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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001669-MR

FREDERICK ROBB — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 04-CR-00161

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, KRAMER AND TAYLOR, JUDGES.

KRAMER, JUDGE: Frederick Robb appeals an October 11, 2018 order of the Pike Circuit Court denying his motion to set aside his 2005 first-degree manslaughter conviction on the bases of either RCr[1] 11.42 or CR[2] 60.02. Upon review, we affirm.

[1] Kentucky Rule of Criminal Procedure.

[2] Kentucky Rule of Civil Procedure.

In *Robb v. Commonwealth*, No. 2005-SC-000169-MR, 2006 WL 2707455 (Ky. Sept. 21, 2006) (unpublished), the Kentucky Supreme Court discussed the circumstances of Robb's incarceration:

> The crime for which Appellant was convicted stemmed from the shooting death of William Stover, Appellant's close friend of many years. Appellant and Stover grew up together and continued to see each other several times each week as adults. Appellant contended that Stover had a history of altercations with both him and his mother involving Stover's desire for painkillers lawfully prescribed to the mother.
>
> On May 17, 2004, Stover arrived at Appellant's home and asked if he wanted to smoke some marijuana with him. Appellant could not participate at that time but allowed Stover to return later that night to "party." At approximately 1:00 a.m. on May 18, 2004, the Kentucky State Police received a call from Appellant informing them that he had just shot his best friend.
>
> During the thirty (30) minute 9–1–1 telephone call, Appellant stated that he shot Stover with a .357 magnum, that Stover made him smoke a little "crystal meth," that Stover had also smoked approximately two and a half grams of methamphetamines, and that Stover had refused to leave and had become forceful despite Appellant's warnings that he had a gun.
>
> When officers arrived at Appellant's home, they photographed the scene and read Appellant his Miranda rights. Appellant refused to sign any waiver of his rights and indicated that he did not think he wanted to talk. The police accepted this and asked no questions. He, however, began to talk to the officers about the incident, and despite several breaks in the discussion, repeatedly provided unsolicited statements about the events of the

> evening to the officers. The entire conversation was recorded and admitted at trial.
>
> An autopsy concluded that Stover had a high level of alcohol in his system but no presence of drugs. Stover's body had no evidence of bruises or abrasions indicative of a struggle prior to death. Appellant also lacked any bruises or indications that he had been in a fight or struggle with anyone, and there was no evidence of a struggle or fight in the home. The autopsy additionally revealed that Stover's body had "stippling" in the area of the wound, which is indicative of a close range firing of a weapon. There was no evidence, however, that Stover had possessed any kind of weapon.
>
> Appellant was subsequently charged and convicted of first degree manslaughter. At trial, Appellant claimed that Stover had attacked him and that he acted in self defense.

Id. at *1.

Thereafter, Robb was sentenced to twenty years' imprisonment, and in 2006 the Kentucky Supreme Court affirmed the circuit court's denial of Robb's motion for a new trial.

In 2007, Robb then moved for post-conviction relief pursuant to RCr 11.42, arguing in part that his counsel had "failed or refused to subpoena the Medical Examiner to establish [Robb] suffered abuse from [Stover] and [Robb] acted in self-defense when [he] shot [Stover];" and had failed to investigate the facts, move to suppress evidence, or object to the testimony of the medical

examiner or any of the other witnesses who testified for the Commonwealth. His motion was denied, and he filed no appeal.

Robb filed another post-conviction motion on September 23, 2008, arguing that the evidence and applicable law should have warranted a sentence of ten years' incarceration, rather than twenty. The Commonwealth regarded his motion as having been filed under the purview of CR 60.02 and opposed it. The circuit court later denied Robb's motion. Robb appealed. He subsequently moved to dismiss his appeal, which was granted.

We now turn to Robb's most recent post-conviction motion, which he filed on July 26, 2018, pursuant to RCr 11.42, CR 60.02, and CR 60.03. The focus of Robb's motion was upon two excerpts from the medical examiner's report regarding Stover's May 19, 2004 autopsy. The first excerpt, under the heading "clothing examination," stated:

> When first viewed, the decedent's body is received in a white body bag to which a Coroner's identification tag with the decedent's name and identifying data is tied. He is clad in the following items of clothing: gray short-sleeved shirt with "NIKE AIR" word and logo on front; gray jeans ("BUCKLE BOY®") with black belt; army green shorts; "FTL" white underwear briefs; white sock on left foot.
> Surrounding the left wrist is a gray metal digital watch with black band, functioning and indicating the correct time.
>
> Recovered from the garments are the following personal effects and monetary units in US currency: 1 ten dollar

> bill, 1 five dollar bill, 10 quarters, and 5 dimes; gray metal key ring with six keys; black cigarette lighter; *double bladed folding pocketknife with brown/silver-colored handle* ("CASE"); silver-colored metal object with black rubber, appearing to be a cigarette lighter.

(Emphasis added).

The second excerpt, which appeared under the heading "upper extremities," stated:

> Symmetrical, trim, slightly-moderately muscular, and normally developed. Fingernail beds are violaceous *with patchy aggregates of dry red bloody material* and moderate subungual dirt. No surgical scars; no hesitation marks.

(Emphasis added).

Relying on these excerpts, Robb's argument in his motion was in relevant part as follows:

> At some point during the Movant's incarceration, he decided to pursue his case, thus, he requested a copy of the Coroner's Report of William S. Stover, the victim. In that report it was discovered that under the fingernail beds of Mr. Stover, there were ". . . patchy aggregates of dry red bloody material." Also in the report, it was discovered that the victim, William S. Stover, had a knife on his person.
>
> This information was never mentioned during the Medical Examiner's testimony while on the stand, nor was it mentioned during the reading of the Autopsy Report to the jury.
>
> . . .

> [Defense Counsel] had an obligation to the Movant to challenge the Coroner's Report and make sure the report was complete and accurate. Obviously, [Defense Counsel] failed his client Mr. Robb by not questioning the Coroner's Report and making sure that the report was absolutely complete, or at least not leaving out key information which would have "no doubt" shined a different light on the Commonwealth's case.
>
> The Movant, Frederick Robb, has always claimed "self-defense." His account of circumstances leading to the unfortunate death of Mr. William S. Stover would have caused the jury a different outcome in their findings had the full and complete Coroner's Report had been read and taken into evidence.

In response, the Commonwealth argued: (1) Robb's motion was time-barred under the standards of RCr 11.42 and CR 60.02; and (2) the evidence detailed in Robb's motion would not, with reasonable certainty, have changed the verdict or result in the event of a new trial.

In an October 11, 2018 order, the circuit court agreed with the Commonwealth and denied Robb's motion. Robb now appeals and repeats the arguments he put forth below. Upon review, however, we agree with the circuit court's disposition of this matter, and adopt its well-reasoned analysis as follows:

> The basis and sole argument for Robb's present motion is that he has received a coroner's investigation report with two details – the presence of blood under the victim's fingernails and a pocket knife found in his pocket – that were not presented at his trial. He claims ineffective assistance of counsel for failing to introduce these facts into evidence.

A RCr 11.42 motion must be brought within three years after the judgment is final. RCr 11.42(10). But if the underlying facts which are the basis of the motion were unknown at the time and incapable of being discovered with due diligence then the three-year limitation runs at the time the facts were discovered. *Id*. It is well settled that an RCr 11.42 motion cannot be used to "retry issues which could and should have been raised in the original proceeding, nor those that were raised in the trial court and considered" on appeal. *Thacker v. Com*., 476 S.W.2d 838, 839 (Ky. 1972). Neither can a second RCr 11.42 motion present issues that were or "reasonably could have been" presented in the original motion. *Deweese v. Com*., 407 S.W.2d 402, 403 (Ky. 1966). Final disposition of the original motion concludes all issues that were, or reasonably could have been, addressed. *Id*.

Insofar as the present motion is based on RCr 11.42 the Court finds the claim to be procedurally barred due to timeliness and waiver. It is untimely because Robb's judgment became final in 2006 thus he is late by nine years. He does not qualify for the evidentiary exception under the rule because the autopsy report he received in 2017 was written in 2004. Thus, due diligence could have revealed the medical examiner's reported finding of a pocket knife or blood under [Stover's] fingernails. Additionally, Robb's previous RCr 11.42 motion in 2007 included allegations that his counsel did not adequately cross examine the medical examiner. Therefore, the Court takes the current allegations as either having already been presented or reasonably could and should have been in 2007.

Robb also brings this motion under CR 60.02(b) and (f); that is newly discovered evidence and reason of extraordinary nature, respectively. A motion under the newly discovered evidence prong has a one-year time limitation and reasons of extraordinary nature need to be filed in a reasonable time. CR 60.02. It has been twelve

years since Robb's judgment became final and so falls outside the time limitations of the rule. But even if his motion was timely it would not be granted. "To justify relief, the movant must specifically present facts which render the 'original trial tantamount to none at all.'" *Foley v. Com.*, 425 S.W.3d 880, 885-86 (Ky. 2014) (internal citations omitted.) Furthermore, only the "most unusual circumstances" may be invoked under CR 60.02(f). *Id*. The evidence which Robb presents simply does not meet this standard.

Because newly discovered evidence must be of the sort that could not have been discovered at the time of trial with reasonable diligence the autopsy report Robb now relies on does not qualify. *Id*. at 887. The report was made in 2004 and was obviously discoverable.

. . .

Neither are the specific pieces of evidence Robb focuses on of such "decisive value or force that it would, with reasonable certainty, have changed the verdict or that it would probably change the result if a new trial should be granted." *Id*. at 886. First, the pocket knife found in the victim's pocket would not lend credibility to Robb's claim of self-defense because simple logic dictates that if he was indeed attacked with that knife it would not have been folded up in the victim's pocket at the time of death. Nor would the alleged blood under the victim's fingernails likely change the verdict. While possibly lending credence to a claim of self-defense it is certainly not of "decisive value", *Id*., as the weight of evidence showed that the victim's body "had no evidence of bruises or abrasions indicative of a struggle prior to death. [Robb] also lacked any bruises or indications that he had been in a fight or struggle with anyone, and there was no evidence of a struggle or fight in the home." *Robb v. Com.*, NO. 2005-SC-0169-MR, 2006 WL 2707455, at *1 (Ky. Sept. 21, 2006). The photographic evidence of the victim's body and crime scene refuted

> "any claim of self defense or struggle prior to the shooting." *Id*. at *2.

As indicated, we find no error with the circuit court's decision to deny Robb's post-conviction motion at issue herein. We therefore AFFIRM.

ALL CONCUR.

BRIEF FOR APPELLANT:

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