

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2018-CA-001308-MR

STEVE FITZGERALD

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT  
HONORABLE DARREN W. PECKLER, JUDGE  
ACTION NOS. 82-CR-00092 AND 86-CR-00018

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GOODWINE, NICKELL, AND SPALDING, JUDGES.

NICKELL, JUDGE: Steve Fitzgerald, *pro se*, appeals from an order of the Boyle Circuit Court denying his Kentucky Rule of Civil Procedure (CR) 60.02 motion for postconviction relief. We affirm.

In 1983, pursuant to his guilty plea, Fitzgerald was sentenced in the Boyle Circuit Court to a total of five years' imprisonment for burglary in the third

degree, theft by unlawful taking and being a persistent felony offender in the second degree. In 1986, Fitzgerald was found guilty in the Boyle Circuit Court of robbery in the first degree and being a persistent felony offender in the first degree, based in part on those 1983 convictions. After the trial court sentenced him to life imprisonment, Fitzgerald appealed to the Supreme Court of Kentucky, but that Court rejected his jury instruction and evidentiary-based arguments.

In 1992, Fitzgerald filed a motion under Kentucky Rules of Criminal Procedure (RCr) 11.42, arguing ineffective assistance of counsel. The trial court denied the motion in February 1992. Undeterred, in March 1992, Fitzgerald filed a second RCr 11.42 motion, again arguing ineffective assistance of counsel. The trial court denied that motion as being successive and groundless. Fitzgerald appealed to this Court, but we dismissed the appeal because he did not file a brief.

In August 1999, Fitzgerald filed a motion for “judicial review” in which he argued he was innocent and had rehabilitated himself, which the trial court quickly denied. In October 2000, Fitzgerald filed his first CR 60.02 motion, arguing vaguely that a conspiracy by two police officers invalidated his conviction(s). The trial court denied the motion in February 2001.

Roughly seventeen years later, Fitzgerald filed the CR 60.02 motion under review in this appeal in which he argued for the first time his 1983 guilty plea was infirm because the trial court judge threatened to sentence him to twenty

years' imprisonment if he refused the Commonwealth's five-year plea offer. He further contended the 1986 conviction, being based on his 1983 guilty plea, was likewise unsound. The trial court denied the motion because it found no evidence in the record to support its allegations, it was successive, and not filed within a reasonable time. This appeal followed.

CR 60.02(f) provides in relevant part that a court may relieve a party from a final judgment upon presentation of a "reason of an extraordinary nature justifying relief." A motion pursuant to CR 60.02(f) must be brought "within a reasonable time[.]" The determination of "[w]hat constitutes a reasonable time . . . under CR 60.02 is a matter that addresses itself to the discretion of the trial court[.]" so "[a]bsent some flagrant miscarriage of justice an appellant [sic] court should respect the trial court's exercise of discretion in these circumstances."

*Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

Additionally, CR 60.02 "is not intended merely as an additional opportunity to relitigate the same issues which could reasonably have been presented by direct appeal or RCr 11.42 proceedings." *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997) (quotation marks and citations omitted). Thus, "[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.” *Id.* In other words, “CR 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could reasonably have been presented by direct appeal or an RCr 11.42 proceeding” and, consequently, successive post-conviction motions are impermissible. *Foley v. Commonwealth*, 425 S.W.3d 880, 884 (Ky. 2014). We review the denial of a CR 60.02 motion for an abuse of discretion. *Id.* at 886.

The trial court did not abuse its discretion in concluding Fitzgerald’s motion was not filed within a reasonable time. The alleged coercion occurred roughly thirty-five years before Fitzgerald filed the motion—a remarkable delay which he has not adequately explained. Kentucky appellate courts have repeatedly concluded motions brought more seasonably were nonetheless untimely. *See, e.g., Gross*, 648 S.W.2d at 858 (five-year delay); *Graves v. Commonwealth*, 283 S.W.3d 252, 257 (Ky. App. 2009) (seven-year delay); *Oller v. Commonwealth*, 292 S.W.3d 332, 334 (Ky. App. 2009) (sixteen-year delay).

We similarly conclude the trial court did not abuse its discretion by finding the 60.02 motion was successive and thus impermissible. Fitzgerald previously filed at least four post-conviction motions, including one pursuant to CR 60.02, and he has not shown why he could not have raised the alleged coercion previously.

Because the trial court did not abuse its discretion in finding the motion to be untimely and successive, we decline to address it on the merits.<sup>1</sup>

For the foregoing reasons, the Boyle Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Steve Fitzgerald, *pro se*  
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BRIEF FOR APPELLEE:

Andy Beshear  
Attorney General of Kentucky

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<sup>1</sup> Fitzgerald's brief utterly fails to comply with CR 76.12 by, for example, citing to specific locations in the record to support his arguments. Though we decline to exhaustively sift through the record, we are aware that the only apparent memorialization of the guilty plea hearing at issue is a fill-in-the-blank summary prepared by the court reporter which states that Fitzgerald answered "[y]es" when asked if anyone had threatened or forced him into pleading guilty. Although that response is curious, the record does not show the reason for it or what discussions ensued. Crucially, Fitzgerald has cited absolutely nothing in the record to support his contention the trial court coerced him into pleading guilty. In fact, Fitzgerald's brief states he agreed to plead guilty so his mother would stop crying, which provides a possible explanation for his plea colloquy response.