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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2025-CA-1624-MR

ALEX RYAN PAYNE — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE DAVID C. PAYNE, JUDGE
ACTION NO. 19-CR-00834

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, ECKERLE, AND A. JONES, JUDGES.

JONES, A., JUDGE: Alex Ryan Payne, *pro se*, appeals from the Daviess Circuit Court's order entered on October 13, 2025, which denied his petition for relief pursuant to CR[1] 60.02. We affirm.

[1] Kentucky Rules of Civil Procedure.

I. BACKGROUND

Payne is currently serving a seventy-year sentence with the Kentucky Department of Corrections. Briefly stated, Payne's jury convicted him on numerous counts of possessing matter portraying a sexual performance by a minor and using a minor in a sexual performance. He appealed to the Kentucky Supreme Court as a matter of right, and the Supreme Court affirmed his convictions and sentence. Further details of the case may be found in the Supreme Court's published opinion. *Payne v. Commonwealth*, 681 S.W.3d 1 (Ky. 2023).

After the Kentucky Supreme Court affirmed his convictions, Payne sought postconviction relief, filing a motion with the circuit court under RCr[2] 11.42. The circuit court denied the RCr 11.42 motion in an order entered on July 11, 2024. Rather than appeal the order directly, Payne attempted to challenge the circuit court's RCr 11.42 denial by filing a writ of mandamus with this Court. We denied the writ. *Payne v. Castlen*, No. 2024-CA-0924-OA (Ky. App. Dec. 17, 2024). Payne then attempted to appeal the trial court's order denying his RCr 11.42 motion, but his appeal was rejected due to his untimely filing of a notice of appeal. *Payne v. Commonwealth*, No. 2025-CA-0725-MR (Ky. App. Sep. 24, 2025). Payne then petitioned the circuit court to vacate his conviction pursuant to

[2] Kentucky Rules of Criminal Procedure.

CR 60.02. On October 13, 2025, the circuit court denied Payne's CR 60.02 motion. This appeal followed.

II. ANALYSIS

"The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete. That structure is set out in the rules related to direct appeals, in RCr 11.42, and thereafter in CR 60.02." *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). "We review the denial of a CR 60.02 motion for an abuse of discretion." *Diaz v. Commonwealth*, 479 S.W.3d 90, 92 (Ky. App. 2015) (citing *Partin v. Commonwealth*, 337 S.W.3d 639, 640 (Ky. App. 2010)). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). "The burden of proof in a CR 60.02 proceeding falls squarely on the movant to affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief." *Foley v. Commonwealth*, 425 S.W.3d 880, 885 (Ky. 2014) (internal quotation marks and citations omitted). "[W]e will affirm the lower court's decision unless there is a showing of some 'flagrant miscarriage of justice.'" *Id*. at 886 (quoting *Gross*, 648 S.W.2d at 858).

Payne raises two issues in his CR 60.02 motion. First, he argues the trial court erred when it improperly instructed the jury in such a way that it resulted in constructive amendment of the indictment. Second, he argues his sentence is illegal because the jury allegedly gave him a non-unanimous verdict. For its part, the Commonwealth asserts that Payne's claims are procedurally barred. We agree with the Commonwealth that Payne's claims are not cognizable under CR 60.02.

"CR 60.02 is only for relief that is not available by direct appeal or under RCr 11.42. . . . Moreover, a defendant is precluded from raising claims which were, or reasonably could have been, raised in prior proceedings." *Berry v. Commonwealth*, 624 S.W.3d 119, 121 (Ky. App. 2021) (citing *Gross*, 648 S.W.2d at 856-57). The claims which Payne now asserts in his CR 60.02 motion arise out of the instructions given to his jury and the jury's subsequent rendering of a guilty verdict, and so they would have been discernible upon the face of the record. In short, Payne was either aware or should have been aware of these claims in order to bring them in a previous proceeding. "[CR 60.02] relief may only be granted upon facts or grounds not appearing on the face of the record and not available by appeal or otherwise, and not discovered until after the rendition of the judgment without fault of the party seeking relief. . . . In other words, CR 60.02 is neither a substitute for, nor a separate avenue of, appeal." *Bruenger v. Miller*, 706 S.W.3d 247, 261 (Ky. 2024) (internal quotation marks and citations omitted).

Because Payne could have raised these claims in his direct appeal or in his RCr 11.42 motion, he is precluded from raising them here. "CR 60.02 . . . may be utilized only in extraordinary situations when relief is not available on direct appeal or under RCr 11.42." *Foley*, 425 S.W.3d at 884 (citing *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997)).

III. CONCLUSION

For the foregoing reasons, we affirm the Daviess Circuit Court's order denying relief pursuant to CR 60.02.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Alex Ryan Payne, *pro se*
Central City, Kentucky

BRIEF FOR APPELLEE:

Russell Coleman
Attorney General of Kentucky

Stephanie L. McKeehan
Assistant Attorney General
Frankfort, Kentucky