

**IMPORTANT NOTICE**  
**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***

RENDERED: MAY 18, 2006  
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2005-SC-0415-MR and 2005-SC-420-MR

DATE 8-24-06 ELLAGravitt, DC.

RALPH STEPHENS BAZE, JR.

APPELLANT

V.

APPEAL FROM ROWAN CIRCUIT COURT  
HONORABLE WILLIAM B. MAINS, JUDGE  
1993-CR-00001

COMMONWEALTH OF KENTUCKY

APPELLEE

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

The two appeals in this case have been consolidated for the purpose of this Opinion. Case No. 2005-SC-0415 is an appeal from an order of the Rowan Circuit Judge denying Baze a motion to reopen an RCr 11.42 proceeding. It contends that Kentucky law and the Federal Constitution provide for the right to effective assistance for post-conviction counsel in death penalty cases. Supreme Court No. 2005-SC-420 is also an appeal from an order of the Rowan Circuit Judge denying Baze relief from judgment pursuant to CR 60.02 on the grounds that new evidence has not been raised within a reasonable time, is not of an extraordinary nature and could have been raised in the original RCr 11.42 action. Both orders were issued on April 26, 2005.

Baze was convicted of the murder of a sheriff and his deputy. He was sentenced to death and that sentence was affirmed on direct appeal. Baze v. Commonwealth, 965 S.W.2d 817 (Ky. 1997). We then denied relief in his first RCr

11.42 action. Baze v. Commonwealth, 23 S.W.3d 619 (Ky. 2000). This case combines a second RCr 11.42 based appeal along with a CR 60.02 action. In addition, a panel of the United States Court of Appeals for the Sixth Circuit Court on June 9, 2004, denied a Federal habeas corpus petition in Baze v. Parker, 371 F.3d 310 (6<sup>th</sup> Cir. 2004), in a very comprehensive opinion. The petition for rehearing was denied in August 2004 *en banc*. An additional CR 60.02 action is currently being rendered today. (2005-SC-0889-MR) Baze asks this Court to reverse the trial judge's denial of the requested RCr 11.42 and CR 60.02 relief. We decline to do so and affirm.

Counsel for Baze argues that the statutory right to post-conviction counsel in Kentucky in capital cases creates a state law right to the effective assistance of post-conviction counsel and a corresponding federal right under the VIII and XIV amendments to the United States Constitution and that Baze suffered from physical and sexual abuse in his childhood as well as from brain injuries and frequent suicide attempts which the jury nor any court has heard as mitigating evidence. In 2005-SC-420, counsel for Baze contends that the circuit judge abused his discretion by denying the motion as untimely; that the reasons for relief are extraordinary; that RCr 60.02 is the only avenue for relief; that new evidence presented requires relief from the death sentence and that Baze suffered from a variety of physical and sexually abusive childhood problems, as well as brain injuries, and frequent suicide attempts. For purposes of this Opinion, we will treat these arguments as being consolidated.

#### I. STANDARD OF REVIEW

The trial judge denied relief from the RCr 11.42 request without a hearing, finding a lack of timeliness. Based on an analysis of foreign case law, the trial judge then rejected the contention that counsel from a previous post conviction relief motion was

ineffective finding there was no right to effective assistance of counsel in post conviction proceedings. See generally Stokes v. State, 146 S.W.3d 56 (Tn. 2004) We examine the combined requests for relief for any abuse of discretion or determination of error. See Gross v. Commonwealth, 648 S.W.2d 853 (1983).

The trial judge also denied relief from a CR 60.02 request on procedural grounds without a hearing. We are required to review that portion of the claim de novo to determine whether the action was filed in a timely manner and to decide whether the issues could have been raised in a prior RCr 11.42 motion or whether the additional mitigation evidence reaches the extraordinary nature required by CR 60.02.

## II. SUCCESSIVE POST-CONVICTION RELIEF MOTIONS

This Court previously affirmed a denial of RCr 11.42 relief in Baze v. Commonwealth, 23 S.W.3d 619 (Ky. 2000). We are now asked to review a requested reopening or in the alternative, a second, RCr 11.42. Whether styled as a reopening or initiated as a new action, it is plainly an attempt to secure a “second bite at the apple”. See Alvey v. Commonwealth, 648 S.W.2d 858 (Ky. 1983).

RCr 11.42 requires that “all issues that could reasonably have been presented” shall be combined in a single motion. Successive RCr 11.42 requests should not be considered. Crick v. Commonwealth, 550 S.W.2d 534 (Ky. 1977). The rules do not allow relief for any issue that could have been raised or should have been raised in previous actions. See Copeland v. Commonwealth, 415 S.W.2d 842 (1967).

## III. RIGHT TO EFFECTIVE COUNSEL

KRS 31.110 provides a limited right to counsel for post conviction proceedings. Baze had appointed counsel but again claims ineffective assistance because of a

failure to present what seems to be absolutely every shred of possible mitigation evidence.

We need not address the issue of a state right to effective post conviction counsel. See Murray v. Giarratano, 492 U.S. 1 (1989). A detailed review of the additional mitigation evidence and the trial court orders presents nothing causing us to determine there was any abuse of discretion or any error significant enough to warrant a reversal of the original conviction and sentence.

#### IV. PROCEDURAL REQUIREMENTS

Any issues which could have been presented in an initial RCr 11.42 motion may not be raised in a later post conviction proceeding. Crick v. Commonwealth, 550 S.W.2d 534 (Ky. 1977). The motion "shall state all grounds for holding the sentence invalid of which the movant has knowledge." RCr 11.42.

A case is not the case of any individual counsel. To suggest that simply securing new counsel should cause us to ignore prior filings or toll time requirements is unacceptable. Baze had the opportunity to present as much evidence as he desired at trial. If trial counsel failed to present that evidence through ineffective assistance, Baze had the opportunity to present it with an RCr 11.42 motion. To now present that evidence in the guise of a successive RCr 11.42 motion or CR 60.02 proceeding is beyond the scope of reasonable consideration. Gross v. Commonwealth, 648 S.W.2d 853 (1983).

RCr 11.42 includes a general time provision of three years. Should the facts of the claim be unknown to the movant or they could not have been ascertained by the exercise of due diligence, the deadline for filing is lengthened to three years after the event establishing one of those exceptions occurs. RCr 11.42(10). A careful review of

the additional mitigation evidence provided by Baze shows that neither exception would apply. The evidence has quite simply, been brought forward too late. It is understandable that any party may not agree with the result of any trial. It should also be understandable that some finality must be present in the process. The trial judge reviewed the motion and the additional mitigation evidence and found it did not meet the time requirements of RCr 11.42. After our own review, we agree. There was no abuse of discretion and there was no error.

In the CR 60.02 portion of this matter, Baze argues that the trial judge again abused his discretion by dismissing the actions based on procedural rules. A one year time limit is imposed for newly discovered evidence which by due diligence could not have been discovered previously. CR 60.02. Extraordinary circumstances are granted a reasonable amount of time. See Gross v. Commonwealth, 648 S.W.2d 853 (Ky. 1983). The rule is not meant to allow yet another opportunity to repeat a prior argument that was unsuccessful in a preceding attack on the judgment. Only issues that cannot be raised in other proceedings are appropriate. See McQueen v. Commonwealth, 948 S.W.2d 415 (Ky. 1997).

The trial judge did not abuse his discretion when dismissing the motion on procedural grounds alone. There was no error. Those procedural deficiencies alone require us to affirm. We have reviewed the additional mitigation evidence in detail and find it all could have been included in a previous post conviction request. Any attempt to now bring this information forward is not timely.

#### V. INEFFECTIVE ASSISTANCE AND MITIGATION EVIDENCE

Both the RCr 11.42 and the CR 60.02 motions seek to show that failure of counsel to present the included additional mitigation evidence was ineffective

assistance of counsel that would require a reversal of the original conviction and sentence. We have exhaustively reviewed the entire record of these arguments and fully examined the supplied affidavits, records, letters, reports, and other materials. There are over thirty exhibits between the two motions, with some duplication of information and most of which encompass multiple pages of information.

This sentence requires a heightened reliability. Atkins v. Virginia, 536 U.S. 304 (2002). Even though we agree that dismissal on procedural grounds was appropriate, ultimately, the result would not have been different if that additional mitigation information had been made available to the jury. Moore v. Commonwealth, 983 S.W.2d 479 (Ky. 1998). The failure to present this evidence until now was not error of such a substantial nature that there is any reasonable probability that Baze would have received a different verdict or sentence. Strickland v. Washington, 466 U.S. 668 (1984).

The allegations of error do not rise to a level requiring us to reverse. The additional mitigation evidence about his life, physical and mental problems, personality and family background do not compel us to substitute our judgment for that of the jury, trial counsel, appellate counsel or even future appellate counsel.

There was no violation of either the VIII or XIV Amendments to the United States Constitution and there was no due process violation of either the state or federal constitutional requirement.

The decision of the circuit judge is affirmed.

Scott, J., not sitting. All others concur.

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