

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001732-MR

THOMAS ELLIOTT

APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE THOMAS B. MERRILL, JUDGE
ACTION NO. 93-FD-2058

RONDA ELLIOTT (NOW HARTLAGE)

APPELLEE

OPINION
AFFIRMING IN PART AND REVERSING IN PART

** ** * * *

BEFORE: BUCKINGHAM, EMBERTON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a judgment denying appellant's motion for a hearing regarding the return of personal property and imposing CR 11 sanctions in the amount of \$10,000 on appellant for filing a *pro se* motion for recusal which alleged that the judge was personally biased. As to that portion of the judgment that denied the hearing on the return of personal property, we affirm. As to the CR 11 sanctions, we reverse on grounds that appellant was denied procedural due process and because the judge had a conflict of interest in ruling on the matter.

Appellant, Thomas Elliott, and appellee, Ronda Elliott, were divorced in the Jefferson Family Court in 1994. Subsequently, there continued to exist unresolved legal issues between the parties regarding custody and visitation of their minor children and the distribution of property pursuant to the property settlement agreement. Consequently, various post-decree motions were made by the parties which were ruled on by Judge Thomas Merrill.

On April 10, 1997, appellant filed a motion to set a hearing regarding the return of certain personal property which appellant claimed appellee had refused to return to him as required by the decree. Judge Merrill denied the motion on April 14, 1997. Thereafter, on May 22, 1997, appellant filed a motion pursuant to CR 60.02 requesting that Judge Merrill set aside his order of April 14. Appellant argued that Judge Merrill's basis for denying the motion – that too much time had passed since the divorce – should not be a factor in deciding whether to resolve the issue of the return of personal property. In response to appellant's motion, appellee argued that she had, in fact, returned all personal property due appellant under the decree. Appellee also argued that the court should impose CR 11 sanctions because the motion was brought in bad faith for the sole purpose of harassing appellee.

On May 27, 1997, the parties argued the motion before Judge Merrill. At the conclusion of appellant counsel's argument to the court, appellant personally tendered a *pro se* motion for recusal to Judge Merrill alleging that the judge was

personally biased against him. In support of this motion, appellant attached an affidavit in which appellant stated that he was told by Tim Mulloy that Judge Merrill was in a financial bind in his campaign and had taken money from the law firm of Mulloy, Walz, Wetterer, Fore and Schwartz, with whom appellee is associated as a practicing attorney. Appellant further stated that he was told that appellee could receive preferential treatment due to her close association with the firm in question and Judge Merrill's allegiance to the firm.¹ Upon reading the motion, Judge Merrill declared the motion an "assault upon the court with no basis whatsoever" and that it was "total hearsay". After denying the recusal motion, Judge Merrill threatened to hold appellant in contempt if he made another motion concerning these matters.

On June 27, 1997, Judge Merrill granted appellee's motion to impose CR 11 sanctions and fined appellant \$350 for filing the motion regarding the return of the personal property, reasoning that appellant's motion was frivolous and that the proper procedure to enforce a previous judgment was a motion for contempt. Three days later on June 30, 1997, Judge Merrill, acting *sua sponte*, entered findings of fact, an opinion, and judgment denying appellant's recusal motion and sanctioning appellant \$10,000 pursuant to CR 11. Judge Merrill stated in his findings that there was no truth to the allegations in

¹Interestingly, upon reviewing the record, we see that the motion to recuse, which was tendered to the court on May 27, 1997, was not entered in the record until February 20, 1998 upon a motion for appellant to supplement the record for purposes of his appeal to this Court.

appellant's affidavit that he accepted monies from the Mulloy law firm or appellee. Judge Merrill further denied any strong allegiance to the Mulloy law firm. He characterized the motion as "a frivolous and perjured motion by a vindictive, disgruntled party to impeach or impugn the integrity of this Judge and publicly bring into disrepute the judicial process based upon manufactured falsehoods." The court continued:

It [the recusal motion] has its origins in the Respondent's October 1995 statement to the Petitioner to "have the Judge removed from office by the Judicial Removal Committee." It is a clear continuation of his plan to remove anyone who has acted contrary to his personal wishes [footnote omitted] and is reflected in his request that the Court forward a copy of his motion and affidavit to the Retirement and Removal Commission.

In the judgment, the court also again denied appellant's CR 60.02 motion set aside its earlier decision denying appellant a hearing on the return of personal property issue. From this judgment, appellant now appeals. We note that no appellee's brief was filed in this case.

Several of appellant's arguments relate to his primary argument that Judge Merrill erred when he imposed the CR 11 sanctions on appellant. CR 11 states in pertinent part that a signature of an attorney or party:

constitutes a certification by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause

unnecessary delay or needless increase in the cost of litigation.

Where sanctions are imposed, the Court of Appeals applies a multi-standard approach for review – a clearly erroneous standard to the trial court's findings in support of sanctions; a de novo review of the legal conclusion that a violation occurred; and an abuse of discretion standard on the type and/or amount of sanctions imposed. Clark Equipment Co., Inc. v. Bowman, Ky. App., 762 S.W.2d 417 (1988). The test to be used by the trial court in considering a motion for sanctions is whether the attorney's conduct, at the time he or she signed the pleading or motion, was reasonable under the circumstances. Id.

Appellant first contends that CR 11 sanctions were imposed on him in violation of his due process rights because he was denied notice and an opportunity to be heard on the matter. It has been clearly held in Kentucky that "a trial court should not impose sanctions without a hearing and without rendering findings of fact." Id. at 421. The United States Supreme Court has also held that, given the inherent power of a court over the parties before it, sanctions should not be imposed "without fair notice and an opportunity to be heard on the record." Roadway Express, Inc. v. Piper, 447 U.S. 752, 766-767, 100 S. Ct. 2455, 2464, 65 L. Ed. 2d 488 (1980). Thus, appellant in the instant case was denied procedural due process when he was not given notice and an opportunity to be heard.

Appellant next argues that the recusal motion was based upon reasonable inquiry and was warranted by existing law. Appellant maintains that his reliance on the representations by

Mr. Mulloy were sufficient basis for him to file the recusal motion. Appellant also claims that the court should have held him to a less stringent standard given his *pro se* status. See Lisack v. Natural Resources and Environmental Protection Cabinet, Ky. App., 840 S.W.2d 835 (1992).

In reviewing the record, we see no evidence to support the allegations against the judge in the recusal motion other than appellant's affidavit, which contained only hearsay statements. In our view, although appellant was acting *pro se*, he nevertheless had a duty under CR 11 to ensure that his motion was grounded in fact. Basing a recusal motion solely on hearsay statements of which there is no way to determine the truth is simply not acceptable. Thus, the trial court's findings regarding the recusal motion were not clearly erroneous.

In other circumstances, the court's determination that a CR 11 violation occurred would have been proper. However, in this case, given the personal nature of the allegations against the sitting judge, we believe Judge Merrill improperly imposed CR 11 sanctions.

Under Canon 3 C(1) (a) of The Code of Judicial Conduct, SCR 4.300:

[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned ... where [h]e has personal bias or prejudice concerning a party, or personal knowledge of disputed facts concerning the proceeding;

Further, Canon 2 of The Code of Judicial Conduct, SCR 4.300, states that "[a] judge should avoid impropriety and the appearance of impropriety in all his activities." In our view,

Judge Merrill acted in violation of these Canons in making a ruling under CR 11 with regard to a motion that made personal allegations against Judge Merrill. Although it is not improper for a judge to rule on a recusal motion regarding that same judge, the judge here clearly had a conflict of interest in punishing the party² for making the motion and the personal allegations therein. It is especially suspect given the fact that appellant had apparently made a complaint to the Judicial Removal and Retirement Commission regarding Judge Merrill. One has to wonder if the CR 11 sanctions were retaliatory in nature. We believe it was an abuse of the court's discretionary powers under CR 11.³ Accordingly, because appellant was not afforded procedural due process and because Judge Merrill had a conflict of interest in ruling on the matter, we reverse the judgment imposing the \$10,000 in CR 11 sanctions.

Appellant's remaining argument is that the court erred as a matter of law when it denied appellant's CR 60.02 motion to set aside the court's prior ruling denying a hearing on the return of personal property issue. A court's ruling on a CR 60.02 motion will not be set aside absent an abuse of discretion. Fortney v. Mahan, Ky., 302 S.W.2d 842 (1957). CR 60.02 requires a very substantial showing to merit relief under its provisions. Ringo v. Commonwealth, Ky., 455 S.W.2d 49 (1970). In his CR 60.02 motion, appellant merely alleged excusable neglect in that

²The court explicitly stated in his opinion that \$8,000 of the sanctions were purely punitive.

³The court could have avoided the appearance of impropriety by having another judge rule on the CR 11 matter.

he failed to collect the property awarded to him because he had hoped his ex-wife would return the property. We do not believe that is a sufficient basis to merit CR 60.02 relief.

Accordingly, the court did not abuse its discretion in denying the CR 60.02 motion.

For the reasons stated above, that portion of the judgment which imposed CR 11 sanctions is reversed, and that portion of the judgment which denied the CR 60.02 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

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