

RENDERED: AUGUST 19, 2005; 10:00 a.m.  
NOT TO BE PUBLISHED

## Commonwealth Of Kentucky

### Court of Appeals

NO. 2005-CA-000284-MR

MICHAEL GASKINS

APPELLANT

v. APPEAL FROM TAYLOR CIRCUIT COURT  
HONORABLE DOUGHLAS M. GEORGE, JUDGE  
ACTION NO. 01-CR-00116

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: HENRY AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.<sup>1</sup>

MILLER, SENIOR JUDGE: Michael Gaskins (Gaskins), pro-se, brings this appeal from an Order of the Taylor Circuit Court, entered November 3, 2004, denying his motion to release evidence seized, with his permission, from his home as a result of a criminal investigation and prosecution. We affirm.

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<sup>1</sup> Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

On October 2, 2001, a Taylor County Grand Jury returned Indictment No. 01-CR-00116 against Gaskins, charging him with one count of first-degree burglary,<sup>2</sup> one count of kidnapping,<sup>3</sup> twelve counts of first-degree rape,<sup>4</sup> twelve counts of first-degree sodomy,<sup>5</sup> and one count of intimidating a witness.<sup>6</sup> The charges arose from Gaskins' entry into the home of a fourteen year-old girl shortly after midnight on September 21, 2001, taking her to his trailer across the road, and repeatedly raping and sodomizing her for twelve hours at which time she was allowed to return home. She immediately reported the crimes to the sheriff, who was present at her home investigating her reported disappearance. Gaskins was immediately arrested, waived his rights under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and gave permission to have his trailer searched, from which the sheriff collected guns, knives, whiskey bottles, bedclothes (bedspread, sheets and pillows), clothes (jeans, t-shirts, shorts, laundry from the floor of the bathroom and four bags containing clothing), several towels, a book, a diary, and a hairbrush and a cup.

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<sup>2</sup> Kentucky Revised Statutes 511.020, a class B felony.

<sup>3</sup> Kentucky Revised Statutes 509.040, a class B felony.

<sup>4</sup> Kentucky Revised Statutes 510.040, a class B felony.

<sup>5</sup> Kentucky Revised Statutes 510.070, a class B felony.

<sup>6</sup> Kentucky Revised Statutes 524.040, a class D felony.

Some of the items, specifically some clothing and the hairbrush and cup, were collected because they were identified by the victim.

Discovery filed in the record indicated that the property, containing hair, semen, and deoxyribonucleic acid (DNA) samples, was submitted to the Kentucky State Police for forensic analysis. According to the forensic reports filed as discovery, the seized sheets contained the victim's DNA and hair consistent with her hair.

Trial began on October 29, 2002. On October 30, 2002, Gaskins, with the assistance of counsel, entered a guilty plea in accordance with the Commonwealth's offer. On November 20, 2002, judgment was entered, sentencing Gaskins, pursuant to his plea of guilty, to a total of twenty-one years incarceration on one count of second-degree burglary,<sup>7</sup> one count of attempted kidnapping,<sup>8</sup> five counts of third-degree sodomy,<sup>9</sup> five counts of third-degree rape,<sup>10</sup> and one count of intimidating a witness.

A little over two months later, on January 28, 2003, Gaskins, through counsel, asked the court to allow the property that was seized from his trailer as evidence and identified in

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<sup>7</sup> Kentucky Revised Statutes 511.030, a class C felony.

<sup>8</sup> Kentucky Revised Statutes (KRS) 506.010, a class C felony reduced from KRS 509.040, a class B felony.

<sup>9</sup> Kentucky Revised Statutes 510.090, a class D felony.

<sup>10</sup> Kentucky Revised Statutes 510.060, a class D felony.

an attached "Exhibit 1" to be returned to his mother, on the basis that the items were no longer needed as evidence.

"Exhibit 1" was a redacted composite property log inventory of items seized on September 21, 2001, from Gaskins' trailer. The following month a hearing was held.<sup>11</sup> The motion was ultimately denied by order entered June 28, 2004.<sup>12</sup> In the order, the court noted that Gaskins could renew the motion upon resolution of "the appeal."<sup>13</sup>

On July 30, 2004, Gaskins filed a pro-se motion to release to him all materials confiscated as evidence, contending that as he was not going to appeal his sentence there was no need to further hold the materials. On August 25, 2004, the trial court summarily denied his motion, concluding that despite Gaskins' claim, "there is no guarantee that [Gaskins] will not [appeal] or seek some other avenue of relief." No appeal was taken from this order.

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<sup>11</sup> This hearing was not included in the record on appeal.

<sup>12</sup> By stipulation, the confiscated firearms were photographed and then released to Gaskins' mother prior to the trial date.

<sup>13</sup> Because of the overlap of several motions, the trial court was presumably referring to an appeal of the denial of a pro-se motion made pursuant to Kentucky Rules of Civil Procedure [CR] 60.02(a) and (d), which was filed nine months later and a year to the date from entry of judgment. Although this motion attacked his plea on several state and federal constitutional grounds, it did not address the return of the property at issue herein. On January 20, 2004, the trial court entered an order summarily denying the CR 60.02 motion, concluding that Gaskins was not justified relief as he failed to allege any mistake, inadvertence, surprise, or excusable neglect or fraud affecting the proceedings. Gaskins, pro-se, appealed this order. His subsequent request to have the appeal dismissed was granted by this Court on October 7, 2004. Michael Earl Gaskins v. Commonwealth, 2004-CA-000323-MR.

On October 15, 2004, several days following this Court's dismissal, on Gaskins' motion, of the appeal of his motion made pursuant to Kentucky Rules of Civil Procedure (CR) 60.02, Gaskins filed another pro-se motion to release to him all materials confiscated as evidence, arguing this time that this Court's dismissal of his CR 60.02 appeal was "in essence granting permission for the release of his confiscated property, that this was the only reason that so property was held." The trial court summarily denied Gaskins' motion by order entered November 3, 2004, concluding that "(t)his Court is not satisfied that all of [Gaskins'] post-conviction remedies have been exhausted."<sup>14</sup> This appeal follows.

Before us, Gaskins argues that the trial court's order denying release of his property was based on the erroneous conclusion that he had failed to exhaust all post-conviction remedies. In so arguing, Gaskins contends that he is time-barred from further post-conviction remedies; and that the property is not evidence, had nothing to do with his conviction, was not used in trial, and would not be used in any further proceedings. As such, he asserts that the trial court has no authority to retain the property. We disagree.

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<sup>14</sup> By order entered January 13, 2005, this Court affirmed the trial court's denial of Gaskins' pro-se motion to proceed in forma pauperis on this appeal. Michael Gaskins v. Commonwealth, 2004-CA-002575-MR.

We review questions of fact under the clearly erroneous standard of CR 52.01 and questions of law *de novo*. See generally Brown v. Commonwealth, 40 S.W.3d 873, 875 (Ky.App. 1999). As we conclude that the findings of the circuit court are supported by substantial evidence and are not an abuse of discretion, we affirm the circuit court.

Despite Gaskins' assertion that he has no more timely post-conviction options, the trial court's order denying relief to Gaskins concluded correctly that Gaskins still has post-conviction remedies available to him. Pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42(10), Gaskins has three years from the date that his judgment became final, or until November 20, 2005, to file a motion to vacate, set aside, or correct his sentence. He may also have other remedies unrevealed by the record before this Court.

It is our responsibility as the reviewing court to determine if the trial court's findings are clearly erroneous, or stated another way, if there is substantial evidence to support the trial court's ruling. Miller v. Eldridge, 146 S.W.3d 909, 917 (Ky. 2004). We conclude that the trial court's order is supported by substantial evidence. Gaskins cites no controlling authority requiring this Court to reverse the trial court's order.

Although not exactly on point, it appears from Kentucky Revised Statutes (KRS) 524.140(3)(b) that the intent of the legislature is to protect property subject to DNA testing in a criminal case from disposal until a state constitutionally guaranteed first appeal is final or the time for an appeal has lapsed. Although Gaskins waived his right to appeal by pleading guilty,<sup>15</sup> at least one post-conviction remedy is still available. Keeping the property safe from disposal is within the intent of KRS 524.140. We see no abuse of the trial court's discretion in refusing to return it to Gaskins.

In keeping with our decision we note that Gaskins' categorization of the property sought to be returned as "not evidence and (having) nothing to do with (his) conviction" is misleading. Discovery filed in the record indicates that the property was tested for the presence of DNA and hair of both the victim and Gaskins, and resulted in a finding supporting the victim's allegations. As such, it appears to be evidence going to the heart of the conviction.

For the foregoing reasons, the order of the Taylor Circuit Court is affirmed.

ALL CONCUR.

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<sup>15</sup> Centers v. Commonwealth, 799 S.W.2d 51 (Ky.App. 1990).

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