

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000235-MR

ALFRED ARNOLD

APPELLANT

v. APPEAL FROM ALLEN CIRCUIT COURT
HONORABLE JANET J. CROCKER, JUDGE
ACTION NO. 06-CR-00040

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CAPERTON, MOORE, AND VANMETER, JUDGES.

VANMETER, JUDGE: Alfred Arnold appeals from an order of the Allen Circuit Court denying his motion for return of property seized as evidence by the police.

For the following reasons, we affirm.

In April 2007, pursuant to a plea agreement with the Commonwealth, Arnold entered a guilty plea to fleeing or evading police in the first degree and receiving stolen property over \$300. As part of the plea agreement, Arnold

agreed to forfeit “any and all evidence seized incident to this matter, unless specifically agreed otherwise.” When Arnold came back before the trial court for final sentencing, he claimed for the first time that certain property seized should be returned to him. As a basis for that motion, he argued that because the indictment only identified four of numerous items seized as stolen, the remaining seized items were not evidence and were not included in the plea agreement.

In response to Arnold’s *pro se* oral motion, the Commonwealth moved to withdraw the plea and continue sentencing on the basis that Arnold was accepting the benefit of the plea agreement but was rejecting portions of it. The trial court denied the Commonwealth’s motion and passed Arnold’s oral motion for return of property, subject to reconsideration upon filing a written motion. A final judgment was entered against Arnold on June 26, 2007.

In June 2008, Arnold filed a *pro se* motion for return of property. The Commonwealth filed a response and the trial court set a hearing for July 15, 2008, but did not issue a transport order. The trial court denied Arnold’s motion for return of property, without a hearing, on the basis that the June 2007 judgment was final. This order was entered on July 16, 2008.

Two months later, Arnold filed a *pro se* notice of appeal from the trial court’s July 2008 order. The court clerk returned the notice of appeal to him since criminal appeals are required to be filed within 30 days after the judgment is entered. RCr¹ 12.04. Thereafter, by letter entered into the record on September 25, 2008, Arnold claimed that he was unaware a judgment had been entered against

¹ Kentucky Rules of Criminal Procedure.

him on the motion for return of property. On October 27, 2008, Arnold tendered *pro se* a second notice of appeal and filed a motion for a belated appeal, which was granted. This court then entered an order remanding the matter to the trial court for an evidentiary hearing to determine whether Arnold implicitly or explicitly waived his right to appeal.

The trial court conducted a hearing and entered findings of fact and conclusions of law on August 28, 2009, holding that Arnold explicitly waived his right to a belated appeal. On October 2, 2009, Arnold, by counsel, filed a motion to supplement the motion for a belated appeal. By order entered November 9, 2009, this court granted Arnold's motion to supplement the motion for a belated appeal and granted his motion for a belated appeal. This matter is now before us for review.

Arnold's sole claim of error is that the trial court violated state and federal due process by denying his *pro se* written motion for return of property without a hearing. However, we decline to address the substantive nature of Arnold's claim since our review of the record reveals that Arnold's June 2008 written motion for return of property was filed over a year after entry of the trial court's June 2007 order, which expressly states, "oral motion for return of property passed subject to reconsideration upon filing of written motion." Arnold's written motion for return of property was in effect a motion under CR² 59.05 to alter or amend the June 2007 order, which motion the trial court was procedurally barred from addressing since it had been filed after the expiration of ten days from entry of the trial court's

² Kentucky Rules of Civil Procedure.

order. *See* CR 59.05 (“[a] motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be served not later than 10 days after entry of the final judgment.”). *See also Commonwealth v. Newsome*, 296 S.W.2d 703, 705 (Ky. 1956) (holding that petitioner’s motion to reconsider a petition for writ of error coram nobis was in effect a motion under CR 59.05 to alter or amend the order dismissing the petition, which motion the trial court had no power to entertain and act upon since filed after the expiration of 10 days from entry of judgment). We further note that the trial court made it abundantly clear to Arnold and his counsel during final sentencing that the court would not entertain Arnold’s claim for return of property until a written motion was filed. Finally, the fact that the trial court’s decision to deny Arnold’s written motion was based upon different reasoning (*i.e.*, on the basis that the June 2007 judgment was final) does not alter our result since well-settled is the rule that an appellate court may affirm a lower court for any reason supported by the record. *See McCloud v. Commonwealth*, 286 S.W.3d 780, 786 n.19 (Ky. 2009).

The order of the Allen Circuit Court is affirmed.

CAPERSON AND MOORE, JUDGES, CONCUR IN RESULT
ONLY.

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