

RENDERED: MARCH 10, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000471-MR

MICHAEL H. BRANTLEY

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NO. 02-CR-00113

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: GUIDUGLI, McANULTY, AND SCHRODER, JUDGES.

McANULTY, JUDGE: Following his plea of guilty to two counts of trafficking in a controlled substance and one count of being a persistent felony offender in the first degree, Michael Brantley (hereinafter appellant) brought a motion in the court below pursuant to CR 60.02, seeking "clarification of sentence and specific performance" of his plea agreement. Appellant argued that the Department of Corrections was not administering his sentence in accordance with the plea agreement, or with applicable statutory and case law. We affirm.

Appellant was informed by the Department of Corrections that, as a persistent felony offender in the first degree having been convicted of a class C felony, he is not eligible for parole until he has served ten years of his sentence. KRS 532.080(7). He observes that pursuant to his plea agreement, however, no sentence was imposed for the persistent felony offender count and he was sentenced to ten years on the trafficking charges alone. He believes that he therefore cannot be made to serve ten years before being parole eligible. He further argues that he could not be sentenced both for a first-offense trafficking in a controlled substance charge under Chapter 218A and with being a persistent felony offender.

The court below held that appellant was not entitled to bring the present action under CR 60.02. The trial court considered the basis for the motion to be a misunderstanding as to appellant's parole eligibility, and stated that did not constitute an appropriate ground for relief under CR 60.02. The court further interpreted appellant's motion to allege mistake, but a motion under CR 60.02(a) alleging mistake must be brought within a year after the judgment was entered. Appellant's CR 60.02 was brought more than a year after his conviction was entered in the Hardin Circuit Court. For that reason, the trial court summarily denied the CR 60.02 motion for relief.

On appeal, appellant states that he was not aware of this issue until two years into his sentence. He also argues that CR 60.02 was the only Rule available to redress his claim since he waived his right to appeal by pleading guilty and his allegations were not in the nature of RCr 11.42 claims.

CR 60.02 is an extraordinary remedy which is available only when a substantial miscarriage of justice will result from the final judgment. Wilson v. Commonwealth, 403 S.W.2d 710, 712 (Ky. 1966). We are unconvinced that the remedy sought by appellant is available by way of CR 60.02 motion. He does not seek relief from the judgment but seeks to compel the Department of Corrections to follow his interpretation of the statutes. A petition for declaratory judgment is the usual means for petitioning the Department to act. Smith v. O'Dea, 939 S.W.2d 353, 355 (Ky. App. 1997). Appellant does not ask for relief from the trial court, but from the Department of Corrections. We believe the trial court correctly determined that appellant had no right to relief under CR 60.02.

Furthermore, we find no merit in appellant's allegations. The plea agreement, first of all, makes no assurance as to appellant's parole eligibility. KRS 532.080(7) plainly states that a prisoner convicted of being a persistent felon must serve ten years prior to being parole eligible. This ineligibility is not dependent upon appellant's having been

sentenced pursuant to that statute. We therefore find no error. Furthermore, we do not agree that any of the cases appellant cites as controlling of this issue involve the same issue as in the case at bar.

For all the foregoing reasons, we affirm the denial of appellant's motion pursuant to CR 60.02.

ALL CONCUR.

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