

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2004-CA-000885-MR

ANTHONY WENTWORTH

APPELLANT

v. APPEAL FROM SHELBY CIRCUIT COURT  
HONORABLE WILLIAM F. STEWART, JUDGE  
ACTION NO. 93-CR-00037

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, KNOPF, AND TAYLOR, JUDGES.

BUCKINGHAM, JUDGE: Anthony Wentworth appeals from an order of the Shelby Circuit Court denying his CR<sup>1</sup> 60.02 motion to void an earlier judgment sentencing him to a one-year prison term that was probated for five years. We affirm.

On July 6, 1993, a Shelby Circuit Court grand jury indicted Wentworth for receiving stolen property over \$100, a Class D felony. Pursuant to a plea agreement with the

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

Commonwealth, on February 6, 1995, Wentworth pled guilty to the charge. Rather than being sentenced, however, he was placed on pretrial diversion for one year and was to be under the control of the Henry County Community Corrections Corporation.

There were various conditions to the diversion agreement, including that Wentworth work faithfully at suitable employment as far as possible, perform 100 hours of community service work, enroll in GED classes and attend them regularly, and submit to random drug or alcohol testing at his expense. Further, the diversion agreement stated that Wentworth was to "stay law abiding." The plea agreement provided that the charge would be dismissed after the one-year period if Wentworth successfully completed the program.

Approximately sixteen months after the diversion agreement was entered, personnel at the Henry County Community Corrections Corporation notified the commonwealth attorney that Wentworth had not been attending his GED classes and had not been reporting to them as required by the supervision agreement. Further, the commonwealth attorney was notified that there were outstanding warrants for Wentworth's arrest.

The commonwealth attorney immediately moved the court to revoke the diversion agreement. Wentworth was arrested, and he appeared before the court on August 5, 1996, for a revocation hearing. On September 9, 1996, Wentworth appeared before the

court with his attorney and was sentenced to one year in prison, probated for a five-year period. Neither Wentworth nor his attorney objected to the entry of the judgment.<sup>2</sup>

Between April and August 1998, Wentworth committed several crimes in Henry County, including two counts of first-degree rape, first-degree sodomy, first-degree burglary, two counts of tampering with physical evidence, and retaliating against a witness. He was convicted of these offenses on December 3, 2002, and was sentenced to twenty years in prison.

On September 11, 2003, Wentworth filed his motion to void the judgment in this case. He filed the motion pursuant to CR 60.02(e) and (f), and he contended that the court had been without jurisdiction to revoke the one-year diversion agreement and sentence him after the one-year period had elapsed. The court denied the motion on the grounds that the diversion agreement did not contain a provision that would terminate the court's jurisdiction after one-year and that Wentworth had failed to object to the judgment sentencing him to the one-year probated sentence. This appeal followed.

Wentworth continues to argue that the circuit court was without jurisdiction to sentence him since more than one year had passed from February 14, 1995, the date the order

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<sup>2</sup> In fact, the record shows that Wentworth's attorney stated that the prosecutor's recommendation of one-year, probated for five years, was accepted.

placing him on pretrial diversion was entered. He contends that the record shows the judge stated when the diversion agreement was entered that Wentworth was to participate in the program for one year and that the charge would be dismissed at the end of that time if he had successfully completed it. He contends that once the one-year period expired, the court lost jurisdiction over him and that the charge should have been dismissed.

There are several problems with Wentworth's arguments. First, had he desired to challenge the one-year probated sentence imposed on him in September 1996, he had the opportunity to do so by objecting at that time or by appealing from that judgment. Although he was represented by an attorney, he did not do so. "Civil Rule 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could 'reasonably have been presented' by direct appeal or RCr 11.42 proceedings." McQueen v. Commonwealth, 948 S.W.2d 415, 416 (Ky. 1997). We conclude that Wentworth should have appealed from the 1996 judgment had he desired to challenge it and that this collateral attack on the judgment by way of a CR 60.02 motion is prohibited.

Second, we agree with the circuit court that it did not lose jurisdiction to sentence Wentworth even though no action was taken to revoke the diversion agreement until several months after the one-year period had passed. Had Wentworth

complied with all terms of the diversion agreement at the end of the one-year period, then he would have been entitled to have the charge dismissed. He states in his brief that he did comply with all provisions of the diversion agreement within the one-year period, but the Commonwealth claims he did not. The record does not indicate which position is accurate.

Wentworth cites the provisions within KRS<sup>3</sup> 533.020 to support his argument that the court lacks jurisdiction. That statute provides in part that "[u]pon completion of the probationary period, probation with an alternative sentence, or the period of conditional discharge, the defendant shall be deemed finally discharged, provided no warrant issued by the court is pending against him, and probation, probation with an alternative sentence, or conditional discharge has not been revoked." KRS 533.020(4). KRS 533.020 does not apply to pretrial diversions, however. Rather, it applies only to situations where the defendant has received probation or conditional discharge.<sup>4</sup>

Furthermore, the pretrial diversion order was not a final order. Rather, it was an order that set conditions to determine the final outcome of the case. If Wentworth complied

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<sup>3</sup> Kentucky Revised Statutes.

<sup>4</sup> The statutes relative to pretrial diversion agreements did not become effective until July 15, 1998, two years after the entry of the judgment herein.

with the agreement, the charge would be dismissed. If he did not, he was subject to further prosecution. Either way, the diversion order itself did not dispose of the case. Thus, the court continued to retain jurisdiction over Wentworth and the charge against him after the one-year period in the diversion order has passed.

In short, regardless of whether Wentworth did or did not comply with the terms of the diversion agreement within the one-year period, the court did retain jurisdiction to finally dispose of the charge and Wentworth failed to object or appeal when the court sentenced him in September 1996. He may not now collaterally attack the judgment under CR 60.02. See McQueen, supra.

Finally, although we do not base our opinion on this ground, it appears that Wentworth's CR 60.02 motion may have been untimely since it may not have been filed within a "reasonable time" as required by the rule.

The order of the Shelby Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Anthony Wentworth, *Pro Se*  
Fredonia, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky

George G. Seelig  
Assistant Attorney General  
Frankfort, Kentucky