

RENDERED: AUGUST 10, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000117-MR

COURTNEY TROWELL

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
ACTION NO. 04-CR-002358

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, CHIEF JUDGE; KRAMER AND NICKELL, JUDGES.

CLAYTON, CHIEF JUDGE: Courtney Trowell brings this appeal pro se from a Jefferson Circuit Court order denying his motion to vacate judgment pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. Because Trowell's claims are procedurally barred and the motion was untimely, we affirm.

A jury convicted Trowell of murder in 2005. A final judgment imposing a sentence of fifty years was entered on June 6, 2005. His conviction was affirmed on direct appeal to the Kentucky Supreme Court on January 25, 2007. *Trowell v. Commonwealth*, 2005-SC-000516-MR, 2007 WL 188997 (Ky. Jan. 25, 2007).

On May 23, 2008, Trowell, with the assistance of counsel, filed a motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 alleging ineffective assistance of trial counsel. The trial court denied the motion. On September 10, 2011, a panel of this Court affirmed the denial of the motion. *Trowell v. Commonwealth*, 2008-CA-001787-MR, 2010 WL 3515706 (Ky. App. Sept. 10, 2010) (*disc. rev. denied* Jan. 14, 2011).

Trowell then petitioned this Court for a writ of mandamus which was denied. The Kentucky Supreme Court affirmed the denial of that petition on February 23, 2012. *Trowell v. Edwards*, 2011-SC-000345-MR, 2012 WL 601269 (Ky. Feb. 23, 2012).

Trowell then filed a second RCr 11.42 motion pro se which was denied by the trial court in an order entered on April 22, 2014. A panel of this Court affirmed the denial of the motion. *Trowell v. Commonwealth*, 2014-CA-000787-MR, 2015 WL 4498790 (Ky. App. July 24, 2015).

Trowell filed the motion which is the subject of the present appeal on July 6, 2016. The motion was made pursuant to CR 60.02(e) and (f) and sought to alter or amend the April 22, 2014, order denying the successive RCr 11.42 motion. It raised claims of ineffective assistance of appellate and post-conviction counsel. The trial court denied the motion on the grounds it was not brought within a reasonable time as required by CR 60.02. This appeal by Trowell followed.

Under CR 60.02 (e) and (f), a court may relieve a party from its final judgment, order or proceeding if “the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application[,]” or for “any other reason of an extraordinary nature justifying relief.” CR 60.02. The Rule specifies that a motion brought under subsections (e) or (f) must be made within a reasonable time. *Id.*

We review the denial of a CR 60.02 motion for an abuse of discretion. *Partin v. Commonwealth*, 337 S.W.3d 639, 640 (Ky. App. 2010). The test for abuse of discretion is whether the trial court’s decision was “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (internal citations omitted).

Trowell argues that the attorney who prosecuted his direct appeal was ineffective for failing to raise a *Batson* challenge to the composition of the jury. In

Batson v. Kentucky, the United States Supreme Court held that racial discrimination in the selection of the jury venire violates the Equal Protection Clause. 476 U.S. 79, 95, 106 S. Ct. 1712, 1722, 90 L. Ed. 2d 69 (1986), *holding modified by Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991).

Trowell's claim is procedurally barred, however, because it could have been raised in his first RCr 11.42 motion. "The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete. That structure is set out in the rules related to direct appeals, in RCr 11.42, and *thereafter* in CR 60.02." *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983).

Under this procedural framework,

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.

Id. at 857.

Because this claim could have been brought under RCr 11.42, it cannot be raised under CR 60.02, which is solely “for relief that is not available by direct appeal and not available under RCr 11.42.” *Id.* at 856.

Trowell contends that his claim is cognizable if CR 60.02(e) and (f) is applied in conjunction with RCr 11.42(10). That subsection permits a claim to be pursued outside the three-year limitations period of RCr 11.42 if the facts upon which the claim is predicated were unknown and could not have been ascertained by the exercise of due diligence or the fundamental constitutional right being asserted was not established within the three-year period provided by RCr 11.42 and has been held to apply retroactively. RCr 11.42(10)(a) and (b).

Batson was decided in 1986, twenty-two years before Trowell brought his first RCr 11.42 motion. In his successive RCr 11.42 motion, Trowell argued, specifically citing *Batson*, that two African American jurors were improperly excluded from the jury venire. He cannot convincingly argue that *Batson*'s existence was unknown to him or could not have been discovered through the exercise of due diligence.

In any event, the extension of the RCr 11.42 limitations period when these exceptional conditions are present does not apply to motions brought pursuant to CR 60.02, which contains its own specific limitations periods. Claims brought under CR 60.02 (a) through (d) must be brought within one year. CR

60.02. Under subsections (e) and (f), motions must “be made within a reasonable time.” *Id.* The trial court denied Trowell’s motion because it was brought more than two years after the entry of the judgment it sought to alter and amend. “An evidentiary hearing is not required to assess the reasonable time restriction inherent in CR 60.02 motions because this determination is left to the discretion of the trial court.” *Foley v. Commonwealth*, 425 S.W.3d 880, 884 (Ky. 2014) (citing *Gross*, 648 S.W.2d at 858).

Trowell has not provided a convincing explanation for his delay in bringing the CR 60.02 motion. We fully recognize that “[p]ro se pleadings are not required to meet the standard of those applied to legal counsel.” *Beecham v. Commonwealth*, 657 S.W.2d 234, 236 (Ky. 1983). Nonetheless, the facts and allegations of the motion were well known to Trowell many years before, as evidenced by his earlier pleadings. Under these circumstances, the trial court did not abuse its discretion in denying the motion as untimely.

Finally, Trowell’s claim his post-conviction attorney was ineffective for failing to introduce a taped statement by a witness refuting his trial testimony and for failing to raise the *Batson* issue is without merit. “In *Coleman v. Thompson*, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566, 115 L. Ed. 2d 640 (1991), the United States Supreme Court held that “[t]here is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot

claim constitutionally ineffective assistance of counsel in such proceedings.’
(citations omitted)[.]’ *Harper v. Commonwealth*, 978 S.W.2d 311, 318 (Ky.
1998).

The Jefferson Circuit Court order denying Trowell’s CR 60.02 motion
is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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