

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000162-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NOS. 99-CR-002006 and 00-CR-000400

G. JOSEPH PAPPAS

APPELLEE

OPINION REVERSING AND REMANDING

** ** * * * * *

BEFORE: KELLER AND NICKELL, JUDGES; KNOPF,¹ SENIOR JUDGE.

KNOPF, SENIOR JUDGE: The Commonwealth of Kentucky appeals from an order of the Jefferson Circuit Court that granted CR 60.02 relief to G. Joseph Pappas on the basis of his cooperation with the Federal Bureau of Investigation (F.B.I.) subsequent to his conviction. We reverse.

Pappas was indicted for fifteen counts of unlawful transaction with a minor, attempted use of a minor in a sexual performance, and for being a first-degree persistent

¹ Senior Judge William L. Knopf, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

felony offender (PFO). In a separate indictment, Pappas was also charged with tampering with physical evidence, first-degree perjury, and for being a first-degree PFO. Pursuant to an agreement with the Commonwealth, Pappas pled guilty to amended charges of fifteen counts of first-degree wanton endangerment, tampering with physical evidence, and first-degree perjury. The other charges were dismissed. The Commonwealth recommended five-year sentences on each wanton endangerment charge with some counts to run consecutively for a total of fifteen years' imprisonment. The fifteen-year sentence would run concurrently with a ten-year sentence for the tampering with physical evidence and perjury charges. The trial court accepted the plea agreement and judgment was entered.

On April 16, 2004, the trial court denied Pappas's CR 60.02 motion requesting that all of his sentences in both indictments run concurrently for a total of five years' imprisonment. Thereafter, the trial court denied Pappas's motion to vacate or amend its order. Pappas then filed another CR 60.02 motion citing his cooperation with the F.B.I. while in prison and the fact that the parole board would not reconsider his eligibility for parole. The trial court again denied the motion, but granted Pappas's motion to vacate or amend its order. Ultimately, the trial court ordered that Pappas's sentences under both indictments run concurrently for a total of five years' imprisonment. This appeal follows.

CR 60.02(f) permits a court to relieve a party from its final judgment for “any other reason of an extraordinary nature justifying relief.”

CR 60.02 was enacted as a substitute for the common law writ of coram nobis. The purpose of such a writ was to bring before the court that pronounced judgment errors in matter of fact which: (1) had not been put into issue or passed on, (2) were unknown and could not have been known to the party by the exercise of reasonable diligence and in time to have been otherwise presented to the court, or (3) which the party was prevented from so presenting by duress, fear, or other sufficient cause.

Gross v. Commonwealth, 948 S.W.2d 853, 856 (Ky. 1983). CR 60.02 provides for relief that is not available by direct appeal or RCr 11.42 and the “movant must demonstrate why he is entitled to this special, extraordinary relief.” *Id.* Under CR 60.02(f), the standard of review is whether the trial court abused its discretion. *Commonwealth v. Bustamonte*, 140 S.W.3d 581, 583 (Ky.App. 2004). “The two factors for the trial court to consider in exercising its discretion are: (1) whether the moving party had a fair opportunity to present his claim at the trial on the merits and (2) whether the granting of CR 60.02(f) relief would be inequitable to other parties.” *Id.* (quoting *Dull v. George*, 982 S.W.2d 227, 229 (Ky.App. 1998)).

We cannot find that Pappas has demonstrated such extraordinary circumstances that would entitle him to CR 60.02(f) relief. The Supreme Court of Kentucky has spoken on the issue of changed circumstances in the context of CR 60.02. *McQueen v. Commonwealth*, 948 S.W.2d 415, 418 (Ky. 1997). In *McQueen*, the defendant sought to have his death sentence commuted to life imprisonment on the basis of his religious conversion and good behavior while in prison. *Id.* Our Supreme Court found that even if such facts were proven, they would not have entitled the defendant to

relief from the “. . . punishment legally imposed for the crimes which he has committed.”
Id. Ultimately, the Court held that arguments based on changed circumstances are “. . . more properly addressed in a plea to the executive for clemency under Section 77 of our Constitution.” *Id.*

This reasoning applies with equal force to the present appeal. The sole basis of the trial court's ruling was Pappas's cooperation with the F.B.I. while he was in prison. There was no alleged error or irregularity in the proceedings which gave rise to Pappas's sentence. Further, it is inequitable to the Commonwealth for the trial court to effectively rescind its agreement with Pappas based on circumstances that had not yet occurred at the time of the plea. While Pappas may have provided a useful service to the F.B.I., CR 60.02 is not the proper vehicle to seek redress for his difficulties with the parole board. We find that the trial court abused its discretion by granting CR 60.02(f) relief.

Accordingly, we reverse the order of the Jefferson Circuit Court and remand this matter for reinstatement of the original judgment and sentence.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Gregory D. Stumbo
Attorney General of Kentucky

Todd D. Ferguson
Assistant Attorney General
Frankfort, Kentucky

BRIEF FOR APPELLEE:

John Anthony Palombi
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky