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Supreme Court of Kentucky.
 Mitchell **WILLOUGHBY**, Appellant
 v.
 COMMONWEALTH of Kentucky, Appellee
 and
 Leif C. **Halvorsen**, Appellant
 v.
 Commonwealth of Kentucky, Appellee.
Nos. 2006-SC-000071-MR, 2006-SC-000100-MR.

Aug. 23, 2007.
 Rehearing Denied April 21, 2008.

Background: After defendants' **murder** convictions and death sentences were affirmed on appeal, [730 S.W.2d 921](#), and denials of postconviction relief were also affirmed, __S.W.3d __, [2007 WL 2403390](#), both defendants moved for relief from judgment. The Circuit Court, Fayette County, [Gary D. Payne](#), J., denied the motions as untimely. Defendants appealed.

Holding: Consolidating, the Supreme Court held that the Circuit Court acted within its discretion in finding that defendants' motions were not brought in a reasonable time.
 Affirmed.

[Scott](#), J., concurred in result only.

Criminal Law 110  **1586**

[110](#) Criminal Law

[110XXX](#) Post-Conviction Relief

[110XXX\(C\)](#) Proceedings

[110XXX\(C\)1](#) In General

[110k1586](#) k. Time for Proceedings.

[Most Cited Cases](#)

The Circuit Court acted within its discretion in finding that defendants' motions for relief from judgment imposing death penalty on murder convictions were

not brought in a reasonable time and in denying them as untimely; motions were based on alleged juror misconduct that could have been discovered and asserted earlier, and could have been asserted in prior motions for postconviction relief, but which were not asserted until over 20 years after trial. [Rules Civ.Proc., Rule 60.02](#).

On Appeal from Fayette Circuit Court, Nos. 83-CR-00152-002, 83-CR-00152-001; [Gary D. Payne](#), Judge. Mitchell Willoughby, [Dennis James Burke](#), [David Hare Harshaw, III](#), Assistant Public Advocates, Department of Public Advocacy, LaGrange, KY, Counsel for Appellant.

Susan Jackson Balliet, Assistant Public Advocate, Department of Public Advocacy, Frankfort, KY, [Julia K. Pearson](#), Assistant Public Advocate, Department of Public Advocacy, Frankfort, KY, Counsel for Appellant, Leif C. Halvorsen.

[Gregory D. Stumbo](#), Attorney General of Kentucky, Matthew Robert Krygiel, Assistant Attorney General, Office of the Attorney General, Office of Criminal Appeals, Frankfort, KY, [David A. Smith](#), [Tami Renee Stetler](#), Assistant Attorney Generals, Office of Attorney General, Criminal Appellate Division, Frankfort, KY, Counsel for Appellee.

MEMORANDUM OPINION OF THE COURT

*1 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.^{[FN1](#)}

[FN1.
http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=713&FindType=Y&SerialNum=1987002217Halvorsen.v.Commonwealth,730S.W.2d921\(Ky.1986\).](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=713&FindType=Y&SerialNum=1987002217Halvorsen.v.Commonwealth,730S.W.2d921(Ky.1986).)

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's** [RCr 11.42](#) relief in 2005. On appeal, we affirmed the trial court's decision to deny **Willoughby's** [RCr 11.42](#) relief.^{FN2}

[FN2.
http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000999&FindType=Y&SerialNum=2010959287Willoughby.v.Commonwealth,2006WL3751392\(Ky.2006\).](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000999&FindType=Y&SerialNum=2010959287Willoughby.v.Commonwealth,2006WL3751392(Ky.2006).)

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.^{FN3}

[FN3.](#) See *Halvorsen v. Commonwealth*, 2004-SC-000017-MR.

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 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.^{FN4} 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."^{FN5} Although we certainly do not condone jurors bringing into jury deliberations a Bible, or other materials extraneous to the trial proceeding,^{FN6} 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 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.

[FN4.](#) *Fortney v. Mahan*, 302 S.W.2d 842 (Ky.1957).

[FN5.](#) *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky.1983).

[FN6.](#) See, e.g., *Grooms v. Commonwealth*, 756 S.W.2d 131 (Ky.1988); *Cole v. Commonwealth*, 553 S.W.2d 468, 471 (Ky.1977).

*2 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.^{FN7}

^{FN7}. *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 pre-

sented 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.”).

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 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.

*3 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.^{FN8} 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.

^{FN8}. 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).

All sitting. [LAMBERT](#), C.J.; [CUNNINGHAM](#), [MINTON](#), [NOBLE](#), and [SCHRODER](#), JJ., concur. [SCOTT](#), J., concurs in result only.

Ky.,2007.

Willoughby v. Com.

Not Reported in S.W.3d, 2007 WL 2404461 (Ky.)

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