

RENDERED: JULY 3, 2003; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-000111-MR

JAMES BOWMAN

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT  
HONORABLE JOSEPH F. BAMBURGER, JUDGE  
ACTION NO. 96-CR-00112

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: JOHNSON, KNOPF AND McANULTY, JUDGES.

JOHNSON, JUDGE: James Bowman has appealed from an order entered by the Boone Circuit Court on November 14, 2001, that denied his motion for relief from his criminal sentence pursuant to CR<sup>1</sup> 60.02. Having concluded that the circuit court did not err, we affirm.

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<sup>1</sup> Kentucky Rules of Civil Procedure.

On October 22, 1996, Bowman pled guilty to one count of rape in the first degree<sup>2</sup> and one count of sexual abuse in the first degree.<sup>3</sup> The Boone Circuit Court sentenced Bowman to ten years' imprisonment on the rape conviction and five years' imprisonment on the sexual abuse conviction with the sentences to run consecutively.

On November 5, 2001, Bowman filed with the Boone Circuit Court a pro se motion for modification of his sentence pursuant to CR 60.02(f) and KRS 532.070. In his motion, Bowman argued that he has experienced a material change in his circumstances since he was incarcerated. He argued that he suffers from several life-threatening illnesses including lung cancer. Bowman argued that the institutional physician told him that he is at the end-stage of his illnesses. On November 14, 2001, the circuit court denied Bowman's motion and stated that the relief that he sought was not permitted by law nor justified by the facts. This appeal followed.

Bowman argues that his motion was timely filed since he filed his motion only when his medical condition became extraordinary pursuant to CR 60.02. He argues that he suffers from both a lung condition, presumably the cancer mentioned in his motion, and a severe chronic heart condition. He argues

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<sup>2</sup> Kentucky Revised Statutes (KRS) 510.040.

<sup>3</sup> KRS 510.110.

that his illnesses and deteriorating health constitute extraordinary circumstances that entitle him to relief pursuant to CR 60.02(f). Bowman argues that his medical condition would also qualify him for early parole pursuant to KRS 439.3405(1). Furthermore, he insists that he can only obtain relief through CR 60.02(f).

In response the Commonwealth argues that a motion pursuant to CR 60.02(f) should not be granted unless the movant shows extraordinary circumstances involving new evidence that if originally presented at trial would have within reasonable certainty changed the results.<sup>4</sup> The Commonwealth argues that a CR 60.02 motion must deal with either a significant defect in the trial process or a significant defect with the evidence at trial and result in a substantial miscarriage of justice.<sup>5</sup> The Commonwealth points out that Bowman's illnesses do not relate to either the trial process or trial evidence, nor would his illnesses, if known at the time, have changed the result. The Commonwealth cites KRS 439.3405 and points out that it provides for early parole for prisoners with terminal illnesses, such as chronic lung diseases, and that Bowman should have petitioned the parole board pursuant to KRS 439.3405 for early release rather than filing a CR 60.02(f) motion.

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<sup>4</sup> Brown v. Commonwealth, Ky., 932 S.W.2d 359, 362 (1996).

<sup>5</sup> Wine v. Commonwealth, Ky.App., 699 S.W.2d 752, 754 (1985).

The Commonwealth also argues that Bowman's motion was untimely. The Commonwealth points out that a motion pursuant to CR 60.02(f) must be brought within a reasonable time and what constitutes a reasonable time is within the sound discretion of the trial court.<sup>6</sup> The Commonwealth argues that Bowman waited five years to file his motion and five years was an unreasonable amount of time since Bowman suffered from both illnesses at the time he was sentenced. The Commonwealth argues that since the standard of review of denial of relief under CR 60.02 is an abuse of discretion and since Bowman has failed to show that the trial court abused its discretion in any way, the trial court must be affirmed.<sup>7</sup>

This Court can only reverse the denial of a motion pursuant to CR 60.02, if the trial court abused its discretion.<sup>8</sup> No abuse of discretion occurred in the case sub judice. The relief sought by way of CR 60.02 must relate to some significant defect in the trial proceeding or to the evidence presented at trial and denial of relief must result in a substantial miscarriage of justice due to the effect of the final judgment.<sup>9</sup> Obviously, Bowman's illnesses were not related to any defect in

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<sup>6</sup> Gross v. Commonwealth, Ky., 648 S.W.2d 853, 858 (1983).

<sup>7</sup> Brown, 932 S.W.2d at 362.

<sup>8</sup> Id. (citing Richardson v. Brunner, Ky., 327 S.W.2d 572, 574 (1959)).

<sup>9</sup> Wine, 699 S.W.2d 752, 754 (1985)(citing Wilson v. Commonwealth, Ky., 403 S.W.2d 710, 712 (1966)).

either the proceedings or the evidence before the Boone Circuit Court that resulted in his guilty plea, and a CR 60.02 motion is not the proper procedure for the relief Bowman seeks.

Although not a criminal case, we find Cawood v. Cawood,<sup>10</sup> helpful. In Cawood, appellant, ex-wife filed a motion pursuant to CR 60.02 seeking to modify her alimony. She claimed extraordinary circumstances warranted the change since she had been diagnosed and received surgery for breast cancer that left her unable to work. The trial court denied her motion.<sup>11</sup> The former Court of Appeals affirmed the trial court's denial and held:

However, because of the desirability of according finality to judgments, this clause [CR 60.02(f)] must be invoked only with extreme caution, and only under most unusual circumstances. If the courts were to treat subsequent changes of physical condition as reasons of an extraordinary nature warranting the setting aside of alimony judgments, there would be no finality to such judgments.<sup>12</sup>

Finality in criminal cases is just as desirable as finality in civil cases. Thus, as in Cawood, Bowman's illnesses do not constitute extraordinary circumstances that entitle him to relief under CR 60.02(f). As the Commonwealth pointed out, Bowman should have and presumably still can petition the

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<sup>10</sup> Ky., 329 S.W.2d 569 (1959).

<sup>11</sup> Id. at 570.

<sup>12</sup> Id. at 571.

Kentucky State Parole Board, pursuant to KRS 439.3405(1), for early parole due to his medical condition.

The Boone Circuit Court did not abuse its discretion when it denied Bowman's CR 60.02 motion and its order of November 14, 2001, is affirmed.

ALL CONCUR.

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