RENDERED: OCTOBER 19, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000639-MR

LARRY PERKINS — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 06-CI-01638

LLOYD LYNCH — APPELLEE

OPINION AND ORDER
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND WINE, JUDGES; ROSENBLUM,[1] SENIOR JUDGE.

WINE, JUDGE: This is an appeal from an order of the Franklin Circuit Court denying a CR 60.02 motion which was filed after appellant's election appeal was dismissed by this Court as untimely. Because this CR 60.02 appeal was practiced as a regular appeal, it has just recently come to the Court's attention that matters pertaining to the November 6, 2007, election are in issue. In order to resolve the appeal as expeditiously as possible, the Court ORDERS that this appeal be assigned to a Special Panel for resolution without oral argument.

[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.

After appellant Larry Perkins won a seat on the Franklin County School Board by a single vote, his opponent, appellee Lloyd Lynch, filed a contest pursuant to KRS 120.155 on the basis that eight ballots in one precinct did not contain the name of either candidate. In support of his petition, Lynch filed the affidavit of the Franklin County Clerk establishing the ballot error, the fact that eight voters had been given the improper ballots, and that Perkins had won the election over Lynch by one vote. Perkins did not file any evidence with the trial court. The matter was then submitted on each party's legal memorandum, and the court heard brief oral arguments by counsel. The trial court ultimately declared the election void.

Perkins' subsequent appeal to this Court under KRS 120.075 was dismissed by order entered March 6, 2007, for failure to adhere to the time requirements provided in that statute.[2] He then filed the instant CR 60.02 motion to set aside the order declaring the election void alleging that the trial court lost jurisdiction to decide the election contest when it failed to resolve the matter within 30 days as required by KRS 120.165(2). The trial court denied the motion on the basis of the following rationale:

> Relief from judgment under CR 60.02 is an extraordinary remedy which allows the trial court to vacate a judgment based on facts or circumstances which were not known by the party seeking relief or could not have been known by a party seeking relief through the exercise of reasonable diligence. *Davis v. Home Indemnity Company*, 659 S.W.2d 185, 188 (Ky. 1983). If the party seeking relief under CR 60.02 could have raised the issue prior to judgment but simply neglected to do so, relief from judgment under CR 60.02 is not available. *Board of Trustees of Policemen's & Firemen's*

[2]Appeal No. 2007-CA-000188-MR.

> *Retirement Fund v. Nuckolls,* 507 S.W.2d 183 (Ky.App. 1974). An argument based upon a statute and case law that w[ere] on the books long before the ill-fated November election cannot form the basis of a successful CR 60.02 motion to set aside an Order of this Court. We believe that [Perkins] waived this argument by not bringing it to the Court until his case was dismissed by the Court of Appeals.

We are convinced that we can add little, if anything, to the trial court's well-reasoned analysis.

Perkins nevertheless argues that a jurisdictional defect is a matter that can be raised at any time. While this legal precept is correct, it has no application in this case. The second basis articulated by the trial court for denying Perkins' motion disposes of his jurisdictional complaint as well: that the parties and the court had in fact complied with the statutory constraints. The plain language of KRS 120.165, when construed in the light of the facts of this case and long-standing case law, supports the trial court's assessment. The pertinent sections of the statute provide:

> (1) A contest instituted under KRS 120.155 shall proceed as equity actions. Upon return of the summons properly executed to the office of the circuit clerk, he shall immediately docket the case and notify the presiding judge of the court that the contest has been filed. The judge shall proceed to a trial of the cause without delay. In courts having more than one (1) judge, the judge who shall try the case shall be determined by lot. **The court shall complete the case as soon as practicable. The action shall have precedence over all other cases.**
>
> (2) **The evidence in chief for the contestant shall be completed within thirty (30) days after service of summons;** the evidence for the contestee shall be completed within twenty-five (25) days after filing of answer, and evidence for contestant in rebuttal shall be completed within

> seven (7) days after the contestee has concluded; provided that for cause the court may grant a reasonable extension of time to either party. (Emphasis added).

As the trial court correctly noted, the only evidence submitted in this case was the affidavit of the Franklin County Clerk which was filed well within the 30-day time frame afforded by the statute. Furthermore, the parties submitted an agreed order for the submission of legal memoranda and the scheduling of oral argument. Having acquiesced by agreement in the decisional time frame, Perkins cannot complain that he should now be relieved of its terms. As emphasized by Kentucky's then-highest court in *Francis v. Sturgill,* 163 Ky. 650, 174 S.W. 753, 755 (1915):

> While the statute with respect to contested elections requires that they be speedily tried and disposed of, it does not require that the court shall ignore such an agreement between the parties to the contest as was admittedly made and carried out in this case.

Clearly, the trial court's properly invoked subject matter jurisdiction was not lost due to an agreement concerning the scheduling of legal argument on timely filed evidence. The statute itself requires only that the court "complete the case as soon as practicable" giving it "precedence over all other cases." On these facts, the trial court did not err in denying Perkins' request to set its prior judgment aside.

Perkins also challenges the trial court's jurisdiction to require him to vacate the office after the election was declared void. Again, the statutes and case law support the decision of the trial court. KRS 120.165(4) by its own terms gives the trial court in an election contest the authority to declare that there has been no election, in which case "the

office shall be deemed vacant, with the same legal effect as if the person elected had refused to qualify." That the trial court has the concomitant authority to enforce its judgment by requiring the successful candidate to vacate the office involved has been confirmed in a long line of cases, including *Scholl v. Bell*, 125 Ky. 750, 102 S.W. 248 (1907); *Francis v. Sturgill, supra;* and *Ellis v. Jasmin,* 968 S.W.2d 669 (Ky. 1998).

Finally, we agree with Lynch that Perkins' argument concerning costs has not been properly preserved for our review. Nothing in the order appealed from addresses the award of costs.

In sum, because the opinion of the trial court is supported by the election contest statutes and case law concerning postjudgment remedies, we affirm the judgment denying Perkins' motion for CR 60.02 relief.

ALL CONCUR.

ENTERED: October 19, 2007

/s/ Thomas B. Wine
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Richard M. Guarnieri
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