

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001001-MR

CHARLES WARD, JR.

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NOS. 06-CR-00278 AND 06-CR-00454

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, JOHNSON AND J. LAMBERT, JUDGES.

COMBS, JUDGE: Charles Ward, Jr., appeals from an Order of the Christian Circuit Court that denied his Motion for Relief filed pursuant to CR¹ 60.02. After our review, we affirm.

On June 23, 2006, Ward was indicted on one count of robbery in the

¹ Kentucky Rules of Civil Procedure.

first degree (KRS² 515.020) and wanton endangerment in the first degree (KRS 508.060) in indictment no. 06-CR-00278. On September 22, 2016, he was indicted on one count of robbery in the first degree, one count of attempted assault in the first degree (KRS 508.010 and 506.010), and one count of fleeing or evading police in the first degree (KRS 520.095) in indictment no. 06-CR-00454. On April 30, 2007, pursuant to a plea agreement with the Commonwealth, Ward pled guilty to an amended count of robbery in the second degree (KRS 515.030) and one count of wanton endangerment in the first degree under indictment no. 06-CR-00278; and one count of robbery in the second degree, one count of attempted assault in the first degree, and one count of fleeing or evading police in the first degree under indictment no. 06-CR-00454. Both pleas were entered contemporaneously.

On May 10, 2007, the circuit court entered its Judgment finding Ward guilty on all of the offenses and sentencing him to ten years on each of the two counts of robbery in the second degree, ten years on attempted assault in the first degree, five years on wanton endangerment in the first degree, and five years on fleeing or evading police in the first degree – all to be served concurrently for a total sentence of ten years.

On March 2, 2016, Ward filed a "Petition for Writ of Error Coram Nobis" seeking to vacate his convictions. On May 31, 2016, the circuit court entered an order denying the Petition. This appeal followed.

² Kentucky Revised Statutes.

The standard of review governing a circuit court's denial of a CR 60.02 motion is whether the court abused its discretion. *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996). “The test for abuse of discretion is whether the judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Therefore, we must affirm the circuit court's decision unless there is a showing of some “flagrant miscarriage of justice.” *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

CR 60.02 was enacted as a statutory codification of the common law writ of *coram nobis*. *Gross*, 648 S.W.2d at 856. “Civil Rule 60.02 . . . abolishes the ‘writ of coram nobis,’ and authorizes the granting of this type of relief by motion made under that Rule.” *Commonwealth v. Spaulding*, 991 S.W.2d 651, 655 (Ky. 1999) (quoting *Harris v. Commonwealth*, 296 S.W.2d 700, 702 (Ky. 1956)).

CR 60.02 motions may be used by criminal defendants to present additional issues not specifically available through direct appeals or RCr³ 11.42 motions. *Gross*, 648 S.W.2d at 856. CR 60.02 motions are limited to addressing special and extraordinary relief not available in other proceedings. *McQueen v.*

Commonwealth, 948 S.W.2d 415, 416 (Ky. 1997). The purpose of *coram nobis* was to bring before the court judgment errors which: (1) had not been heard or litigated, (2) were not known or could not have been known by the party through the exercise of due diligence, or (3) were denied to a party by his inability to

³ Kentucky Rules of Criminal Procedure.

present them as a result of duress, fear, or some other sufficient cause. *McQueen*, 948 S.W.2d at 416. Indeed, *coram nobis*

is an extraordinary and residual remedy to correct or vacate a judgment upon facts or grounds, not appearing on the face of the record and not available by appeal or otherwise, which were discovered after the rendition of the judgment without fault of the party seeking relief.

Harris, 296 S.W.2d at 701. See also *Sanders v. Commonwealth*, 339 S.W.3d 427, 437 (Ky. 2011).

In its current form, CR 60.02 “does not extend the scope of the remedy [of *coram nobis*] nor add additional grounds of relief.” *Baze v. Commonwealth*, 276 S.W.3d 761, 766 (Ky. 2008). “Thus, while the remedies formerly available in criminal cases by writ of *coram nobis* have been preserved by CR 60.02, the remedies have not been extended, but have been limited by the language of that rule.” *Gross*, 648 S.W.2d at 856 (internal citation omitted). “The burden of proof in a CR 60.02 proceeding falls squarely on the movant” *Foley v. Commonwealth*, 425 S.W.3d 880, 885 (Ky. 2014).

Ward requested that his conviction be vacated because at the time that he entered his guilty plea, the circuit court failed to apprise him of the nature of the charges against him. Additionally, the attorney who appeared on his behalf, Joy Kimbrough, was not licensed to practice law in the state of Kentucky. Ward contends that based on these two issues, his guilty plea was not entered voluntarily.

In denying his motion, the circuit court adopted the reasons expressed by the Commonwealth in its response to the motion.

First, the Commonwealth argues that the motion was untimely. Ward's claims fall under Subsection (f) of CR 60.02, which provides relief for "any other reason of an extraordinary nature justifying relief." CR 60.02(f) is a catch-all provision that encompasses those grounds which would justify relief pursuant to a writ of *coram nobis* that are not otherwise set forth in the rule. *Spaulding*, 991 S.W.2d at 655.

A motion under CR 60.02(f) must be brought within "a reasonable time." Ward entered his guilty plea in April 2007, and the final judgment and sentence were entered in May 2007. Ward filed his CR 60.02 motion in March 2016 – approximately nine years later. Both of these issues were readily apparent at the time that he entered his guilty plea and was sentenced. Under the circumstances, the circuit court's finding that Ward failed to move for CR 60.02 relief within a "reasonable time" was not an abuse of its discretion. *See Gross*, 648 S.W.2d at 858 (holding that the trial court did not abuse its discretion by finding that the passage of five years between the final judgment and the CR 60.02 motion exceeded a reasonable time); *Reyna v. Commonwealth*, 217 S.W.3d 274, 276 (Ky. App. 2007) (indicating that CR 60.02 motion filed four years after entering guilty plea could be considered untimely); *Ray v. Commonwealth*, 633 S.W.2d 71, 73 (Ky. App. 1982) (holding that a CR 60.02 motion filed twelve years after defendant's conviction exceeded a reasonable time); *Wise v. Commonwealth*, No.

2011-CA-001291-MR, 2012 WL 5457526 (Ky. App. Nov. 9, 2012) (stating CR 60.02 was untimely because six years was not a reasonable length of time to wait before raising an argument of which appellant should have been aware at the time of his guilty plea).

Second, the Commonwealth contends that the motion should have been denied because the issues could have – and should have – been raised in an RCr 11.42 motion. As noted earlier, a CR 60.02 motion is unavailable if the issues could have been raised by way of RCr 11.42. In his motion, Ward indicated that he has served out his sentence on these convictions and is raising these issues mainly because they are being used to enhance his sentence on a recent federal conviction for being a felon in possession of a firearm. However, the alleged facts supporting Ward’s arguments were known to him at the time he entered his guilty plea. He could have filed an RCr 11.42 motion at any time after his conviction. Thus, he is procedurally barred from bringing the CR 60.02 motion both because it is untimely and because the issues should have been raised in an RCr 11.42 motion. Accordingly, the circuit court did not abuse its discretion in denying Ward’s CR 60.02 motion.

We affirm the order of the Christian Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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