

RENDERED: JUNE 12, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-000283-MR

LEO CORNELIUS SPURLING

APPELLANT

v. APPEAL FROM LYON CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL, III, JUDGE
ACTION NO. 88-CR-00074

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

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

TAYLOR, JUDGE: Leo Cornelius Spurling, *pro se*, brings this appeal from a January 30, 2019, order of the Lyon Circuit Court denying Spurling's Kentucky Rules of Civil Procedure (CR) 60.02 motion to vacate his judgment of conviction. We affirm.

In 1988, while incarcerated at Kentucky State Penitentiary (KSP),¹ Spurling was charged with murder following the death of a fellow inmate. Spurling was indicted by a Lyon County Grand Jury upon one count of murder. Following a jury trial, Spurling was found guilty of murder, and by Final Judgment entered August 14, 1989, the circuit court sentenced Spurling to 150-years' imprisonment. His conviction was affirmed upon direct appeal to the Kentucky Supreme Court (Action No. 1989-SC-000638).

Over the next several decades, Spurling filed numerous post-conviction motions. In 2005, Spurling filed a motion pursuant to CR 60.02 to vacate his judgment of conviction. The circuit court denied the CR 60.02 motion by order entered February 15, 2006. This Court affirmed the denial of the motion (Appeal No. 2006-CA-000551-MR), and Spurling did not seek discretionary review.

Then, in 2006, Spurling filed another CR 60.02 motion to vacate his judgment of conviction. By order entered November 1, 2007, the circuit court denied the motion as untimely and as a successive CR 60.02 motion. The Court of

¹ In 1982, Leo Cornelius Spurling was convicted of first-degree manslaughter in Jefferson Circuit Court (Action No. 79-CR-001047) and was sentenced to ten-years' imprisonment. Then, in September 1983, Spurling was convicted in Jefferson Circuit Court of murder, two counts of wanton endangerment in the first degree, and with being a persistent felony offender in the second degree. Spurling was sentenced to life imprisonment (Action No. 83-CR-000328). In 1988, while serving his sentences of imprisonment, Spurling was charged with the murder of another inmate.

Appeals affirmed the circuit court's denial of the motion (Appeal No. 2007-CA-002505-MR), and Spurling did not seek discretionary review.

On December 18, 2017, Spurling filed the instant CR 60.02 Motion alleging, *inter alia*, that the Commonwealth withheld certain evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). By order entered January 30, 2019, the circuit court denied Spurling's CR 60.02 motion concluding it was untimely filed. This appeal follows.²

When reviewing the circuit court's denial of a CR 60.02 motion, we must determine whether the circuit court abused its discretion. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000). An abuse of discretion occurs when the "decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Miller v. Eldridge*, 146 S.W.3d 909, 914 (Ky. 2004). Our review proceeds accordingly.

Spurling contends the circuit court erred by denying his CR 60.02(f) motion as untimely. Spurling also contends he is entitled to CR 60.02 relief as he only recently became aware of evidence being withheld by the Commonwealth in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Spurling asserts that in response to another motion he had pending before the circuit court, the

² By order also entered January 30, 2019, the circuit court also denied Spurling's motion for DNA testing. Spurling has not pursued an appeal of the denial of that motion. In fact, in Spurling's brief, he acknowledges there is currently no DNA evidence available for testing.

Commonwealth produced a copy of a “cover sheet” that indicated a Kentucky State Police file had been forwarded to the FBI relative to the 1988 murder.

Spurling’s Brief at 5. Spurling specifically asserts:

At no time prior to the Commonwealth’s September 19, 2016, disclosure of this cover sheet was Spurling ever aware of the fact that there existed a file in relation to his case generated by the Kentucky State Police and that it had been turned over to . . . the F.B.I. with explicit instructions not to release. The contents of this file still have not been produced by the Commonwealth.

Spurling’s Brief at 5.

In the instant CR 60.02(f) motion, Spurling asserts he could not have discovered the above described evidence any sooner. However, CR 60.02(f) clearly provides that a motion thereunder “shall be made within a reasonable time.” Spurling filed the instant CR 60.02(f) motion on December 18, 2017, almost twenty-eight years after entry of the judgment and sentence of imprisonment in 1989. As noted by the circuit court, timeliness is important because the evidence and witnesses are likely no longer available with the substantial passage of time. Considering the lengthy delay of some twenty-eight years, we are simply unable to conclude that the circuit court abused its discretion by denying the instant CR 60.02 motion as untimely. *See Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

Even if the CR 60.02 motion were timely filed, the motion is without merit. Spurling claims the Commonwealth withheld the subject evidence in violation of *Brady*, 373 U.S. 83. For the following reasons we disagree.

In *Brady*, the United States Supreme Court held that due process is offended when the prosecution withholds “evidence favorable to an accused upon request . . . where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady*, 373 U.S. at 87; *see also Commonwealth v. Bussell*, 226 S.W.3d 96, 99 (Ky. 2007) (citation omitted). And, in *Strickler v. Greene*, 527 U.S. 263 (1999) the Supreme Court set forth three components necessary to demonstrate a *Brady* violation:

There are three components of a true *Brady* violation:
The evidence at issue must be favorable to the accused,
either because it is exculpatory, or because it is
impeaching; that evidence must have been suppressed by
the State, either willfully or inadvertently; and prejudice
must have ensued.

Id. at 281-82.

The Kentucky Supreme Court addressed an alleged *Brady* violation in *Commonwealth v. Bussell*, 226 S.W.3d 96. The *Bussell* Court held that under the *Brady* doctrine, evidence is material “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Bussell*, 226 S.W.3d at 99-100 (citations omitted). A “reasonable

probability” may be defined as “a probability sufficient to undermine confidence in the outcome.” *Id.* at 100 (citation omitted).

In this case, Spurling fails to set forth the content of any specific evidence he believes was withheld nor how the evidence would change the outcome of his trial. Rather, Spurling merely states in general terms that he believes a file exists indicating the FBI was somehow involved in an investigation of the 1988 murder at KSP. Spurling admits he does not know the contents of this file. Consequently, Spurling has failed to demonstrate that a reasonable probability exists that the result of the trial would have been different if the file had been disclosed. *See Bussell*, 226 S.W.3d at 99-100.

Accordingly, we hold that the circuit court did not abuse its discretion by denying Spurling’s CR 60.02 motion for relief from judgment.

We view any remaining contentions to be moot or without merit.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

Leo Cornelius Spurling, *Pro Se*
Eddyville, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky
Frankfort, Kentucky

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky