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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: AUGUST 23, 2007
NOT TO BE PUBLISHED

FINAL

Supreme Court of Kentucky

DATE 8-21-08 ELABROWN P.C.

2006-SC-000071-MR

MITCHELL WILLOUGHBY — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
NO. 83-CR-00152-002

COMMONWEALTH OF KENTUCKY — APPELLEE

AND

2006-SC-000100-MR

LEIF C. HALVORSEN — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
NO. 83-CR-00152-001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Mitchell Willoughby and Leif Halvorsen, both of whom have been sentenced to death, appeal the trial court's denial of their motion for extraordinary relief under Kentucky Rules of Civil Procedure (CR) 60.02. We affirm because we find no abuse of discretion in the trial court's ruling that the motions were untimely filed.

In 1983, a jury convicted both Willoughby and Halvorsen of three counts of murder. They were sentenced to death on two counts and life imprisonment on the third. On appeal, we affirmed their convictions and sentences.[1]

In 1988, Willoughby filed a petition for post-conviction relief under Kentucky Rules of Criminal Procedure (RCr) 11.42. Following several delays due to such matters as substitution of counsel, the trial court conducted a hearing on Willoughby's RCr 11.42 petition in 1998. For reasons that are not readily apparent from the record, the case lay dormant for several years until the trial court issued an order denying Willoughby RCr 11.42 relief in 2005. On appeal, we affirmed the trial court's decision to deny Willoughby RCr11.42 relief.[2]

Meanwhile, Halvorsen filed his own post-conviction motion for relief under RCr 11.42. The trial court denied the motion, and Halvorsen's appeal of that decision is still pending before this Court.[3]

In November 2004, approximately one year after the trial court denied his RCr 11.42 petition, Halvorsen filed a motion for relief from final judgment under CR 60.02. Halvorsen's CR 60.02 motion alleged that his conviction was constitutionally infirm because one of the jurors, a clergyman, brought a Bible into the jury room and read Bible passages to the jurors and led jurors in prayer during deliberations. To support that claim, Halvorsen relied upon an affidavit submitted by a Department of Public Advocacy (DPA) investigator, Bruce Gentry. Gentry's affidavit contends that in November 2003, he interviewed Walter Garlington, the clergyman who sat on

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1 Halvorsen v. Commonwealth, 730 S.W.2d 921 (Ky. 1986).

2 Willoughby v. Commonwealth, 2006 WL 3751392 (Ky. 2006).

3 *See* Halvorsen v. Commonwealth, 2004-SC-000017-MR.

Halvorsen's and Willoughby's jury. According to Gentry's affidavit, Juror Garlington stated that he had a Bible with him in the jury room and that he read Bible passages to the other jurors and prayed with them during deliberation.

In June 2005, Willoughby filed his own CR 60.02 motion, relying upon Gentry's affidavit and making essentially the same allegations as had Halvorsen. In December 2005, the trial court issued an order denying Halvorsen's and Willoughby's CR 60.02 motions, principally because it found that the motions had not been timely filed. Halvorsen and Willoughby each appealed that decision. Because those two appeals involve common questions of law and fact, we have elected to resolve both appeals in this combined opinion.

In relevant part, CR 60.02 provides that a court may "relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: . . . (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time . . . ." The trial court has the discretion to decide whether relief under CR 60.02 is appropriate.[4] Likewise, "[w]hat constitutes a reasonable time in which to move to vacate a judgment under CR 60.02 is a matter that addresses itself to the discretion of the trial court."[5] Although we certainly do not condone jurors bringing into jury deliberations a Bible, or other materials extraneous to the trial proceeding,[6] the foremost question we must resolve on this appeal is whether the trial court abused its discretion when it determined that Halvorsen's and Willoughby's CR 60.02 motions were not filed within a reasonable time. Therefore, we

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4 Fortney v. Mahan, 302 S.W.2d 842 (Ky. 1957).

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

6 *See, e.g.*, Grooms v. Commonwealth, 756 S.W.2d 131 (Ky. 1988); Cole v. Commonwealth, 553 S.W.2d 468, 471 (Ky. 1977).

may examine the merits of the CR 60.02 motions only if we find that the trial court abused its discretion when it found the motions to have not been timely filed.

The CR 60.02 motions were filed over twenty years after the trial and nearly twenty years after we affirmed Halvorsen's and Willoughby's convictions on direct appeal. That protracted delay is clearly prima facie evidence to support the trial court's conclusion that Halvorsen's and Willoughby's motions were not, in fact, filed within a reasonable time.

Halvorsen and Willoughby contend that they were unable to make their allegations regarding Juror Garlington's alleged misconduct sooner because they did not learn of it until November 2003 when Garlington agreed to be interviewed by the DPA investigator. It is uncontested that the trial court gave permission for the jurors to be interviewed in 1985. At that time, many of the jurors refused to be interviewed; but two jurors were actually interviewed. And Juror Garlington's strong religious views surfaced during the trial, as is plainly evident from the astonishing fact that the trial court allowed Garlington to lead the courtroom in prayer at the conclusion of the case. So through due diligence and proper questioning, Halvorsen and Willoughby could have learned of any alleged jury misconduct approximately twenty years before they filed their CR 60.02 motion. Indeed, since they had already had an opportunity to speak to at least two jurors, it appears as if Halvorsen and Willoughby could have, and should have, included any claims regarding jury misconduct in their RCr 11.42 petitions. Investigator Gentry's affidavit states that his interview with Juror Garlington occurred before the trial court denied Willoughby's RCr 11.42 petition. So Willoughby presumably could have, at a minimum, sought leave to amend his RCr 11.42 petition to reflect the jury misconduct allegations stemming from Gentry's affidavit. Issues that

could reasonably have been made in an RCr 11.42 motion are not cognizable in a CR 60.02 motion filed later in time.[7]

After trial, a juror is under no obligation to discuss his or her jury service with either the Commonwealth or defense. So giving authoritative approval to Halvorsen's and Willoughby's delay of twenty years in filing their CR 60.02 motion would potentially subject jurors to a perpetual fishing expedition in which representatives of a convicted defendant would attempt to ferret out alleged jury misconduct ad infinitum. No juror should be subject to such contact simply because he or she fulfilled their civic obligation.

Halvorsen also contends that he could not have brought his CR 60.02 motion sooner because his former trial counsel, who had become a member of the General Assembly, had allegedly threatened to cut funding for the DPA if any DPA attorney argued that his representation of Halvorsen was ineffective. This argument is without merit. First, nothing in the CR 60.02 motion regarding jury misconduct has anything to do with an allegation that Halvorsen's trial counsel was ineffective. Second, the contention that DPA refused to file a motion regarding alleged juror misconduct for several years due to its fear of economic reprisals by the General Assembly is grounded in speculation. Third, the DPA ceased representing Halvorsen in 1990 and was not reinstated as counsel for Halvorsen until approximately 2002. Since private counsel

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[7] Gross, 648 S.W.2d at 857 ("Next, we hold that a defendant is required to avail himself of RCr 11.42 while in custody under sentence or on probation, parole or conditional discharge, as to any ground of which he is aware, or should be aware, during the period when this remedy is available to him. Final disposition of that motion, or waiver of the opportunity to make it, shall conclude all issues that reasonably could have been presented in that proceeding. The language of RCr 11.42 forecloses the defendant from raising any questions under CR 60.02 which are 'issues that could reasonably have been presented' by RCr 11.42 proceedings.").

could have filed a post-conviction motion without fear of any economic reprisal, the alleged fear regarding loss of DPA funding does not excuse the long delay before the CR 60.02 motion was filed.

The appellate courts of this state have found that CR 60.02 motions which were filed far sooner after the trial than the ones at hand were, nevertheless, not brought in a reasonable time.[8] Accordingly, given the circumstances of this case, we hold that the trial court did not abuse its discretion in finding that both Halvorsen's and Willoughby's CR 60.02 motions were not filed within a reasonable time. Thus, we affirm.

All sitting. Lambert, C.J.; Cunningham, Minton, Noble, and Schroder, JJ., concur. Scott, J., concurs in result only.

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[8] *See, e.g., id.* (trial court did not abuse its discretion in finding that CR 60.02 motion filed five years after conviction was not filed in a reasonable time); Reyna v. Commonwealth, 217 S.W.3d 274 (Ky.App. 2007) (CR 60.02 motion filed four years after guilty plea not filed in reasonable time).

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