

Commonwealth Of Kentucky

Court of Appeals

NO. 2007-CA-000746-MR

ALPHONZO R. MORTON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 99-CR-00936

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: ACREE AND NICKELL, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

ACREE, JUDGE: Alponzo Morton appeals, *pro se*, from an order of the Fayette Circuit Court denying his request to alter, amend, or vacate a previous order, pursuant to Kentucky Civil Procedure Rule (CR) 59.05. We have reviewed the issues and the applicable law and we affirm the trial court.

Morton was convicted of two counts of second-degree sodomy, four counts of second-degree sexual abuse, and twenty counts of use of a minor in a sexual performance. Final

¹ Senior Status Judge David C. Buckingham sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

judgment was entered on June 6, 2000, and he received a sentence of sixty years' imprisonment. The Kentucky Supreme Court upheld the conviction on appeal, and this Court upheld the denial of Kentucky Rule of Criminal Procedure (RCr) 11.42 relief thereafter. Morton subsequently filed a motion seeking jail time credit, a correction of his sentence, and a transcript of the grand jury testimony. The trial court denied all three requests; however, on appeal, we concluded that Morton was entitled to the grand jury transcript.

After the case was remanded to the circuit court, the Commonwealth's Attorney's office filed a pleading stating that the grand jury tape could not be located. Consequently, Morton filed a motion to dismiss the indictment, pursuant to RCr 5.16, and requested a hearing on the motion. The trial court denied both requests. He then filed a motion to alter, amend, or vacate, pursuant to CR 59.05, which the trial court also denied. This appeal followed.

On appeal, Morton argues the trial court abused its discretion in denying him a hearing on his motion to dismiss the indictment. He further contends that the trial court should have dismissed the indictment, pursuant to RCr 5.16, due to the Commonwealth's Attorney's failure to make a record of the grand jury testimony. We disagree. This issue has already been addressed and resolved by the Kentucky Supreme Court, *Jackson v.*

Commonwealth, 20 S.W.3d 906, 909 (Ky. 2000), wherein the Court held that failure to comply with RCr 5.16 did not require dismissal. Therefore, the judgment of the trial court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Alphonzo R. Morton, *pro se*
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

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