

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000649-MR

MORTAVIUS MITCHELL

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO SCORSONE, JUDGE
ACTION NO. 02-CR-00196

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION
AFFIRMING

** ** * * * * *

BEFORE: KRAMER, LAMBERT, AND TAYLOR, JUDGES.

Mortavius Mitchell, *pro se*, brings this appeal of an order of the Fayette Circuit Court entered March 27, 2017, denying his motion for post-conviction relief pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. After a careful review, we affirm.

On direct appeal, the Kentucky Supreme Court succinctly set forth the underlying facts relevant to this case as follows:

Appellant's convictions stem from an incident in which Appellant shot and killed Wilbert Adams in Lexington. In the early hours of November 9, 2001, Appellant, Adams, and two other individuals, Eric Gill and Michael Hocker, were together in a moving automobile. Appellant and Adams were in the backseat, and Adams was attempting to purchase crack-cocaine from Appellant. Appellant demanded money from Adams and Adams replied that he did not have any money. Appellant drew his gun and pointed it at Adams, who began swatting at the gun. Appellant then shot Adams once. At that point, the car stopped, and Adams exited the car and ran.

Adams was killed by a single gunshot wound from a 9–mm bullet. The firearm used in the shooting was not recovered. The three individuals at the scene all testified at trial. Appellant testified that he shot Adams in self-defense after Adams pointed a gun at him.

Mitchell v. Commonwealth, (2003-SC-0670-MR) 2005 WL 2316195, at *1 (Ky. Sept. 22, 2005). Mitchell was convicted of wanton murder and robbery in the first degree, for which he was respectively sentenced to life without possibility of parole for twenty-five years and ten years' imprisonment. In affirming his convictions on direct appeal, the Kentucky Supreme Court specifically held that there was sufficient evidence to support the robbery conviction, stressing "Hocker's testimony that [Mitchell] was robbing Adams with a weapon . . ." *Id.* at *8.

In March 2006, Mitchell filed a motion for postconviction relief under Kentucky Rules of Criminal Procedure (RCr) 11.42, in which he again argued he should not have been convicted of robbery. In October 2008, we affirmed the trial court's denial of Mitchell's RCr 11.42 motion. *Mitchell v. Commonwealth*, (2007-CA-002482-MR) 2008 WL 4601340 (Ky. App. Oct. 17, 2008).¹

In December 2008, Mitchell sought federal habeas corpus relief, arguing (among other things) for the third time that there was insufficient evidence to support his robbery conviction. Both a United States Magistrate Judge and a United States District Judge ultimately rejected that argument. *Mitchell v. Meko*,

¹ Specifically, we held as follows:

Mitchell's third contention is that counsel was ineffective in failing to impeach the testimony of witness Michael Hocker at trial. Specifically, Mitchell argues with respect to Hocker that "had counsel conducted a proper investigation into the circumstances surrounding the murder, Appellant may have only been found guilty of homicide, not robbery, thus eliminating the possibility of receiving the death penalty." We are not persuaded by this argument for at least two reasons. First, the Kentucky Supreme Court found on direct appeal of Mitchell's conviction that "[t]he evidence ... was sufficient to support a first-degree robbery conviction." Just as important, Mitchell asserts that a more vigorous impeachment of Hocker's testimony *may* have led to Mitchell being found guilty of homicide. Again, this language evidences the speculative nature of Mitchell's claim of error on this issue, and as such does not form a basis for finding that a reasonable probability exists that the outcome of the trial would have been different but-for this issue. Accordingly, we find no error.

Mitchell v. Commonwealth, (2007-CA-002482-MR) 2008 WL 4601340, at *3 (Ky. App. Oct. 17, 2008).

(No. 5:08-CV-511-KSF) 2011 WL 7070995, at *9-11 (E.D. Ky. Aug. 30, 2011), *report and recommendation approved at* (Civil Action No. 08-511-KSF) 2012 WL 176583, at *4-5 (E.D. Ky. Jan. 20, 2012).

In April 2016, Mitchell filed a CR 60.02 motion in the Fayette Circuit Court raising again -- **for the fourth time** -- the same core argument regarding an alleged lack of sufficient evidence to convict him of robbery. The trial court denied the motion in March 2017, concluding the motion was improper because it raised issues which had already been addressed previously by the court. This appeal follows.

We begin by noting that CR 60.02 “may be utilized only in extraordinary situations when relief is not available on direct appeal or under RCr 11.42.” *Foley v. Commonwealth*, 425 S.W.3d 880, 884 (Ky. 2014). The denial of a motion under CR 60.02 is reviewed for an abuse of discretion. *Diaz v. Commonwealth*, 479 S.W.3d 90, 92 (Ky. App. 2015). 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). And, any motions filed under CR 60.02(e) and (f) must be brought within a reasonable time after the judgment has been entered. CR 60.02; *See Commonwealth v. Spaulding*, 991 S.W.2d 651 (Ky. 1999).

We wholeheartedly agree with the circuit court that Mitchell is not entitled to CR 60.02 relief on this issue because he has already unsuccessfully raised the same essential argument on both direct appeal and in a subsequent RCr 11.42 motion, as well as in a federal habeas petition. 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) (internal quotation marks and citation omitted). Because Mitchell could have—and did—raise this issue before, his regurgitated claims “do not qualify to be brought in a CR 60.02 proceeding.” *Id.* at 437. Accordingly, the circuit court did not abuse its discretion in denying Mitchell’s CR 60.02 motion.²

For the foregoing reasons, the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

² Because Mitchell thus plainly is not entitled to Kentucky Rules of Civil Procedure 60.02 relief we need not determine whether his 60.02 motion was brought within a reasonable time.

BRIEF FOR APPELLANT:

Mortavius Mitchell, *Pro Se*
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky
Frankfort, Kentucky

Bryan D. Morrow
Assistant Attorney General
Frankfort, Kentucky