RENDERED: SEPTEMBER 17, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002759-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 01-CR-00112

BRIAN WAYNE HAWKINS — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: GUIDUGLI, TACKETT, AND VANMETER, JUDGES.

VANMETER, JUDGE: In June 2001, Brian Hawkins received a five year probated sentence from the Warren Circuit Court. This probated sentence was revoked in August 2002 because of a felony conviction in Hart County, and it was ordered to run consecutively with the Hart County sentence. We must decide whether the Warren Circuit Court later possessed jurisdiction to amend its August 2002 judgment to delete the requirement that the sentences be served consecutively. As we hold that it did

not, we reverse and remand the order of the Warren Circuit Court.

Brian Hawkins pled guilty to one count of burglary third degree in June 2001 in the Warren Circuit Court. His five-year sentence was probated for five years, with one of the terms of probation being that he not commit another offense. Unfortunately, Hawkins was charged in the Hart Circuit Court with wanton endangerment first degree, unlawful imprisonment first degree, violation of EPO, and terroristic threatening. Hawkins pled guilty to each of these offenses and on May 7, 2002, the Hart Circuit Court sentenced him to five years on each of the two felony counts and twelve months on each of the misdemeanor counts. All the sentences were ordered to run concurrently with one another for a total sentence of five years, with the last two years of the sentence probated. The Hart Circuit Court's judgment did not mention the Warren Circuit Court's judgment.

On August 19, 2002, after a hearing attended by both Hawkins and his attorney, the Warren Circuit Court revoked Hawkins' probation due to the Hart Circuit Court's convictions. The court's "Final Judgment Probation Revocation" sentenced him to five years "[c]onsecutive to Hart Co."

Hawkins filed a motion in the Warren Circuit Court on October 23, 2002, seeking shock probation, an alternative sentence, or modification of the judgment's directive that the Warren and Hart Circuit Court sentences should be served concurrently. On November 1 the court denied this motion. On November 7 Hawkins filed a motion to reconsider, specifically stating that the court had failed to rule on the motions "for alternative sentence or to modify the sentence." Evidently, Hawkins attended a December 2 hearing on this motion, and on December 3 the court entered an order overruling Hawkins' motion to reconsider.

Next, on March 21, 2003, Hawkins filed a motion to correct the Warren Circuit Court judgment under CR[1] 60.02. The grounds cited for relief were that a "five year burglary sentence for spending the night in a $50.00 motel room without paying is unduly harsh." Hawkins requested either that the Warren and Hart Circuit Court sentences be served concurrently, or that the word "consecutive" be deleted from the Warren Circuit Court's final judgment, thereby leaving to the Hart Circuit Court the determination of whether its sentence should be served concurrently with that imposed as to the earlier Warren County case. The Commonwealth responded by denying that Hawkins was entitled to relief under CR 60.02. While the record

[1] Kentucky Rules of Civil Procedure.

does not contain any contemporaneous order explicitly addressing this motion, on December 1 the court entered an order "that this sentence is amended to delete the order that it is to be served consecutive to the Hart Circuit Court sentence." This appeal follows.

The November 2003 order does not explicitly refer to the March 2003 motion, but since the record does not contain any order contemporaneous with the March 2003 motion, and the order grants the relief sought by Hawkins, we assume that the order was in response to Hawkins' CR 60.02 motion.

CR 60.02 provides in part:

> 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.

Clearly, the first four subsections of the rule do not apply to Hawkins' situation, as he makes no allegations of mistake,

inadvertence, surprise, excusable neglect, newly discovered evidence, perjury, falsified evidence or fraud. Hawkins' argument instead is that the sentence is "unduly harsh." While superficially Hawkins' argument may be thought to fall under the provisions of subsection (e), pertaining to notions of equity, that section addresses the type of situation in which some change of circumstance has occurred since the entry of the judgment. *James v. Hillerich & Bradsby Co.*, Ky., 299 S.W.2d 92, 94 (1956). Hawkins makes no allegation that any change in circumstance has occurred since the entry of the final judgment.

Hawkins also argues that the court was authorized to amend its judgment under CR 60.02(f), due to a reason of an extraordinary nature. In *Brown v. Commonwealth*, Ky., 932 S.W.2d 359, 361-62 (1996), the court discussed the history and purpose of CR 60.02(f):

> Generally, CR 60.02(f) stands in the place of the ancient writ of coram nobis. To have a judgment set aside in a coram nobis proceeding, a petitioner had to convince the court that "the real facts as later presented on application for the writ, rendered the original trial tantamount to none at all, and [enforcement of] the judgment as rendered would be an absolute denial of justice and analogous to the taking of life or property without due process of law." Jones v. Commonwealth, 269 Ky. 779, 108 S.W.2d 816, 817 (1937), cited in Gross v. Commonwealth, Ky., 648 S.W.2d 853, 855 (1983). In *Gross,* this Court made it clear that Rule 60.02 did not extend the

> scope of remedies available under *coram nobis* or add new grounds of relief. *Gross* at 856.
>
> This Court has held that actions under CR 60.02 are addressed to the "sound discretion of the court and the exercise of that discretion will not be disturbed on appeal except for abuse." *Richardson v. Brunner,* 327 S.W.2d 572, 574 (1959). Rule 60.02(f) "may be invoked only under the most unusual circumstances. . . ." *Howard v. Commonwealth,* 364 S.W.2d 809, 810 (1963); *see also, Cawood v. Cawood,* 329 S.W.2d 569 (1959) and relief should not be granted, pursuant to Rule 60.02(f), unless the new evidence, if presented originally, would have, with reasonable certainty, changed the result.

Against this background, the amendment of the August 2002 order was clearly an abuse of discretion. The record discloses and Hawkins cites to no fact, circumstance or other aspect of the case which was not known to the trial court at the time it revoked Hawkins' probation in August 2002. The only circumstance cited by Hawkins is his belief that a sentence of five years for sleeping in a $50.00 hotel room without paying is "unduly harsh." This alleged mitigating circumstance certainly could, and should, have been argued to the trial court during the original proceedings rather than by means of a CR 60.02 motion.

Hawkins' final argument is that the running of the sentences consecutively was not authorized by KRS 197.035. A careful reading of subsection (1) of the statute indicates that

it provides that if a sentence imposed on a "confined prisoner" for "a crime committed prior to the date of his instant commitment" is "designated to be served consecutively," that sentence "shall be added to" the sentence[s] being served. Contrary to Hawkins' suggestion, the statute does not limit the discretion of the sentencing court. Even if the statute did limit the trial court's discretion, the case law is clear that a trial court's error of law must be addressed by direct appeal and not by a CR 60.02 motion. *See, e.g., Wimsatt v. Haydon Oil Co.*, Ky., 414 S.W.2d 908, 910 (1967) (an error of law by the trial court is subject to review upon appeal in due course, and CR 60.02 may not be invoked as an alternate method of review). And, Hawkins' argument ignores KRS 533.060(2), which limits a sentencing court's discretion by providing that a person who is on probation and who "is convicted or enters a plea of guilty to a felony committed while on" probation "shall not be eligible for probation, shock probation, or conditional discharge and the period of confinement for that felony shall not run concurrently with any other sentence." So, despite Hawkins' argument that equities favor his receipt of concurrent sentences, the sentencing court appears to have been legislatively precluded from granting such relief by virtue of KRS 533.060(2).

As CR 60.02 did not permit the amendment of the August 2002 judgment in order to delete the requirement that the Warren

sentence be served consecutively to the Hart sentence, Hawkins had no other avenue for recourse under our rules unless he was entitled to seek relief by means of a CR 59.01 motion to alter, amend or vacate a judgment. Such a motion must be served within 10 days of the entry of the judgment. CR 59.05. As Hawkins failed to serve such a motion by the required date of August 31, 2002, the trial court lost its ability to amend the judgment. *Stallworth v. Commonwealth*, Ky., 102 S.W.3d 918, 923-24 (2003).

The order of November 26, 2003, is reversed, and this matter is remanded to the Warren Circuit Court for further proceedings consistent with the views stated herein.

ALL CONCUR.

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