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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002555-MR

LEROY KINSER — APPELLANT

v.

APPEAL FROM BUTLER CIRCUIT COURT
HONORABLE SAM H. MONARCH, SPECIAL JUDGE
ACTION NO. 83-CR-00018-02

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER[1] AND DIXON, JUDGES; PAISELY,[2] SENIOR JUDGE.

DIXON, JUDGE: Appellant, Leroy Kinser, appeals *pro se* from the Butler Circuit Court's denial of his CR 60.02 motion for relief. Finding no error, we affirm the order of the trial court.

In August 1985, Appellant and two co-defendants, Ronald Johnson and Dean Vincent, were tried in the Butler

[1] Judge David A. Barber concurred in this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

[2] Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Circuit Court and convicted of murder, first-degree burglary and first-degree robbery. They were sentenced to twenty-year terms of imprisonment on the burglary and robbery charges and life imprisonment for murder. All three convictions were affirmed by the Kentucky Supreme Court in *Kinser v. Commonwealth,* 741 S.W.2d 648 (Ky. 1987).

Appellant did not pursue his case further and the judgment and sentence against him became final. However, Vincent and Johnson both filed petitions for a writ of habeas corpus. The Sixth Circuit Court of Appeals granted Vincent's petition in *Vincent v. Parke,* 942 F.2d 989 (6th Cir. 1991) and Johnson's petition in *Johnson v. Parke*, 955 F.2d 44 (6th Cir. 1992) (Unpublished disposition).

In February 1993, Vincent and Johnson were again tried together in the Butler Circuit Court, and found guilty of first-degree burglary, first-degree robbery and wanton murder. They received consecutive sentences of fifteen years, fifteen years, and life imprisonment, respectively. However, in June 1995, the Kentucky Supreme Court affirmed the convictions but remanded the cases to the trial court with directions to run the two fifteen year sentences concurrently with the life sentence for murder.

While Johnson did not seek further relief, Vincent filed a second petition for a writ of habeas corpus claiming that testimony at this second trial violated his Sixth Amendment

rights under the Confrontation Clause. In September 2000, the Sixth Circuit granted Vincent's second petition and remanded his case for a third trial. *Vincent v. Seabold,* 226 F.3d 681 (6th Cir. 2000), *cert. denied*, 532 U.S. 1063 (2001). On August 27, 2001, prior to the third trial date, Vincent entered into a plea agreement and was sentenced to concurrent terms of fifteen years each for the burglary and robbery convictions and life imprisonment for wanton murder.

In March 2004, Appellant filed the instant CR 60.02 motion claiming: (1) there was insufficient evidence to support his murder conviction; (2) the jury instructions erroneously failed to require the Commonwealth to prove every element of the charges, including intent; and (3) the trial court erred by failing to instruct the jury on second-degree manslaughter and reckless homicide. By order entered January 28, 2005, Special Judge Monarch denied Appellant's motion, ruling, in part:

> [D]efendant argues a series of trial errors, many of which were argued in his appeal before the Supreme Court and all of which were capable of being raised on appeal. He alleges lack of jurisdiction by this Court, insufficient evidence, improper use of his statements, improper impeachment of witnesses, errors in the jury instructions, and errors in the sentencing process. This Court has repeatedly read the defendant's twenty-three page memorandum and has considered every argument and allegation of error raised therein. The inevitable conclusion is that nothing new is being asserted. Every ground for relief alleged

> was or could have been raised on appeal and, accordingly, is not a basis of relief under CR 60.02.

CR 60.02 is not intended as an additional opportunity to relitigate the same issues that could "reasonably have been presented" by direct appeal or RCr 11.42 proceedings. *See McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky.1997), *cert. Denied,* 521 U.S. 1130 (1997) (*Quoting* RCr 11.42(3)). Rather, CR 60.02 is meant to provide relief which is not available by direct appeal or under RCr 11.42. *Gross v. Commonwealth,* 648 S.W.2d 853 (Ky. 1983); *McQueen, supra*. The rule states in relevant part that,

> 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 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.

CR 60.02 allows a judgment to be corrected or vacated based "upon facts or grounds, not appearing on the face of the

record and not available by appeal or otherwise, which were not discovered until after rendition of judgment without fault of the parties seeking relief." *Barnett v. Commonwealth,* 979 S.W.2d 98, 101 (Ky. 1998), *citing Davis v. Home Indemnity Company,* 659 S.W.2d 2d 185, 188 (Ky. 1983). In order to be eligible for CR 60.02 relief, the movant must demonstrate why he is entitled to extraordinary relief. *Barnett, supra, citing Gross* at 856.

We conclude that Appellant is barred by operation of CR 60.02 and the case law from prosecuting his claim by way of CR 60.02 when it could have been brought on direct appeal or by way of his RCr 11.42 motion. The fact that he could have raised the issues herein before the Kentucky Supreme Court is by itself a basis for affirming the order denying his motion for CR 60.02 relief.

Notwithstanding, Appellant's claim of error is time-barred. A motion for relief under CR 60.02(e) must be brought with a "reasonable time". Appellant was convicted in 1985 and he brought this motion for CR 60.02(e) relief in 2004. CR 60.02 exists to correct errors only upon a showing of facts or grounds not appearing on the face of the record and that were discovered only after the judgment without fault of the party seeking relief. *Harris v. Commonwealth,* 296 S.W.2d 700 (Ky. 1956). The basis for Appellant's CR 60.02 motion, whether meritorious or

not, existed in 1985 and should have been raised if at all on direct appeal. This is not simply a matter of judicial economy; rather, it is a requirement of the civil rules and supported by case law.

"The standard of review of an appeal involving a CR 60.02 motion is whether the trial Court abused its discretion." *See, e.g., White v. Commonwealth,* 32 S.W.3d 83, 86 (Ky. App. 2000). And we find that the trial court did not abuse its discretion in denying Appellant's CR 60.02 motion without a hearing.

Accordingly, the trial court's decision is affirmed.

ALL CONCUR.

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