in piecemeal fashion.[8] His persistence prompted the trial court to write:

> Even if Thomas had not previously raised these same issues and had them rejected, he would be barred from raising them at this time. Issues that a Defendant knows about, or should know about, have to be raised at the first opportunity. Post-conviction Motions for relief pursuant to RCr 11.42 and CR 60.02 are not some smorgasbord from which to pick and choose at one's pleasure. These mechanisms are separate and distinct and there are set procedures and time deadlines to follow. *McQueen v. Commonwealth,* 948 S.W.2d 415, 416 (Ky. 1997); *Gross v. Commonwealth,* 648 S.W.2d 853 (Ky. 1983). Thomas has had his "day in court" with a jury trial, direct appeal, an RCr 11.42 petition and now **two** Motions for relief pursuant to CR 60.02. Enough is enough.

We could not have said it better ourselves and are unwilling to upend years of settled precedent.

Accordingly, the order of the Fayette Circuit Court denying Thomas's motion for relief from his judgment of conviction pursuant to CR 60.02(f) is affirmed.

ALL CONCUR.

[8] According to the opinion and order entered December 6, 2011, Thomas has also filed a second RCr 11.42 motion.

BRIEF FOR APPELLANT:

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