

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001833-MR

CURTIS LEE MAYES

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 76-CR-158164

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; DIXON AND KRAMER, JUDGES.

DIXON, JUDGE: Curtis Lee Mayes appeals from the Jefferson Circuit Court's order denying his motion for post-conviction relief pursuant to CR 60.02. Finding no error, we affirm.

In an unpublished opinion, a panel of this Court summarized the post-conviction procedural history of Mayes's case as follows:

The appellant, Curtis Lee Mayes, was convicted in 1977 of the murder of Grace Noble during the commission of a jewelry store robbery. Since that conviction, Mr. Mayes has filed three motions pursuant to RCr 11.42. The first motion, filed in 1980, alleged improper waiver of his case from the juvenile court to the circuit court. That motion was denied; this Court affirmed the trial court's ruling. A second motion pursuant to RCr 11.42 was filed in 1981, in which Mr. Mayes claimed that his arrest was not based on probable cause. The trial court denied relief, and this Court affirmed. In 1984, Mr. Mayes filed a third motion under RCr 11.42, raising the issues of improper jury instructions and ineffective assistance of counsel. The trial court denied relief of this third motion, and this Court affirmed. In May of 2002, Mr. Mayes filed a motion pursuant to CR 60.02, seeking relief for extraordinary circumstances. The motion was denied and Mr. Mayes now appeals.

Mayes v. Commonwealth, 2003-CA-000539-MR (Oct. 31, 2003). This Court affirmed the trial court's denial of CR 60.02 relief, concluding Mayes's arguments could have been raised on direct appeal.

In January 2014, thirty-seven years after his conviction, Mayes filed a second motion to vacate his conviction pursuant CR 60.02(e)-(f). Mayes alleged the evidence at trial did not support a conviction for wanton murder and that the jury instructions improperly deviated from the indictment. The circuit court summarily denied Mayes's motion, and this appeal followed.

We review the lower court's denial of a CR 60.02 motion under the abuse of discretion standard. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000).

The Commonwealth contends Mayes's motion was untimely and that his claims should have been raised on direct appeal or in a prior post-conviction motion. We agree.

Where, as here, a movant seeks relief pursuant to CR 60.02(e) or (f), the rule requires that the motion must be filed "within a reasonable time." Furthermore, in *Gross v. Commonwealth*, 648 S.W.2d 853, 857 (Ky. 1983), the Supreme Court of Kentucky outlined the availability of post-conviction relief as follows:

[A] defendant is required to avail himself of RCr 11.42 while in custody under sentence or on probation, parole or conditional discharge, as to any ground of which he is aware, or should be aware, during the period when this remedy is available to him. Final disposition of that motion, or waiver of the opportunity to make it, shall conclude all issues that reasonably could have been presented in that proceeding. The language of RCr 11.42 forecloses the defendant from raising any questions under CR 60.02 which are 'issues that could reasonably have been presented' by RCr 11.42 proceedings.

Here, appellate review is foreclosed for several reasons. This was a successive post-conviction motion, and Mayes had the opportunity to raise these claims on direct appeal or in a prior post-conviction proceeding. "CR 60.02 is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings."

McQueen v. Commonwealth, 948 S.W.2d 415, 416 (Ky. 1997). Furthermore, since Mayes waited thirty-seven years after his conviction, we conclude that he failed to bring his motion within a reasonable time. After careful review, we conclude that

the trial court did not abuse its discretion by summarily denying Mayes's CR 60.02 motion.

For the reasons stated herein, we affirm the order of the Jefferson Circuit Court.

ALL CONCUR.

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