RENDERED: OCTOBER 7, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001594-MR

DALE PANKIN — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 01-CR-00564

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION AND ORDER
DISMISSING

** ** ** ** **

BEFORE: CLAYTON, KELLER AND MOORE, JUDGES.

KELLER, JUDGE: Dale Pankin (Pankin) appeals from an order of the Hardin Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rule(s) of Civil Procedure (CR) 60.02. For the reasons set forth below, we dismiss his appeal.

FACTS

On October 30, 2002, Pankin entered a guilty plea to two counts of first-degree sexual abuse, two counts of first-degree sodomy, and two counts of incest. The Hardin Circuit Court subsequently entered a final judgment on March 20, 2003, sentencing Pankin to fifty years' imprisonment. More than five and a half years later, Pankin filed a *pro se* motion arguing that he was entitled to relief pursuant to Kentucky Rule(s) of Criminal Procedure (RCr) 11.42 and CR 60.02. On February 23, 2009, the trial court entered an order denying Pankin's motion. Pankin appealed from that order; however, at Pankin's request, the appeal of that decision was dismissed by an order entered by this Court on December 10, 2009.

On April 26, 2010, Pankin filed another motion to vacate the judgment against him pursuant to CR 60.02(e) and (f). Pankin contended that police records and statements made by his daughter showed that he could not have been convicted of first-degree sodomy because the offenses occurred after his daughter reached twelve years of age. Pankin further alleged that the two counts of incest occurred in Meade County as opposed to Hardin County.

The trial court denied Pankin's motion on April 29, 2010, concluding that Pankin had raised the issue regarding his daughter's age in his previous RCr 11.42 and CR 60.02 motion. The trial court also determined that the basis for

Pankin's argument stemmed from information that he could have reviewed even before he entered his guilty plea. Additionally, the trial court determined that Pankin entered a guilty plea specifically admitting that he was guilty of the offenses, that they took place in Hardin County, and that the offenses occurred when his daughter was less than twelve years of age. The trial court further concluded that Pankin's motion was not filed within a reasonable time as required by CR 60.02.

On August 26, 2010, Pankin filed a *pro se* motion in this Court for a belated appeal. In that motion, Pankin alleged he received the trial court's order in late April or early May 2010 at Little Sandy Correctional Complex where he is currently confined. Pankin allegedly gave the order to an inmate legal aide that same day without reading it. The inmate legal aide was transferred from Little Sandy Correctional Complex to Kentucky State Reformatory the next morning and took Pankin's order with him. Pankin alleged that he received a copy of the trial court's order from the inmate legal aide one week prior to when he filed his motion for a belated appeal. On December 14, 2010, a motion panel of this Court entered an order granting Pankin's motion for a belated appeal.

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 principles." *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

On appeal, Pankin contends that the trial court abused its discretion in denying his CR 60.02 motion because (1) his daughter was thirteen when the first-degree sodomy offenses were committed; and (2) the two counts of incest were committed in Meade County instead of Hardin County. Pankin further contends that the trial court erred in failing to hold an evidentiary hearing on his CR 60.02 motion.

First, we address whether Pankin is entitled to a belated appeal. Although a motion panel of this Court granted Pankin's motion for a belated appeal, such a ruling is not binding upon the "merits" panel. *Knott v. Crown Colony Farm, Inc.*, 865 S.W.2d 326, 329 (Ky. 1993) (concluding that "[s]uch an order [an interlocutory order of a Court of Appeals three-judge motion panel] is by its nature

subject to further review in the court where the case is still pending, either at the request of a party or sua sponte, until a final, appealable decision has been entered, whether by judgment, order or opinion"). Having reviewed the record and the arguments of the parties, we conclude that Pankin is not entitled to a belated appeal.

This appeal is controlled by *Moore v. Commonwealth*, 199 S.W.3d 132 (Ky. 2006). In *Moore*, Moore filed an RCr 11.42 motion and requested appointment of counsel. The trial court determined that it could dispose of the motion without a hearing; therefore, it denied Moore's request for appointment of counsel and his RCr 11.42 motion. Moore appealed, but missed the deadline for filing his notice of appeal by more than two months. He then moved for leave to file a belated appeal, which this Court denied. *Id.* at 134-35.

The Supreme Court affirmed this Court's holding that an individual proceeding *pro se* is entitled to a belated appeal from the denial of a collateral attack only if he was erroneously denied the assistance of counsel in the collateral proceeding. Because the allegations Moore raised in his RCr 11.42 motion could be determined on the face of the record without an evidentiary hearing, he was not entitled to appointment of counsel. The Supreme Court noted that, while Moore was entitled to appeal, he was obligated to comply with the procedural rules, which

he failed to do. Therefore, the denial of his motion to file a belated appeal was proper. *Id.* at 140.

In this case, Pankin filed a *pro se* CR 60.02 motion. The Supreme Court of Kentucky has held that indigent defendants are not entitled to counsel in CR 60.02 proceedings. *See Gross*, 648 S.W.2d at 857-58. Thus, Pankin was not entitled to counsel on his CR 60.02 motion. Because he was not entitled to counsel, the exemption set forth by the Supreme Court in *Moore* does not apply. Therefore, Pankin was required to comply with the procedural rules for filing a timely appeal. This he did not do. Accordingly, like Moore, Pankin was not entitled to a belated appeal.

Even if Pankin had been entitled to a belated appeal, he would not prevail. As correctly noted by the trial court, Pankin voluntarily, knowingly, and intelligently entered a guilty plea, and specifically admitted that his daughter was between the ages of seven and eleven when the offenses occurred. "The effect of entering a voluntary guilty plea is to waive all defenses other than that the indictment charges no offense." *Parrish v. Commonwealth*, 283 S.W.3d 675, 678 (Ky. 2009). Because Pankin knowingly and voluntarily entered into the guilty plea, he forfeited the opportunity to challenge the sufficiency of the evidence against him. Thus, he cannot now claim that his daughter was over the age of

twelve when the sodomy offenses occurred and that the incest offenses occurred in a county other than the one in which he was charged.

Further, as correctly noted by the trial court, Pankin previously brought a motion pursuant to RCr 11.42 and CR 60.02. Although he did not raise the venue issue, he did raise the issue of his daughter's age at the time the sodomy offenses occurred. As stated in *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997),

> Civil Rule 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could "reasonably have been presented" by direct appeal or RCr 11.42 proceedings. The obvious purpose of this principle is to prevent the relitigation of issues which either were or could have been litigated in a similar proceeding.

(Citations omitted). Because Pankin did or could have raised these issues in a similar proceeding, his CR 60.02 motion fails.

Finally, a claim of relief pursuant to CR 60.02(e) and (f) must be "made within a reasonable time." Pankin's motion is based upon evidence that was available to him before he entered his guilty plea. Therefore, we cannot say that the trial court abused its discretion in determining that Pankin failed to meet the "reasonable time" requirement by filing his motion more than seven years later.

CONCLUSION

For the foregoing reasons, we conclude that Pankin was not entitled to a belated appeal. Accordingly, it is hereby ORDERED that Pankin's appeal be DISMISSED.

ALL CONCUR.

ENTERED: October 7, 2011

/s/ Michelle M. Keller
JUDGE, COURT OF APPEALS

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