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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001869-MR

MICHAEL LINDE

APPELLANT

APPEAL FROM BOONE CIRCUIT COURT
v. HONORABLE STANLEY BILLINGSLEY, SENIOR JUDGE
INDICTMENT NO. 04-CR-00136

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER,¹ JUDGE; HUDDLESTON AND PAISLEY, SENIOR JUDGES.²

HUDDLESTON, SENIOR JUDGE: Michael Linde appeals from a Boone Circuit Court order that denied his Kentucky Rule of Civil Procedure (CR) 60.03 motion seeking to set aside payment of the restitution ordered on his conviction for evading police,

¹ Judge David A. Barber concurred in this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

² Senior Judges Joseph R. Huddleston and Lewis G. Paisley sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Ky. Rev. Stat. (KRS) 21.580.

criminal mischief, wanton endangerment, and assault associated with an automobile chase. Linde contends that he should not be required to pay restitution for damage to some police vehicles compensated for by private insurance coverage.

On the night of January 24, 2004, several Kentucky State Police (KSP) officers attempted to stop Linde, but rather than pull over, he lead the police on a chase at speeds exceeding 100 miles per hour through Boone and Gallatin counties. The chase terminated with Linde hitting several police vehicles causing extensive damage and injuring one of the police officers. On March 2, 2004, Linde was indicted in Boone County on one felony count of fleeing or evading in the first degree,³ one felony count of criminal mischief in the first degree,⁴ two felony counts of wanton endangerment in the first degree,⁵ one felony count of assault in the third degree,⁶ and one count of being a persistent felony offender in the second degree (PFO II)⁷.

³ KRS 520.095.

⁴ KRS 512.020.

⁵ KRS 508.060.

⁶ KRS 508.025.

⁷ KRS 532.080(3). Linde was also indicted in Gallatin Circuit Court in Case No. 04-CR-00010 for fleeing and evading the police, criminal mischief in the first degree, two counts of wanton endangerment in the first degree, and PFO II, associated with the automobile chase. Linde was on parole from a felony conviction for robbery in Jefferson County at the time of the incident.

The circuit court conducted two pretrial status conferences in March and April 2004 with Linde present. Following negotiations with the Commonwealth's Attorney, Linde agreed to enter a guilty plea on May 5, 2004, pursuant to an agreement with the Commonwealth, to the charges of fleeing or evading the police, criminal mischief, wanton endangerment (two counts), and assault. Linde also agreed to accept revocation of his parole on the Jefferson County conviction with the sentence to run consecutively to the Jefferson County sentence, concurrent sentencing of the Boone and Gallatin county charges, and payment of restitution to the Kentucky State Police. The Commonwealth agreed to dismiss the PFO II count. On June 16, 2004, Linde appeared with counsel and was sentenced consistent with the plea agreement to serve concurrent five-year sentences on each of the remaining five felony counts, plus payment of restitution. At the sentencing hearing, the Commonwealth's Attorney submitted a restitution order showing an amount of restitution of \$18,437.01.⁸

On October 29, 2004, Linde filed a motion to run his sentence concurrently with the Jefferson County sentence, but the motion was denied. On November 19, 2004, Linde filed a motion seeking shock probation, which was also denied. On March 18, 2005, Linde, through counsel, filed a motion for additional

⁸ The restitution order was entered on July 1, 2004.

jail-time credit, which was denied. On May 27, 2005, Linde filed his "Motion Pursuant to Civil Rule 60.03" seeking relief from the order requiring the payment of restitution, and the Commonwealth shortly thereafter filed a response. On August 15, 2005, the circuit court denied the CR 60.03 motion. This appeal followed.

Linde argues on appeal that the circuit court erred by failing to set aside the order requiring restitution. He contends that the restitution statutes have been interpreted to preclude double recovery of restitutionary amounts by crime victims, and that the KSP has received compensation for damage to its vehicles from either its insurance carrier or his private automobile insurance carrier. As a result, Linde maintains, he should be relieved of any obligation to pay restitution to the KSP for any amounts it has already received in insurance proceeds for the damage caused in the automobile pursuit. Linde also asserts that the circuit court abused its discretion by failing to grant him an evidentiary hearing on his motion.

The Commonwealth raises several procedural issues with respect to Linde's bringing this action pursuant to CR 60.03. First, it contends that the motion should be construed as a CR 60.02 motion because it is not truly an independent action as contemplated under CR 60.03, which provides that

Rule 60.02 shall not limit the power of any court to entertain an independent action to relieve a person from a judgment, order or proceeding on appropriate equitable grounds. Relief shall not be granted in an independent action if the ground of relief sought has been denied in a proceeding by motion under Rule 60.02, or would be barred because not brought in time under the provisions of that rule.

The language of this rule indicates an interrelationship between CR 60.02 and CR 60.03 with respect to the time limitations⁹ and recovery under the two rules is not cumulative in that denial of relief under CR 60.02 precludes the same relief under CR 60.03. At the same time, "[t]he remedy by motion provided in Rule 60.02 is not exclusive, nor is such a proceeding by motion required before a party may resort to an independent action. The two methods of procedure are optionally available, and under proper circumstances may be successively invoked."¹⁰ While there is no precise definition of "independent action," CR 60.03 is intended to retain the court's historical equity jurisdiction outside of the common law writs such as *coram nobis*, *coram vobis*, *audita querela*, and bills of review, which were abolished and codified in CR 60.02 and CR 60.03.¹¹ While Linde's claim appears to be

⁹ See also *Huffaker v. Twyford*, 445 S.W.2d 124 (Ky. 1969).

¹⁰ Kurt A. Phillips, Jr., David V. Cramer, and David W. Burleigh, 7 *Kentucky Practice, Rules of Civil Procedure Annotated*, Rule 60.03, cmt. 1 at 616 (6th ed. 2005).

¹¹ See Cr 60.05; *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983) (stating that CR 60.02 was enacted as substitute for common law writ of *coram*

more suited to treatment under CR 60.02 because it seeks a reopening or continuation of the underlying proceeding that culminated in the judgment,¹² we cannot say that Linde is precluded from utilizing CR 60.03 as an alternative means of challenging the judgment. This issue is not especially significant because of substantial overlap and similarity in the principles that apply to both CR 60.02 and CR 60.03, including that of exhaustion of remedies.

In *Bowling v. Commonwealth*,¹³ the Kentucky Supreme Court discussed the aspects of a CR 60.03 motion and independent actions. Generally, a claimant seeking relief through an independent action under CR 60.03 must satisfy three requirements: (1) that he has no other available or adequate remedy; (2) that the movant did not create the situation for which he seeks equitable relief by his own fault, neglect, or carelessness; and (3) that the equitable relief is justified

nobis); *United States v. Beggerly*, 524 U.S. 43, 45, 118 S. Ct. 1862, 1867, 141 L. Ed. 2d 32 (1998) (stating that while contours of an "independent action" are unclear, the historical rights of courts to entertain independent actions were more broadly available than the more narrow writs abolished by the adoption of the civil rules).

¹² See *Fanelli v. Commonwealth*, 423 S.W.2d 255, 257 (Ky. 1968) (stating that a motion under CR 60.02 is a continuation or re-opening of the same proceeding that culminated in the judgment under attack). See also *Wallace v. Commonwealth*, 327 S.W.2d 17, 18 (Ky. 1959) (stating principles connected with writ of *coram nobis* are applicable to a motion or independent action under CR 60).

¹³ 163 S.W.3d 361 (Ky. 2005).

based on a recognized ground such as fraud, accident, or mistake.¹⁴

"Further, an independent action for equitable relief from a judgment is unavailable if the complaining party has, or by exercising proper diligence would have had, an adequate remedy in the original proceedings.¹⁵

With respect to challenges to criminal convictions, the Kentucky Supreme Court has held that the procedure is not haphazard or overlapping.¹⁶ A defendant must first bring a direct appeal when available and state every ground of error of which he or his counsel is reasonably aware.¹⁷ Next, he must utilize Kentucky Rule of Criminal Procedure (RCr) 11.42 to raise errors of which he is aware or should be aware during the period this remedy is available.¹⁸ Final disposition of or waiver of the opportunity to make a RCr 11.42 motion shall conclude all issues that reasonably could have been presented in that proceeding.¹⁹ A CR 60.02 motion is available only in extraordinary situations not otherwise subject to relief by

¹⁴ *Id.* at 365 (citing *Campaniello Imports, Ltd. v. Saporiti Italia S.p.A.* 117 F.3d 655, 662 (2nd Cir. 1997)).

¹⁵ *Id.* (citing Charles A. Wright, Arthur R. Miller & Mary K. Kane, 11 *Fed. Prac. & Proc. Civ.* 2d § 2868, at n. 9 (2004 supplement)).

¹⁶ See *Gross, supra*, note 11 at 856.

¹⁷ *Id.* at 857.

¹⁸ *Id.*

¹⁹ *Id.*

direct appeal or by way of RCr 11.42.²⁰ CR 60.02 is not intended as an additional opportunity to relitigate the same issues which could or should reasonably have been presented by direct appeal or in a RCr 11.42 proceeding.²¹ The Kentucky Supreme Court has indicated that these same exhaustion principles apply to motions under CR 60.03 as well.²²

The Commonwealth contends that Linde has not satisfied the three requirements for obtaining CR 60.03 relief. It states that Linde failed to exercise due diligence in either pursuing or obtaining knowledge of his claim. Linde asserts that he "was never aware of restitution nor did he enter into a Plea of any kind of restitution and was never included in any of the proceedings considering restitution." He points to the fact that the circuit court did not conduct an evidentiary hearing to determine the exact amount of the restitution.

The record on appeal conflicts with many of Linde's assertions. For instance, the plea agreement clearly included the payment of restitution. Subsection 5 of the Commonwealth's Offer on a Plea of Guilty entitled Recommendations on a Plea of

²⁰ *Id.* at 856.

²¹ *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997); *Land v. Commonwealth*, 986 S.W.2d 440, 442 (Ky. 1999).

²² *See Bowling, supra*, note 13 at 366 (stating that the appellant was not entitled to relief pursuant to CR 60.03 because he had not alleged an error that was unknown and could not have been known to him by exercise of reasonable diligence at the time of his trial, RCr 11.42, or a petition for a writ of habeas corpus).

Guilty (Plea Agreement), states: "Commonwealth recommends five years to serve on each of counts 1 through 5 to serve concurrently with each other and with Gallatin County Circuit Court case number 04-CR-010. Commonwealth will be dismissing count 6. Said sentence shall run consecutively with any sentence for which he is currently on probation and/or parole. Judgment of restitution shall be entered prior to sentencing on behalf of the Kentucky State Police." Linde's signature and the date of May 5, 2004, are affixed to this document just below Subsection 5. During the sentencing hearing on June 16, 2004, the Commonwealth's Attorney handed the trial judge the document entitled "Restitution Order" stating that restitution in the amount of \$18,437.01 would be paid to the KSP through the Boone Circuit Clerk. This order was briefly discussed at the hearing in Linde's presence. At the sentencing hearing, Linde's attorney noted that the KSP had filed a claim for reimbursement with Linde's automobile insurance carrier. In addition, Linde has included in his brief on appeal a copy of a preliminary estimate of damage to a police vehicle dated February 2, 2004, some three months prior to the date on which he entered his guilty plea, showing that insurance proceeds of \$4,734.67 would be paid for the repairs.²³

²³ Another estimate dated January 28, 2004, included in the appendix to Linde's reply brief shows an insurance payment for damages in the sum of \$2,923.21.

The record clearly reveals that Linde agreed to the payment of restitution to the KSP in the amount of \$18,437.01 as part of the plea agreement and that restitution in that amount was ordered as part of his sentence.²⁴ More importantly, the record also shows that Linde was aware prior to sentencing that he had liability insurance coverage that he expected to pay for some of the damages, and that an insurance carrier had agreed to pay for part of the repairs to one of the KSP vehicles. Linde could have discovered with minimal effort further information on any automobile insurance coverage carried by the KSP. In other words, Linde could have raised the issue of double recovery or reduction in his restitution obligation based on insurance payments at the guilty plea, the sentencing hearing, or even on direct appeal or post-judgment motion by way of RCr 11.42. Consequently, he has not shown that he had no other available or adequate remedy, or that he did not create the situation for which he seeks equitable relief because of his own fault, neglect or carelessness. Linde has not alleged an error that was unknown or could not have been known to him by the exercise of reasonable diligence at the time of the original proceedings or shortly thereafter. Linde has been active in filing several post-judgment motions, but he has not raised the restitution

²⁴ In fact, the circuit court was statutorily required by KRS 532.032(1) to order Linde to pay restitution as part of the sentence. See *Commonwealth v. O'Bryan*, 97 S.W.2d 454 (Ky. App. 2003).

issue despite having the information necessary to have done so earlier. He also has not established a recognized ground such as fraud, accident or mistake to support his claim for relief. Thus, Linde has not satisfied any of the three requirements or demonstrated exhaustion of remedies entitling him to equitable relief pursuant to CR 60.03.²⁵

The order denying Linde's CR 60.03 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE

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²⁵ For similar reasons, Linde would not be entitled to relief if his motion were to be treated as having been filed pursuant to CR 60.02 as well.