

RENDERED: November 12, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002138-MR

WALTER TAYLOR

APPELLANT

v. APPEAL FROM CARROLL CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 00-CR-00040

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: SCHRODER AND TACKETT, JUDGES; EMBERTON, SENIOR JUDGE.¹

SCHRODER, JUDGE: This is an appeal from an order denying appellant's CR 60.02 motion to set aside the order revoking his probation. Because appellant's motion was not filed within a year of the revocation order, it was untimely pursuant to CR 60.02(c). Hence, we affirm.

¹ Senior Judge Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

In February 2001, appellant, Walter Taylor, was sentenced to five years of supervised probation, in lieu of an aggregate prison term of five years as a result of pleading guilty to various felony and misdemeanor offenses. One of the terms of Taylor's probation was that he submit to regular drug testing and refrain from using illegal drugs. On November 29, 2001, the Commonwealth filed a motion to revoke appellant's probation on grounds that Taylor failed to refrain from using marijuana on two occasions. At the revocation hearing held on January 28, 2002, the Commonwealth introduced documents that established the positive drug test results. Defense counsel objected to the introduction of these documents, arguing that the validity of the tests was questionable and that the chain of custody was not established. In addition to the test results, the Commonwealth presented the testimony of KSP Trooper Peter Brinkley that on November 9, 2001, he accompanied Staples to serve an arrest warrant on Taylor. Officer Brinkly testified that when he did a patdown of Taylor upon his arrest, Brinkley found a pipe in his pocket which he recognized to be the type of pipe used to smoke marijuana and which had a very strong odor of burnt marijuana. On February 4, 2002, the court entered an order revoking Taylor's probation. The court found that "the Defendant violated the conditions of his probation, namely failure to refrain from the use of marijuana." No appeal was

ever taken from this order. Subsequently, Taylor made a motion for shock probation, which was denied. Again, no appeal was taken.

On August 5, 2003, Taylor filed a pro se CR 60.02 motion seeking to set aside the order revoking his probation. In the motion, Taylor argued that the Commonwealth acted fraudulently in seeking to prove the chain of custody of his urine sample. Specifically, Taylor alleged that the chain of custody form offered by the Commonwealth contained information from two different drug screenings. After the motion was denied, Taylor sought an evidentiary hearing on the motion. This motion was also denied. This appeal by Taylor followed.

CR 60.02 provides:

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 not 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. The motion shall be made within a reasonable time, and on grounds (a), (b),

and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.

In the present case, Taylor filed his motion under CR 60.02(d) - "fraud affecting the proceedings, other than perjury or falsified evidence" - which must be filed "within a reasonable time." A motion under section (c) of the rule - "perjury or falsified evidence" - must be brought within a year of the judgment. We believe that Taylor's allegation that the Commonwealth intentionally combined information from two drug screenings in one chain of custody form constituted "falsified evidence" for purposes of CR 60.02. Accordingly, since the CR 60.02 motion was brought more than one year after the order revoking Taylor's probation, it was untimely.

For the reasons stated above, the order of the Carroll Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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