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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000319-MR

THOMAS LYNN FENNELL

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES E. HIGGINS, JR., JUDGE
ACTION NO. 81-CR-000270

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: DYCHE, KNOPF, AND TACKETT, JUDGES.

TACKETT, JUDGE: Thomas Fennell appeals from an order of the Jefferson Circuit Court denying his request for post-conviction relief pursuant to Kentucky Rule of Civil Procedure (CR) 60.02. Fennell argues that he has already served the maximum sentence allowed by law and that the trial court erred in denying his motion without appointing counsel. We disagree with both

contentions and find that the trial court correctly concluded that Fennell's CR 60.02 motion was untimely.

In 1981, a jury convicted Fennell of murder in the beating death of his fourteen month-old stepson and of being a persistent felony offender in the second degree. The trial court imposed the recommended sentence of twenty years' imprisonment on the murder, enhanced to a life sentence by the PFO II. Fennell appealed as a matter of right, and the Kentucky Supreme Court affirmed the conviction and sentence. In 2003, he subsequently filed a motion asking the trial court to alter or amend his sentence to twenty years and to appoint counsel. The trial court, treating Fennell's motion as a request for relief pursuant to CR 60.02, denied the motion without a hearing as being untimely. This appeal followed.

Fennell first argues that he is serving an illegal sentence, as he should only have been sentenced to twenty years' imprisonment. This argument was not raised on direct appeal; however, in 1990, two cases were decided which called Fennell's sentence into question. In Offutt v. Commonwealth, 799 S.W.2d 815 (Ky. 1990), and Berry v. Commonwealth, 782 S.W.2d 625 (Ky. 1990), the appellants raised the issue of using persistent felony offender convictions to enhance the sentences for murder convictions. Because PFO enhancements are statutorily limited to Class A, B, C, and D felonies and murder is always a capital

offense, the appellants argued that their convictions were improperly enhanced. The Kentucky Supreme Court agreed, stating that "conviction of a capital offense may indeed establish PFO status, and the appellant is not entitled to dismissal of the PFO charge. Enlargement of the sentence, however, is not authorized." Offutt at 816.

The trial court's order dealt, not with the merits of Fennell's argument, but rather with his entitlement to have his judgment amended after twenty-two years pursuant to CR 60.02. A circuit court's ruling on a CR 60.02 motion is reviewed for abuse of discretion. Gross v. Commonwealth, 648 S.W.2d 853 (Ky. 1983). CR 60.02 states 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.

The trial court found that Fennell's motion was untimely filed. Although the Barry and Offutt cases clarified existing law rather than changing the law, Fennell contends that he could not have been aware of his claim that his sentence was improper until those decisions were rendered. Nevertheless, that argument does not excuse his failure to wait an additional thirteen years before filing his CR 60.02 motion. In Ray v. Commonwealth, 633 S.W.2d 31 (Ky. App. 1983), we found a twelve-year delay in filing a CR 60.02 motion in a criminal case to be unreasonable, and the Kentucky Supreme Court declined to find abuse of discretion where a trial court ruled that a five-year delay was untimely. Gross at 858. Consequently, Fennell fails to demonstrate that the trial court abused its discretion in finding that his CR 60.02 motion was untimely.

Fennell next argues that the trial court erred by denying his request for appointed counsel to represent him in pursuing his CR 60.02 claims. The constitutional right to representation exists at the trial and direct appeal stages, but our state Supreme Court has previously held there is no constitutional right to counsel in post-conviction proceedings. Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001). Kentucky Revised Statute (KRS) 31.110(2)(c) limits a needy person's right to appointed counsel in post-conviction proceedings to "a

proceeding that a reasonable person with adequate means would be willing to bring at his own expense. . . ." Kentucky Rule of Criminal Procedure 11.42(5) provides that "if the movant is without counsel of record and is financially unable to employ counsel, (the court) shall appoint counsel to represent him in the proceedings, including appeal." There is no corresponding provision in CR 60.02, and the Kentucky Supreme Court has previously declined to extend KRS 31.110 to apply to CR 60.02 motions. Gross at 857. Consequently, the trial court did not abuse its discretion in denying Fennell's request for appointed counsel.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Emily Holt
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Ian G. Sonogo
Assistant Attorney General
Frankfort, Kentucky