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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000427-MR

LEROY FRYREAR — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 13-CR-138521

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, MOORE, AND VANMETER, JUDGES.

MAZE, JUDGE: Appellant, Leroy Fryrear, appeals from an order of the Jefferson Circuit Court denying his motion to set aside his 1969 conviction and sentence for first-degree rape. Specifically, he contends that application of his sentence is no longer equitable because he is in ill health and because Kentucky law no longer punishes the crime of first-degree rape with the sentence of life without parole.

Though our reasoning differs from that of the trial court, we conclude that Fryrear is not entitled to relief under CR 60.02. Hence, we affirm.

Background

This case stems from a brutal crime committed nearly a half-century ago. On May 23, 1969, a jury convicted Leroy Fryrear of the rape and murder of Faith Ann Callahan of Louisville. The jury sentenced Fryrear to death for the murder and to life without the possibility of parole for the rape. However, the Court of Appeals reversed his sentence on the murder conviction, *see Fryrear v. Commonwealth*, 471 S.W.2d 321 (Ky. 1971), and following retrial on sentencing, a jury set Fryrear's punishment for the murder conviction at life with the possibility of parole.

Three years after his resentencing, in a motion filed pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42, Fryrear unsuccessfully challenged the constitutionality of his sentence for rape. *See Fryrear v. Commonwealth*, 507 S.W.2d 144 (1974). In 1975, a change to Kentucky's criminal statutes amended the maximum sentence for first-degree rape to life with the possibility of parole. *See* KRS 510.040(2). The General Assembly did not give this amendment retroactive effect, and Fryrear remained under his sentence of life without the possibility of parole on his rape conviction.

In a 1993 petition for *habeas corpus* filed with the Lyon Circuit Court, Fryrear again challenged the constitutionality of his rape sentence. Fryrear, along with several other similarly-situated prisoners, argued that his sentence

violated his Fifth, Eight, and Fourteenth Amendment rights, as well as his rights under Kentucky's Constitution. The Lyon Circuit Court agreed and held that Fryrear's sentence was unconstitutional and must be modified to life with the possibility of parole. However, Kentucky's Supreme Court subsequently reversed this ruling, concluded that *habeas corpus* was an inappropriate basis for relief from Fryrear's sentence because he was not seeking immediate release.[1] *See Fryrear, v. Parker*, 507 S.W.2d 519 (Ky. 1996). The Supreme Court did not address the merits of Fryrear's constitutional claims, but stated "that if application [via a CR 60.02 motion] is made expeditiously after the opinion of this Court, it shall be deemed timely." *Id.* at 523.

Apparently in response to the Supreme Court's prompt, Fryrear filed a motion pursuant to Kentucky Rules of Civil Procedure (CR) 60.02 in 1997, again alleging the unconstitutionality of his sentence. The Jefferson Circuit Court denied this motion and this Court later affirmed. *See Fryrear v. Commonwealth*, 1997-CA-001692-MR (Ky. App. 1999).

In January 2013, Fryrear filed another CR 60.02 motion the denial of which is the subject of the present appeal. Fryrear again asserted that his sentence was unconstitutional and added that it could no longer be equitably applied due to his age and ill health. In an order entered February 7, 2013 without the benefit of an evidentiary hearing, the trial court denied Fryrear's motion on the basis that it

[1] Fryrear and his fellow movants did not seek to immediately terminate their status of "being detained" as Kentucky's *habeas corpus* statute required. *See* Kentucky Revised Statutes (KRS) 419.020. Rather, they sought commutation of their sentences to life with the possibility of parole, which would merely make their future release possible.

was not timely filed. The court stated that, given the lapse between the Supreme Court's 1996 instruction to file a motion "expeditiously" and his 2013 motion, the latter was not filed within a "reasonable time" as required under the rule. It is from this order that Fryrear now appeals.

Standard of Review

"Given the high standard for granting a CR 60.02 motion, a trial court's ruling on the motion receives great deference on appeal...." *Barnett v. Commonwealth,* 979 S.W.2d 98, 102 (Ky.1998) (*internal citations omitted*); *see also Roberts v. Roberts*, 2010-CA-000653-MR, 2012 WL 3764719 (Ky. App. 2012). Therefore, on the appeal of a denial of a CR 60.02 motion, the trial court's ruling will not be overturned absent an abuse of discretion. *Id*.; *see also Lawson v. Lawson,* 290 S.W.3d 691, 693–94 (Ky. App. 2009). To amount to an abuse of discretion, the trial court's decision must be "arbitrary, unreasonable, unfair or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W. 2d 941, 945 (Ky. 1999). With this deferential standard in mind, we turn to the several issues Fryrear's motion presents.

Analysis

Fryrear seeks relief from his rape sentence based upon several facts. He argues that application of his sentence is inequitable given that it is no longer possible under Kentucky law for a person convicted of first-degree rape to be sentenced to life without the possibility of parole. He further asserts that equity

and leniency require mitigation of Fryrear's sentence to life with the possibility of parole due to his advanced age and ill health.

CR 60.02 creates an avenue of relief under a variety of grounds of which a party became aware after entry of the judgment he seeks to set aside. Among these grounds, and most pertinent to the present case, CR 60.02(e) permits relief from a judgment when "it is no longer equitable that the judgment should have prospective application" and CR 60.02(f) permits the same for "any other reason of an extraordinary nature justifying relief." Motions asserting one or both of these grounds must also be brought "with a reasonable time[.]" CR 60.02.

Fryrear contends that CR 60.02 (e) and (f) apply and entitle him to relief from his sentence. Accordingly, he has the burden of showing that his allegations are true and that there is a reasonable certainty that if true, such would have changed the verdict or probably change the result if a new trial were granted. *Commonwealth v. Spaulding*, 991 S.W.2d 651, 654 (Ky. 1999).

I. Timeliness of the 2013 CR 60.02 Motion

We first address the trial court's sole basis for denying Fryrear's latest CR 60.02 motion. The trial court's order focused exclusively upon whether the motion was timely relative to the Supreme Court's 1996 denial of his *habeas corpus* petition. The trial court pointed out that the Court had required any future CR 60.02 to be filed "expeditiously" and concluded that it could not "stretch its discretion to find that a motion filed so long after the appellate court's decision has been filed within a 'reasonable time.'"

We are troubled that the trial court's order seemingly operates as if Fryrear never filed his 1997 CR 60.02 motion, as that motion seemingly complied with the Supreme Court's timeliness directive. The Commonwealth also makes no mention in its argument of Fryrear's 1997 CR 60.02 motion and the impact it might have on the question of timeliness. Given that seventeen years have passed since denial of that motion, we are tempted to conclude that these omissions are of no consequence because the present CR 60.02 motion is obviously untimely. However, the trial court's omission, as well as the unique procedural history of this case, compels us, in the interest of caution, to look elsewhere for support of the trial court's order.

II. Fryrear's Constitutional Arguments

CR 60.02 and the legal framework for collateral appeals exist to grant relief based on issues that cannot be raised in other proceedings. *See McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997); *see also Gross v. Commonwealth*, 936 S.W.2d 853, 856 (Ky. 1996). They also exist "to prevent the relitigation of issues which either were, should or could have been litigated in a similar proceeding." *Stoker v. Commonwealth*, 289 S.W.3d 592, 597 (citing to *McQueen* at 416).

Fryrear's arguments regarding the alleged unconstitutionality and inequity of his sentence have been litigated, and they are therefore successive. On at least one occasion since his 1996 *habeas* petition, a court considered the very

issue Fryrear now raises regarding the 1975 change to Kentucky law. Therefore, to the extent that Fryrear's 2013 motion is again comprised of this constitutional challenge, it is impermissibly successive and we do not reach its merits.

III. Fryrear's Health

The sole basis for relief in Fryrear's present CR 60.02 which remains unlitigated is that he "now suffers from serious medical concerns and is in much ill health[.]" However, these facts do not entitle him to relief under CR 60.02.

In *Wine v. Commonwealth*, 699 S.W.2d 752 (Ky. App. 1985), in which a prisoner sought relief based on the strain his sentence placed upon his familial relationships, this Court established that CR 60.02 does not apply. *See also Duncan v. Commonwealth*, 2005 WL 2046005, 2005-CA-001654-MR (Ky. App. 2005); *Commonwealth v. Hayes*, 2011 WL 1812406, 2010-CA-001021-MR (Ky. App. 2011). We stated, "[t]he hardships cited by the appellant have no relation to the trial proceedings or any additional undiscovered evidence not presented at trial…." *Wine* at 754. We further held that, "if changes in family or other conditions were viewed as proper grounds for relief under CR 60.02(f), great uncertainty would arise surrounding the finality of judgments." *Id*. at 754.

The same logic we employed in *Wine* extends to the physical hardship Fryrear now asserts pursuant to CR 60.02. Without intending to seem callous, Fryrear's age and infirmity are not results of his life sentence, nor are they related

to the trial proceedings that precipitated it. They are results of the mere passage of time; time spent in prison following a crime for which he was tried, convicted, and sentenced according to the laws as they existed at that time. Furthermore, such issues may form a basis for a request for clemency pursuant to Section 77 of Kentucky's Constitution. *See McQueen*, 948 S.W.2d at 418. As Fryrear raises them now, we observe in these facts nothing which entitles him to relief.

IV. Fryrear's Right to a Hearing

Finally, Fryrear argues that the trial court abused its considerable discretion when it denied his motion without conducting a hearing. We disagree.

A hearing on the issues involved in a party's CR 60.02 motion is not always necessary. If the record rebuts the moving party's allegations, a hearing on the CR 60.02 motion is not necessary. *See Parrish v. Commonwealth*, 283 S.W.3d 675, 677-678 (Ky. 2009). However, "a hearing is required if there is a material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record." *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). Though a trial court enjoys discretion in its decision whether to grant a hearing, "[a] trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them." *Id*. at 453.

The successive nature of Fryrear's collateral motions is a secret to no one who reviews the extensive procedural history of this case. It is also apparent

from the record that Fryrear's only remaining argument is based on his age, an argument, as we demonstrate above, does not relate to the prior proceedings or evidence in this case. Hence, we conclude that Fryrear's claims in his CR 60.02 were conclusively resolved on the record and that the trial court did not abuse its discretion in denying him a hearing.

Conclusion

For the foregoing reasons, we hold that Fryrear was not entitled to the extraordinary relief provided under CR 60.02. Accordingly, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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