

RENDERED: October 8, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002384-MR

MILLARD THORNHILL

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
ACTION NO. 85-CR-00001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

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

TACKETT, JUDGE: Millard Thornhill appeals from an order of the Letcher Circuit Court denying his motion to vacate the judgment against him pursuant to Kentucky Rule of Civil Procedure (CR) 60.02. Thornhill's motion asked the trial court for additional credit against his sentence of twenty years' imprisonment for time spent in a federal penitentiary after he was convicted on

¹ Senior Judge Thomas D. 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.

state charges. We find that Thornhill's CR 60.02 motion was not timely and, thus, the judgment of the trial court is affirmed.

Thornhill was sentenced to a ten year term of imprisonment by a federal court in 1980 and placed on probation. Five years later, he was convicted by a jury of felony theft by unlawful taking and being a persistent felony offender in the first degree. The Letcher Circuit Court sentenced Thornhill to twenty years' imprisonment in a state correctional facility, but the judgment failed to specify whether this sentence was to run concurrently with or consecutively to his federal sentence. Both the Kentucky Court of Appeals and the Kentucky Supreme Court affirmed his conviction and sentence on appeal. He was also unsuccessful in litigating a 1986 motion to vacate the judgment pursuant to Kentucky Rule of Criminal Procedure 11.42.

On October 12, 1994, Thornhill was paroled on his state sentence; however, the United States Marshall placed him into custody immediately for a federal probation violation. He remained in federal custody until February 9, 1995, when he was placed on federal parole. Thornhill filed his first CR 60.02 motion in 2002, and the trial court held the motion in abeyance and appointed counsel to represent Thornhill. His second CR 60.02 motion, which asked for credit against his state sentence for the time spent in federal custody during 1994-1995, was filed in June 2003. The trial court entered an order denying his request, and this appeal followed.

Thornhill argues that the version of the Kentucky Revised Statutes in effect at the time of his sentencing by the Letcher Circuit Court required his state sentence of imprisonment to run concurrently with his federal sentence. He contends that when he was paroled by the Commonwealth of Kentucky, but compelled to serve additional time in a federal penitentiary, he should have received credit on his state sentence for the time spent in federal custody. The vehicle which he used to attempt to gain this credit is motion to vacate the 1985 judgment pursuant to CR 60.02. The rule reads as follows:

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.

We decline to address the merits of Thornhill's argument regarding the sentencing statutes in effect in 1985 because his CR 60.02 motion was not timely filed. Arguably, the issue of whether the two sentences were to run concurrently or consecutively was not apparent to Thornhill until he was paroled to federal custody in 1994. Nevertheless, we cannot agree that the trial court was required to consider Thornhill's motion for CR 60.02 relief since he neglected to file it until 2003.

For the foregoing reason, the judgment of the Letcher Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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