

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000003-MR

PETER BARD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 00-CR-000707

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: ACREE, KELLER, AND LAMBERT, JUDGES.

KELLER, JUDGE: Peter Bard (Bard) appeals from an opinion and order of the Jefferson Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rule of Civil Procedure (CR) 60.02(e). Because Bard failed to exhaust his administrative remedies before seeking this Court's review as required by

Kentucky Revised Statute (KRS) 454.415, we affirm the decision of the circuit court.

FACTS

On October 27, 1997, Bard was arrested for the murder of Deputy Sheriff Floyd Cheeks. However, Bard was determined to be incompetent to stand trial and the charges were dismissed. Bard later became competent and was re-indicted for murder on March 28, 2000. On February 1, 2002, a jury found Bard guilty but mentally ill of first-degree manslaughter and recommended a twenty-year sentence.

On April 8, 2002, a sentencing hearing was held. At the close of the proceeding, the trial court asked Bard's counsel if they had reviewed Bard's presentence investigation report (PSI) and whether they had any additions or corrections to make. Bard's counsel replied by noting a couple of small changes. The trial court did not ask the Commonwealth if it had reviewed the PSI and the Commonwealth made no comment on it. The trial court then imposed the recommended twenty-year sentence and asked if there was "anything else?" There was no response from counsel from either side. During the hearing, no mention was made about the calculation of time already served by Bard.

In its written judgment entered on April 9, 2002, the trial court sentenced Bard to twenty years' imprisonment. The last sentence of the judgment stated, "The Defendant shall be entitled to credit for time spent in custody prior to sentencing, said time to be calculated by the Division of Probation and Parole.

KRS 532.120.” Bard’s Documentation Custody Time Credit (time credit sheet) from the Department of Corrections, dated April 8, 2002, calculated Bard’s custody credit at 3,086 days.¹

On July 1, 2008, the Department of Corrections discharged Bard from custody, and Bard was sent directly to Central State Hospital pursuant to a mental inquest warrant. On July 9, 2008, the Warden of the Kentucky State Reformatory issued a warrant for Bard’s immediate return to the Kentucky State Reformatory due to his “inadvertent release.”

On July 14, 2008, an Amended Documentation Custody Time Credit (amended time credit sheet) was submitted to and signed by Judge James Shake in the Jefferson Circuit Court. The amended time credit sheet awarded Bard with only 1,449 days of custody credit. The difference in the calculation apparently resulted from Bard being credited for time served while being treated at Central State Hospital and while not under indictment.

On July 22, 2008, Bard filed a Motion to Investigate Enforcement of Final Judgment alleging that the Department of Corrections had released him from custody and then unlawfully took him back into custody. At the August 8, 2008, hearing on this motion, Bard tendered a copy of his time credit sheet that he

¹ The Assistant Commonwealth Attorney who prosecuted the case and was present at the sentencing hearing did not recall ever seeing a sentence calculation sheet at or before the sentencing hearing. In an affidavit submitted to the circuit court, Bard’s trial counsel stated that he examined the PSI at the sentencing hearing and recalled seeing and inspecting the time credit sheet at that time. Having reviewed the record, we note that Bard’s time credit sheet does not appear in the record at the time he was sentenced. However, a copy of the time credit sheet was submitted to the circuit court years after Bard’s sentencing.

obtained from the Department of Corrections through an open records request.

Bard also tendered the amended time credit sheet.

The trial court denied Bard's motion to investigate on August 14, 2008, and noted that "this Court defers to the Division of Probation and Parole to accurately determine credit [for] time served and will not hear this matter until Bard exhausts the appropriate administrative remedies provided in the Department of Corrections policies and procedures." Bard did not appeal this order.

After the motion to investigate was denied, Bard filed a Motion to Declare Judgment Satisfied pursuant to CR 60.02(e). On October 23, 2008, the circuit court heard oral arguments on the motion. The circuit court entered an opinion and order on October 30, 2008, denying Bard's CR 60.02 motion. The circuit court noted that it had previously ruled that the court lacked jurisdiction over the issue, and held that Probation and Parole is the body responsible for calculating and determining Bard's credit time.

Bard moved to vacate the circuit court's opinion and order on November 6, 2008, and the circuit court denied the motion on December 15, 2008. This appeal followed.

STANDARD OF REVIEW

"The standard of review of an appeal involving a CR 60.02 motion is whether the trial court abused its discretion." *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000). To amount to an abuse of discretion, the trial court's decision must be "arbitrary, unreasonable, unfair, or unsupported by sound legal

principals.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Absent a “flagrant miscarriage of justice,” the trial court will be affirmed. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

ANALYSIS

Bard brought his motion pursuant to CR 60.02(e), which states that “a court may . . . relieve a party . . . from its final judgment . . . upon the following grounds: . . . the judgment is void, or has been satisfied, released, or discharged” Bard argues that his sentence has been satisfied and that his time credit sheet was improperly amended.

Because Bard is challenging his custody credit, KRS 454.415 applies.

KRS 454.415 states the following:

- (1) No action shall be brought by or on behalf of an inmate, with respect to a prison disciplinary proceeding or challenges to a sentence calculation or challenges to custody credit or to prison conditions, until administrative remedies as set forth in Department of Corrections policies and procedures are exhausted.
- (2) Administrative remedies shall be exhausted even if the remedy the inmate seeks is unavailable.
- (3) The inmate shall attach to any complaint filed documents verifying that administrative remedies have been exhausted.

Through an examination of the record, it is clear that Bard did not exhaust his administrative remedies. Accordingly, the trial court was correct in denying his CR 60.02 motion. Nothing in this Opinion shall be construed to

preclude further judicial review of this matter once Bard has fully exhausted his administrative process.

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

ALL CONCUR.

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