

RENDERED: APRIL 22, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000966-MR

MARK LANE

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 91-CR-00134

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, JOHNSON, AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Mark Lane, pro se, has appealed from an order of the Kenton Circuit Court entered on April 27, 2004, which denied his pro se CR¹ 60.02² motion for jail time credit pursuant

¹ Kentucky Rules of Civil Procedure.

² 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

to KRS³ 532.120(3) and (4). Having concluded that the Kenton Circuit Court properly denied Lane's motion as untimely, we affirm.

On June 7, 1991, a Kenton County grand jury indicted Lane for flagrant non-support⁴ and on October 8, 1991, he pled guilty to the charge. A judgment and sentence on plea of guilty and an order of probation were entered on November 22, 1991. Lane was sentenced to a five-year prison term, which was probated for five years on the condition that he not commit any other offense and continue to support his dependents.

Lane was arrested on April 7, 1994, in Kenton County, pursuant to a federal warrant, for trafficking in cocaine and lodged in the Kenton County Detention Center. On November 1, 1994, the federal charges were dismissed and Lane was transferred to the custody of the Commonwealth and charged in

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.

³ Kentucky Revised Statutes.

⁴ KRS 530.050.

the Campbell Circuit Court with one count of trafficking in a controlled substance, first offense.⁵

On October 14, 1994, an arrest warrant was issued as a result of Lane's violation of the terms of his probation⁶ as previously ordered by the Kenton Circuit Court in 1991. An affidavit filed by the Office of Probation and Parole in support of the arrest warrant stated that Lane had violated the conditions of his probation because he had been arrested and charged with possession of cocaine, a controlled substance. On December 14, 1994, the Office of Probation and Parole submitted a supplemental affidavit stating that Lane had entered a guilty plea in Campbell County to the charges of trafficking in a controlled substance in the first degree and persistent felony offender in the second degree. A probation revocation hearing was held in the Kenton Circuit Court on December 19, 1994.⁷

On January 24, 1995, Lane was sentenced by the Campbell Circuit Court to seven years' imprisonment for the trafficking charge, but he was not given any credit for time

⁵ KRS 218A.1412.

⁶ See KRS 533.050.

⁷ The Kenton Circuit Court noted that Lane was also on probation from charges in Campbell County, and because he had been found to be in violation of that probation, the circuit court postponed sentencing in this case until Lane had been sentenced in Campbell County.

spent in custody.⁸ On January 30, 1995, the Kenton Circuit Court entered an order revoking Lane's probation on the 1991 Kenton Circuit Court sentence, and ordered him to serve his five-year sentence, crediting him with seven days of jail time served. The Kenton Circuit Court sentence was ordered to run consecutively with the two sentences from Campbell Circuit Court.

On April 12, 2004, Lane filed a CR 60.02 motion for jail time credit under KRS 532.120(3) and (4) on the 1991 conviction, and requested the Kenton Circuit Court to amend its order and to give him credit for an additional 268 days served. Lane claimed that from the time he was arrested for violating his probation on April 7, 1994, until his sentence began to run on November 1, 1994, he served 268 days in jail, even though he was originally incarcerated on unrelated charges stemming from a federal warrant.⁹ The Kenton Circuit Court denied Lane's motion by order entered on April 27, 2004, and this appeal followed.

Lane argues on appeal that, based on KRS 532.120(3) and (4),¹⁰ he is entitled to 268 days of additional jail credit

⁸ On January 26, 1995, the Campbell Circuit Court revoked Lane's probation on his prior conviction in that circuit, and he was sentenced to three years' imprisonment to run consecutively with the seven-year sentence on the trafficking conviction.

⁹ According to the record, Lane was arrested on October 14, 1994, not April 7, 1994, for violation of the probation ordered by the Kenton Circuit Court.

¹⁰ KRS 532.120 provides, in part, as follows:

for the time he served in the Kenton County jail from April 7, 2004, until November 1, 2004, when the federal charges against him were dismissed, and the Commonwealth indicted him on the trafficking charges. Lane also claims the Kenton Circuit Court's failure to render findings of fact, explaining the denial of his CR 60.02 motion, violated his constitutional right of due process and his right to appeal.

"Given the high standard for granting a CR 60.02 motion, a trial court's ruling on the motion receives great deference on appeal and will not be overturned except for an abuse of discretion" [citations omitted].¹¹ We conclude that Lane's motion under CR 60.02 is not timely, as he did not raise this issue until nine years after the final judgment of

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- (3) Time spent in custody prior to the commencement of a sentence as a result of the charge that culminated in the sentence shall be credited by the court imposing sentence toward service of the maximum term of imprisonment. If the sentence is to an indeterminate term of imprisonment, the time spent in custody prior to the commencement of the sentence shall be considered for all purposes as time served in prison.
 - (4) If a person has been in custody due to a charge that culminated in a dismissal, acquittal, or other disposition not amounting to a conviction, the amount of time that would have been credited under subsection (3) of this section if the defendant had been convicted of that charge shall be credited as provided in subsection (3) of this section against any sentence based on a charge for which a warrant or commitment was lodged during the pendency of that custody.

¹¹ Barnett v. Commonwealth, 979 S.W.2d 98, 102 (Ky. 1998).

conviction.¹² In Duncan v. Commonwealth,¹³ this Court noted that a motion for additional jail credit under KRS 532.120(3) and (4) falls within the requirements of CR 60.02 and is bound by those provisions.¹⁴ In Duncan the motion was not filed until one and one-half years after entry of the judgment and the Court concluded it was not timely.¹⁵

While Lane does not specifically state which section of CR 60.02 he relied upon in filing his motion, a motion for jail credit is essentially a motion to be relieved from a trial court's final judgment on the basis of mistake under CR 60.02(a).¹⁶ A motion pursuant to CR 60.02 "shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment[.]"¹⁷ Lane fails to explain how a delay of nine years from the date of his sentencing to the filing of the CR 60.02 motion is "within a reasonable time," and we conclude his motion is untimely. Having determined that the delay in Lane's filing of his CR 60.02 motion was unreasonable,

¹² The judgment was entered on January 30, 1995, but Lane did not file his motion until April 2004. In the case of Gross v. Commonwealth, 648 S.W.2d 853, 858 (Ky. 1983), a period of five years was not considered a reasonable time to file a CR 60.02 motion in a criminal case.

¹³ 614 S.W.2d 701 (Ky.App. 1980).

¹⁴ Id. at 702.

¹⁵ Id.

¹⁶ Id.

¹⁷ CR 60.02.

we will not address the validity of his claim for additional jail credit under KRS 532.120(3) and (4).

Lane also argues that the Kenton Circuit Court erred by not making specific findings of fact under CR 52.01. We find no merit to this argument. The denial of CR 60.02 relief does not require the entry of written findings and conclusions under CR 52.01.¹⁸

Accordingly, the order of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Gregory D. Stumbo
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Clint Watson
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¹⁸ Clay v. Clay, 424 S.W.2d 583, 584 (Ky.App. 1968).