

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

NO. 2017-CA-001068-MR

ROBERT JOSEPH CECIL, JR.

APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT  
HON. ELISE GIVHAN SPAINHOUR, JUDGE  
INDICTMENT NO. 94-CR-00066

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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

LAMBERT, J., JUDGE: Robert Joseph Cecil, Jr. appeals, *pro se*, from the Bullitt Circuit Court's order denying his motion to vacate sentence under Kentucky Rule of Civil Procedure (CR) 60.02, entered May 22, 2017. We affirm the circuit court.

The underlying facts of this case are not in issue. In a trial held December 13, 2001, the jury found Cecil guilty of first-degree rape,<sup>1</sup> kidnapping,<sup>2</sup>

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<sup>1</sup> Kentucky Revised Statutes (KRS) 510.040.

<sup>2</sup> KRS 509.040.

two counts of first-degree sodomy,<sup>3</sup> and being a persistent felony offender<sup>4</sup> (PFO). The jury subsequently fixed Cecil's sentence at forty-two years in prison. The trial court entered its final judgment on March 6, 2002, sentencing Cecil in accord with the jury's verdict. The Supreme Court of Kentucky upheld Cecil's conviction on direct appeal in an unpublished opinion.<sup>5</sup> In the direct appeal, among his claims, Cecil alleged the trial court erred by admitting evidence of his prior sexual offenses and not providing a limiting instruction regarding those offenses.

Cecil has extensively litigated his case following conviction. Three years after entry of final judgment, he filed a Kentucky Rule of Criminal Procedure (RCr) 11.42 motion to vacate, set aside, or correct sentence. Among the grounds Cecil cited for his ineffective assistance of counsel claim in the RCr 11.42 motion were his attorney's failures to impeach one of the prosecution witnesses who testified regarding Cecil's prior conviction, request a limiting instruction regarding her testimony, request other relief for improper statements, or prevent admission of her testimony into evidence. The trial court found the allegations unmeritorious and denied the motion. Cecil unsuccessfully appealed the denial of this RCr 11.42 motion.<sup>6</sup>

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<sup>3</sup> KRS 510.070.

<sup>4</sup> KRS 532.080.

<sup>5</sup> *Cecil v. Commonwealth*, No. 2002-SC-0252-MR, 2003 WL 22975018 (Ky. Dec. 18, 2003), *reh'g denied* (Ky. Mar. 18, 2004).

<sup>6</sup> *Cecil v. Commonwealth*, No. 2009-CA-000462-MR, 2010 WL 4739987 (Ky. App. Nov. 24, 2010), *review denied* (Ky. Nov. 16, 2011).

Cecil then sought relief in federal court, petitioning for a writ of *habeas corpus*. After federal courts denied him relief,<sup>7</sup> he filed this CR 60.02 motion on October 18, 2016. He presented the single issue of untruthful testimony of the prosecution witness, introduced to provide evidence of Cecil's *modus operandi*. Cecil claimed in his prior appeals the witness had perjured herself when she testified about the result of Cecil's first trial. The trial court denied the motion on May 22, 2017, concluding Cecil should have raised this argument in his initial RCr 11.42 motion, his motion was untimely, and his claims were without merit. This appeal followed.

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

Cecil's sole issue on appeal is the alleged perjury of the prosecution witness who testified about Cecil's first trial for rape in which she was the victim. CR 60.02 states that a motion under the Rule "shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken." Although perjury is grounds under CR 60.02(c) with a one-year statute of limitations, courts in Kentucky have allowed claims of perjury to be filed outside the one-year period in a reasonable time when

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<sup>7</sup> *Cecil v. Crews*, No. 3:12CV-P14-C, 2012 WL 3598276 (W.D. Ky. Aug. 17, 2012)

exceptional circumstances allow. For example, when a witness is later convicted of perjury for testimony given at trial, the false testimony arises to the level of a due process violation and “can be a reason of an extraordinary nature justifying relief pursuant to CR 60.02(f) and subject to the reasonable time limitation of the rule.” *Commonwealth v. Spaulding*, 991 S.W.2d 651, 657 (Ky. 1999).

“What 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 v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983). In *Gross*, the Supreme Court of Kentucky affirmed a trial court’s denial of a CR 60.02 motion as untimely when filed five years post-judgment. *Id.* Similarly, a panel of this court has reasoned, albeit in dicta, that denial of a CR 60.02 motion filed four years post-judgment would be within a trial court’s discretion. *Reyna v. Commonwealth*, 217 S.W.3d 274, 276 (Ky. App. 2007). Here, Cecil filed his CR 60.02 motion over fourteen years post-judgment. We find, under the totality of the circumstances, the trial court did not abuse its discretion in finding fourteen years was an unreasonable time to wait to bring this claim.

Additionally, “[CR 60.02] is not intended as merely an additional opportunity to raise claims which could and should have been raised in prior proceedings, but, rather, ‘is for relief that is not available by direct appeal and not available under RCr 11.42.’” *Sanders v. Commonwealth*, 339 S.W.3d 427, 437 (Ky. 2011) (quoting *Gross*, 648 S.W.2d at 856). Cecil has raised a similar set of claims in nearly every post-judgment motion and none have been deemed

meritorious. The witness testimony at issue here has been in the record since trial. Therefore, Cecil could have and should have raised this issue in an earlier motion. Cecil has not offered a compelling reason why this motion should be deemed anything other than a successive retread of previously unavailing arguments.

For the foregoing reasons, we affirm the Bullitt Circuit Court's order denying Cecil's motion to vacate sentence entered May 22, 2017.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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