

RENDERED: NOVEMBER 22, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000691-MR

TERRY W. ROACH

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE W.A. KITCHEN, III, JUDGE
ACTION NO. 01-CR-00037

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: ACREE, LAMBERT AND SPALDING, JUDGES.

ACREE, JUDGE: Terry Roach appeals the McCracken Circuit Court's order denying his CR¹ 60.02 motion. Finding no error, we affirm.

¹ Kentucky Rules of Civil Procedure.

BACKGROUND

This case began eighteen years ago, on February 16, 2001, when Roach was indicted for murder and first-degree robbery. The Commonwealth intended to seek the death penalty; however, Roach pleaded guilty in exchange for a life sentence without parole for twenty-five years. The trial court conducted a lengthy colloquy with Roach, during which he admitted to both crimes. He understood he faced the death penalty and expressly stated he was entering his guilty plea freely, voluntarily, knowingly, and without threat of force.

When Roach appeared for final sentencing, his counsel informed the trial court that Roach wished to address the trial court. Claiming coercion by his counsel, Roach sought to withdraw his guilty plea. Specifically, Roach said, “When I first entered this plea, I was forced into this. I can’t go down for something I didn’t do. So, I want to apologize to you, and I would like to change my plea to not guilty.” The Commonwealth objected to Roach’s motion to withdraw his plea.

The trial court denied Roach’s request without setting the motion for an evidentiary hearing to inquire into Roach’s motion. In supporting and explaining its denial of Roach’s motion, the trial court stated it doubted Roach’s attorney coerced him and expressed the opinion that Roach had received excellent legal representation.

On December 18, 2003, following Roach's direct appeal, the Kentucky Supreme Court affirmed the conviction, finding the trial court adequately determined the voluntariness of Roach's plea.² One year later, Roach filed a *pro se* motion for relief under RCr³ 11.42, again denying his plea was valid. The trial court appointed new counsel to represent Roach and abated his *pro se* motion until his new counsel supplemented the motion. For reasons not discernible from the record, that supplementation took Roach's new counsel four years.⁴ Ultimately, the trial court denied his motion, as supplemented, stating the claims were either refuted by the record or untimely filed and thus barred by the doctrine of laches. Roach appealed; both this Court and the Supreme Court affirmed.

On February 11, 2015, Roach filed a motion seeking relief under CR 60.02, claiming his trial counsel abandoned him during his motion to withdraw his guilty plea. In support of his motion, Roach cited new case law – *Carrigan v.*

² Justice Keller dissented on grounds that the trial court should have held an evidentiary hearing to determine the validity of Roach's plea before denying his motion. *Roach v. Commonwealth*, No. 2003-SC-000013-TG, 2003 WL 22971265, at *2 (Ky. Dec. 18, 2003) (Keller, J., dissenting).

³ Kentucky Rules of Criminal Procedure.

⁴ The trial court appointed Roach counsel in May 2004. The supplemental motion was not filed until September 3, 2008.

Commonwealth, 414 S.W.3d 16 (Ky. App. 2013).⁵ The trial court denied Roach relief, and this Court, again, affirmed the denial because Roach’s motion was untimely, ruling that his argument should have been raised in his direct appeal or in his RCr 11.42 motion.

This brings us to the fourth and current appeal. Once again, Roach seeks CR 60.02 relief. This time Roach cites *Commonwealth v. Tigue*, 459 S.W.3d 372 (Ky. 2015). In *Tigue*, the Supreme Court held a motion to withdraw a guilty plea is a critical stage of a criminal proceeding, implicating a defendant’s constitutional right to counsel. Roach contends that because *Tigue* was not established law until 2015, he could not have raised the issue in his RCr 11.42 motion. The trial court denied this motion, too. It found Roach failed to demonstrate how his counsel’s abandonment prejudiced him at a critical stage of the proceedings and that he was merely rehashing old arguments previously considered and rejected. This appeal followed.

STANDARD OF REVIEW

We apply an abuse of discretion standard when reviewing denial of a CR 60.02 motion. *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,

⁵ In *Carrigan*, this Court, in dicta, stated a motion to withdraw a guilty plea is a critical stage of trial, at which a defendant is entitled to effective assistance of counsel.

unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). However, CR 60.02 is limited to affording extraordinary relief to defendants not available by other means. *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). The rule is not intended as a vehicle for defendants to relitigate previously determined issues or to raise issues that could have been addressed in a direct appeal or by RCr 11.42 motion. *Id.*; *see also McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997).

ANALYSIS

“A defendant who is in custody under sentence or on probation, parole or conditional discharge, is required to avail himself of RCr 11.42 as to any ground of which he is aware, or should be aware, during the period when the remedy is available to him.” *McQueen*, 948 S.W.2d at 416. CR 60.02 is not intended to be used as a tool to relitigate the same issues which could “reasonably have been presented” by direct appeal or in RCr 11.42 proceedings. *Id.* (quoting RCr 11.42(3)). “The obvious purpose of this principle is to prevent the relitigation of issues which either were or could have been litigated in a similar proceeding.” *Id.* As stated in *Gross, supra*, CR 60.02 was enacted as a substitute for the common law writ of *coram nobis*.

The purpose of such a writ was to bring before the court that pronounced judgment errors in matter of fact which (1) had not been put into issue or passed on, (2) were unknown and could not have been known to the party by

the exercise of reasonable diligence and in time to have been otherwise presented to the court, or (3) which the party was prevented from so presenting by duress, fear, or other sufficient cause. *Black's Law Dictionary, Fifth Edition*, 487, 1444.

Gross, 648 S.W.2d at 856.

This is the fourth time Roach appealed his conviction and the second time he appealed the denial of a CR 60.02 motion. Roach's conviction became final on December 18, 2003, when the Supreme Court affirmed his guilty plea and sentence – fifteen years ago.

This is not Roach's first CR 60.02 appeal. Because the factual predicate upon which these successive motions are based remains unchanged, we repeat this Court's previous ruling: "Roach does not allege any facts unknown to him or which could not have been ascertained with due diligence within the time required to file an RCr 11.42 motion." *Roach v. Commonwealth*, No. 2015-CA-001606-MR, 2017 WL 544629, at *2 (Ky. App. Feb. 10, 2017). As before, Roach's motion remains untimely on its face. The Supreme Court's rendering of *Tigue* does not change the underlying facts of this case. CR 60.02 is available only to raise issues that could not be raised in other proceedings. Nothing the Kentucky Supreme Court said in *Tigue* alters or abrogates these principles.

CONCLUSION

For the foregoing reasons, we affirm the order of the McCracken Circuit Court denying Roach's request for relief.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Andrea Reed
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Emily Bedelle Lucas
Assistant Attorney General
Frankfort, Kentucky