

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000161-MR

MITCHELL RICE

APPELLANT

v. APPEAL FROM LARUE CIRCUIT COURT
HONORABLE JOHN DAVID SEAY, JUDGE
ACTION NO. 83-CR-00036

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, JONES, AND MAZE, JUDGES.

MAZE, JUDGE: On June 7, 1983, a Hart County grand jury returned an indictment charging Mitchell Rice and two co-defendants with one count of Kidnapping, seven counts of first-degree Rape, and one count of Complicity to Sodomy. The trial court granted the defendants' motions transferring venue to LaRue County. Following a jury trial, Rice was found guilty of Kidnapping,

Complicity to Sodomy, five counts of first-degree Rape and two counts of Complicity to first-degree Rape. He was sentenced to 20 years for Kidnapping, 20 years on each count of Rape and Complicity to Sodomy, and 18 years for each count of Complicity to first-degree Rape. In accord with the jury verdict, the trial court ordered the sentences to run consecutively for a total of 176 years imprisonment.

Rice attempted to appeal, but his counsel failed to properly file the notice of appeal. Thereafter, he filed a motion for relief from the judgment under CR¹ 60.02, which was denied. He also filed a motion for relief under RCr² 11.42 based upon the failure of his counsel to timely file a notice of appeal. The trial court granted the motion, vacating the judgment and re-entering the same judgment as of February 19, 1985, to provide Rice an opportunity to appeal his convictions. The Kentucky Supreme Court affirmed the conviction on direct appeal.

No further pleadings appear in the record until July 26, 2013, when Rice filed his current motion for relief from his sentence pursuant to CR 60.02. Rice argued that he was subjected to double jeopardy when he was charged and sentenced for multiple counts of Rape arising from a single course of conduct. He also argued that an aggregate sentence of indeterminate terms may not exceed seventy years. The trial court denied the motion without a hearing, concluding that it was not brought within a reasonable time. This *pro se* appeal followed.

¹ Kentucky Rules of Civil Procedure.

² Kentucky Rules of Criminal Procedure.

It is well-established that CR 60.02 is for relief that is not available by direct appeal and not available collaterally under RCr 11.42. *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). CR 60.02 is not intended to afford individuals an additional opportunity to re-litigate issues that have already been presented in an earlier direct appeal or collateral attack or present new issues that could have been raised in those proceedings. *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997); RCr 11.42(3). And, CR 60.02 should only be used to provide relief when the movant demonstrates why he or she is entitled to the special, extraordinary relief provided by the rule. *Gross*, 648 S.W.2d at 856. Finally, claims under CR 60.02(e) and (f) must be raised within a reasonable time.

On appeal, the trial court's denial of a CR 60.02 motion will not be overturned absent an abuse of discretion. *Age v. Age*, 340 S.W.3d 88, 94 (Ky. App. 2011). Likewise, a trial court's decision as to "[w]hat constitutes a reasonable time in which to move to vacate a judgment under CR 60.02 is a matter that addresses itself to the discretion of the trial court." *Gross*, 648 S.W.2d at 857. We will not disturb the trial court's exercise of discretion absent a determination that it was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Rice filed his current CR 60.02 motion more than 28 years after his conviction and sentence became final. He presents no reason for the delay in bringing this motion for relief. Therefore, he is not entitled to assert his current claims based upon double jeopardy or illegal sentencing.

Furthermore, we find no proof in the record to support either of Rice's assertions concerning the illegality of the sentence. The Rape and Sodomy charges were each based upon separate acts occurring at different times. Thus, the multiple prosecutions were not prohibited by KRS 505.020. *See also Kiper v.*

Commonwealth, 399 S.W.3d 736, 745 (Ky. 2012). Rice merely challenges the sufficiency of the evidence supporting those separate charges, but that is not a basis for relief under CR 60.02. *Gross*, 648 S.W.2d at 856-57.

The Commonwealth also points out that the 70-year cap on consecutive aggregate sentences was not incorporated into KRS 532.110(1)(c) until 1998 – some 13 years following Rice's conviction. 1998 *Ky. Laws* Ch. 606 § 114. Rice makes no argument showing that the current limitation must be retroactively applied. Moreover, we find no indication that Rice's lengthy sentence was illegal or unauthorized at the time it was imposed. *See Violet v. Commonwealth*, 907 S.W.2d 773, 777 (Ky. 1995). Therefore, the trial court properly denied Rice's motion for modification of the sentence.

Accordingly, the order of the LaRue Circuit Court denying Rice's CR 60.02 motion is affirmed.

ALL CONCUR

BRIEF FOR APPELLANT:

Mitchell Rice, *Pro se*
Kentucky State Reformatory
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Taylor Payne
Assistant Attorney General
Frankfort, Kentucky