

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

NO. 2015-CA-000859-MR

ALEJANDRO GONZALES DE ALBA

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE A.C. MCKAY CHAUVIN, JUDGE  
ACTION NO. 03-CR-003218

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON, MAZE, AND STUMBO, JUDGES.

DIXON, JUDGE: Alejandro Gonzales De Alba, *pro se*, appeals from an order of the Jefferson Circuit Court that denied his motion for post-conviction relief pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. Finding no error, we affirm.

In March 2005, a Jefferson Circuit Court jury found Appellant guilty of fourth-degree assault and murder.<sup>1</sup> The court imposed an aggregate sentence of fifty years' imprisonment pursuant to the jury's recommendation. Appellant's conviction was affirmed on direct appeal to the Kentucky Supreme Court.

*Gonzalez De Alba v. Commonwealth*, 202 S.W.3d 592 (Ky. 2006). In June and July 2007, Appellant filed two Kentucky Rules of Criminal Procedure (RCr) 11.42 motions alleging ineffective assistance of counsel. The trial court denied the first motion on July 31, 2007, and denied the second motion on August 10, 2007.<sup>2</sup> Appellant filed a notice of appeal on November 13, 2007. In an order entered December 10, 2008, this Court dismissed Appellant's appeal because the notice of appeal was untimely.<sup>3</sup>

Nearly eight years after filing his RCr 11.42 motion, Appellant filed a motion to vacate the trial court's order denying RCr 11.42 relief. Appellant contended he had not received notice of the entry of the court's order denying relief, which caused him to file an untimely appeal. Citing *Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454 (Ky. 2002), Appellant asked the court to vacate its prior order and re-enter the order so that Appellant

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<sup>1</sup> The victim of the assault was Appellant's wife, Pauline Gonzalez. The victim of the murder was Appellant's stepson, Patrick Carter.

<sup>2</sup> Appellant filed a motion to proceed *in forma pauperis* on September 25, 2007, which was granted by the court on November 13, 2007.

<sup>3</sup> *Gonzalez De Alba v. Commonwealth*, 2007-CA-002336-MR (Dec. 10, 2008). Thereafter, the Kentucky Supreme Court denied Appellant's motion for discretionary review. *Gonzalez De Alba v. Commonwealth*, 2009-SC-17-D (Oct. 21, 2009).

could file a timely appeal of the court's denial of his RCr 11.42 motion.<sup>4</sup> The trial court denied Appellant's motion, treating it as a request for post-judgment relief pursuant to CR 60.02. This appeal followed.

Appellant alleges the court erred by denying his CR 60.02 motion to vacate and then re-enter the July 31, 2007, order denying RCr 11.42 relief. We disagree.

“The standard of review of an appeal involving a CR 60.02 motion is whether the trial court abused its discretion.” *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000).

In the case at bar, Appellant filed his CR 60.02 motion nearly eight years after the trial court rendered its order denying RCr 11.42 relief. A motion to vacate an order based on mistake pursuant to CR 60.02(a) must be made within one year after the order was entered. The record clearly reflects Appellant's CR 60.02 motion was untimely, as he failed to raise this issue within one year after the order was entered. After careful review, we conclude the trial court did not abuse its discretion by denying Appellant's CR 60.02 motion.

For the reasons stated herein, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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<sup>4</sup> In *Kurtsinger*, the Kentucky Supreme Court held that a trial court may rely on CR 60.02(a) to vacate a prior order upon a finding of mistake, where a litigant did not receive notice of the entry of the court's earlier order. *Kurtsinger*, 90 S.W.3d at 458.

BRIEF FOR APPELLANT:

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