

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001692-MR

ROBERT C. MANLEY, III

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 01-CR-00012

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Robert C. Manley, III, *pro se*, brings this appeal from a February 23, 2018, Order of the Franklin Circuit Court denying a Kentucky Rules of Civil Procedure (CR) 60.02 motion to vacate his sentence of imprisonment. We affirm.

In May 2004 after a jury trial, Manley was found guilty of first-degree rape. Before the penalty phase of trial, Manley reached a plea agreement with the Commonwealth. Under its terms, Manley would plead guilty to being a persistent

felony offender in the second degree and waive his right to appeal the rape conviction. In return, the Commonwealth would recommend a thirty-year sentence of imprisonment. On May 13, 2004, Manley pleaded guilty to being a second-degree persistent felony offender. However, before the circuit court sentenced Manley, he filed a motion to withdraw guilty plea on July 16, 2004. The circuit court conducted a hearing, and by order entered October 25, 2004, the circuit court denied Manley's motion to withdraw guilty plea. The circuit court ultimately sentenced Manley to a total of thirty-years' imprisonment by Judgment entered November 17, 2004.

Manley then undertook a direct appeal from the October 23, 2004, order denying his motion to withdraw guilty plea. In Appeal No. 2004-CA-002454-MR, the Court of Appeals concluded that the circuit court did not commit reversible error by denying Manley's motion to withdraw guilty plea.

Thereafter, on July 31, 2007, Manley filed a Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to vacate his sentence of imprisonment due to ineffective assistance of trial counsel. The circuit court, however, denied the RCr 11.42 motion, and Manley filed a direct appeal. In Appeal No. 2009-CA-001836-MR, the Court of Appeals affirmed, holding that the circuit court did not commit reversible error by denying Manley's RCr 11.42 motion.

Some thirteen years after entry of final judgment, on February 2, 2017, Manley filed a CR 60.02 motion to set aside his sentence of imprisonment. By Order entered February 23, 2018, the circuit court denied the CR 60.02 motion, finding it was not filed within a reasonable time, thus precipitating this *pro se* appeal.

Manley contends the circuit court erroneously denied his CR 60.02(e) and (f) motion to set aside his sentence of imprisonment. Manley asserts that he was denied effective assistance of trial counsel in regard to withdrawing his guilty plea. Manley also maintains that his trial counsel had an actual conflict of interest concerning the withdrawal of his guilty plea relying on *Commonwealth v. Tigue*, 459 S.W.3d 372 (Ky. 2015). Manley argues that his CR 60.02 motion was filed within a reasonable time after rendition of *Tigue*, 459 S.W.3d 372. Manley asserts that he was denied the assistance of trial counsel during a critical stage of the proceeding (motion to withdraw guilty plea), thus mandating the vacation of guilty plea.

CR 60.02 reads:

On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than

perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. The motion 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. A motion under this rule does not affect the finality of a judgment or suspend its operation.

A CR 60.02 motion is an extraordinary remedy only available to redress a “substantial miscarriage of justice.” *Wilson v. Commonwealth*, 403 S.W.2d 710, 712 (Ky. 1966). When seeking relief under CR 60.02(e) or (f), the motion must be filed “within a reasonable time.” And, the determination of a reasonable time is within the discretion of the circuit court. *Foley v. Commonwealth*, 425 S.W.3d 880, 884 (Ky. 2014).

In his CR 60.02 motion, Manley relies upon *Tigue*, 459 S.W.3d 372, which was rendered on May 14, 2015. Manley states that the CR 60.02 motion was timely filed as *Tigue*, 459 S.W.3d 372, was only decided in 2015. However, Manley filed the CR 60.02 motion on February 2, 2017, some 21 months after *Tigue*, 459 S.W.3d 372, was rendered.

Additionally, in its February 23, 2018, Order, the circuit court concluded that Manley’s CR 60.02 (e) and (f) motion was not made within a reasonable time. The circuit court pointed out that Manley “waited nearly thirteen

(13) years from entry of his plea before filing the motion.” February 23, 2018, Order at 4. The court also cited to Manley’s previous RCr 11.42 motion wherein he argued that trial counsel was ineffective for advising him to waive jury sentencing. As such, the court believed Manley was fully aware of such allegation of error as early as 2007.

Upon the whole, we are unable to conclude that the circuit court abused its discretion by determining Manley’s CR 60.02 (e) and (f) motion was not filed within a reasonable time. *See Foley*, 425 S.W.3d at 884.

We view any remaining contention of error as moot or without merit.

For the foregoing reasons, the Order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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