

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000629-MR

ALPHONSO NORTH

APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE STEVEN R. JAEGER, JUDGE
INDICTMENT NO. 02-CR-00182

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AND ORDER DISMISSING

** ** *

BEFORE: DIXON AND LAMBERT, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.

LAMBERT, JUDGE: Alphonso North appeals from a denial of his *pro se* motion for concurrent sentencing. For the reasons set forth herein, we dismiss this appeal.

On March 22, 2002, North was indicted by the Kenton County Grand Jury on a charge of possession of a handgun by a convicted felon in violation of KRS 527.040.

¹ Senior Judge Paul W. Rosenblum, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and KRS 21.580.

He subsequently entered a guilty plea and was sentenced to five years in prison, which the court probated for a period of five years.

On October 28, 2004, North was sentenced by the Hamilton County (Ohio) Court of Common Pleas following his entry of guilty pleas on one count of possession of cocaine and one count of theft. The court sentenced him to four years of community control with intensive supervision for each conviction with notice that the court would impose prison sentences of twelve months for each conviction to be served consecutively should he violate the terms and conditions of community control. On November 24, 2004, the court revoked North's release and sentenced him to prison for twelve months on each conviction to be served consecutively for a total of two years in prison.

On February 3, 2005, Keith Link, a Kentucky Probation and Parole Officer, filed an affidavit with the trial court that North had violated his probation from the 2002 conviction by, *inter alia*, receiving new felony convictions and receiving a new misdemeanor conviction, and he requested a warrant for North's arrest. A warrant was issued, and a detainer was filed by the Kenton Circuit Court with the Ohio Department of Corrections at Noble Correction Institute.

On July 10, 2006, the Kenton County Sheriff's Department served the warrant for North's arrest, and North was transferred to Kenton County, Kentucky, having completed his sentence in Ohio. On July 19, 2006, a probation revocation hearing was scheduled for August 1, 2006. At the hearing, North stipulated to the allegations

contained in Link's affidavit, and the trial court entered an order revoking his probation and ordering North to serve the sentence of five years in prison from the 2002 conviction.

North thereafter filed a *pro se* motion for concurrent sentencing on February 22, 2007, requesting that the trial court order his sentence for the 2002 conviction to run concurrently with the sentences he served in Ohio pursuant to KRS 533.040(3). The trial court denied this motion, and this appeal followed.

The sole issue North brings on appeal is whether the trial court properly denied his motion to run his Ohio and Kentucky sentences concurrently. Under CR 59.05, “a motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be served not later than 10 days after entry of the final judgment.” In this case, North brought his motion for concurrent sentencing 203 days after the trial court entered its order revoking his probation and sentencing him to serve five years. Clearly, the motion was untimely filed pursuant to CR 59.05. *See also Commonwealth v. Gross*, 936 S.W.2d 85, 87 (Ky. 1996); *Silverburg v. Commonwealth*, 587 S.W.2d 241 (Ky. 1979); and *McMurray v. Commonwealth*, 682 S.W.2d 794 (Ky.App. 1985).

The only other possible rule to provide basis for North's motion would be CR 60.02. However,

the purpose of CR 60.02 is to allow the trial court a method to correct errors in judgments upon a showing of

facts or grounds, not appearing on the face of the record *and not available by appeal or otherwise*, which were discovered after rendition of the judgment without fault of the party seeking relief.

See *Gross*, 936 S.W.2d at 88 (*quoting Harris v. Commonwealth*, 296 S.W.2d 700, 701 (Ky. 1956)(emphasis added). This issue is clearly one that was available by appeal at the time of judgment. Therefore, North's motion fails under CR 60.02 as well.

We find that the trial court acted beyond its jurisdictional authority in denying North's Motion, in that the ten day time limit of CR 59.05 had expired. Accordingly, we dismiss this appeal as it has not been properly brought pursuant to the rules of procedure.

DIXON, JUDGE, CONCURS.

ROSENBLUM, SENIOR JUDGE, CONCURS IN RESULT AND FILES
A SEPARATE OPINION.

ROSENBLUM, SENIOR JUDGE, CONCURRING: I would affirm the trial court's order overruling North motion for concurrent sentencing.

/s/ James H. Lambert
JUDGE, COURT OF APPEALS

ENTERED: November 21, 2007

BRIEF FOR APPELLANT:

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