

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001021-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NOS. 131500 & 131922

OTTIE NATHAN HAYES

APPELLEE

OPINION
REVERSING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; MOORE AND WINE, JUDGES.

MOORE, JUDGE: The Commonwealth of Kentucky appeals from the order of the Jefferson Circuit Court granting Ottie Nathan Hayes's Motion for Relief from Judgment pursuant to CR¹ 60.02(f). After a careful review of the record, we reverse because the circuit court abused its discretion in granting Hayes's motion.

¹ Kentucky Rule(s) of Civil Procedure.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1965, Hayes was indicted in case number 131500 of armed robbery, malicious shooting without wounding, and illegal possession of narcotics. The next year, he was indicted in case number 131922 of armed robbery. The parties state in their appellate briefs that Hayes entered guilty pleas to the charges in both indictments, and he received life sentences for both armed robbery convictions.²

Hayes was released on parole in 1980. Then, in August 2008, he allegedly witnessed an assault upon a neighbor and defended himself and his neighbor by discharging “a firearm into the air to encourage the assailant to leave the area.” Hayes contends that the assailant left and when the police arrived, Hayes cooperated fully with the investigation. Hayes was then arrested and his parole was revoked due to the firearm violation.

Hayes filed his CR 60.02(f) motion in the circuit court in 2010, contending that in 1975, the penalty for robbery in the first degree, which includes armed robbery, was reduced by statute to a maximum term of imprisonment of

² The circuit court stated in its order granting Hayes’s CR 60.02 motion that “in 1975, the Kentucky General Assembly reduced the *maximum* sentence for a conviction of armed robbery from life imprisonment to twenty (20) years.” (Emphasis added). However, according to Hayes’s 1965 and 1966 indictments for armed robbery under KRS 433.140, the penalty for armed robbery was either life imprisonment or death at that time. This range of penalties for armed robbery was confirmed in *Uwaniwich v. Commonwealth*, 390 S.W.2d 658 (Ky. 1965) (stating that KRS 433.140 provided “but two alternative punishments, life or death.”). Thus, contrary to the circuit court’s finding, the maximum sentence that Hayes could have received was death, but he was sentenced to the minimum of life imprisonment.

twenty years.³ Hayes alleged that CR 60.02(f) permitted the court to relieve a party from its final judgment for reasons of “an extraordinary nature justifying relief.” He further asserted as follows:

It is the defendant’s belief that his punishment has become more onerous beyond that ordinar[ily] contemplated by the life sentence as imposed in 1966. Mr. Hayes is currently 68 years old and is not a threat to the community, in which he has lived quietly for twenty-eight years. Defendant’s current sentence is inequitable and due to the passage of time and changes in the law, his punishment has become unconstitutional under both the United States and Kentucky Constitutions. The prohibition against cruel and unusual punishment “must draw its meaning [from] the evolving standards of decency that mark the progress of a maturing society.” *See Trop v. Dulles*, 356 U.S. 86, 100, 78 S.Ct. 590, 598, 2 L.Ed.2d 630, 642 (1958). Defendant, having already served more time than he would receive today for the same offense, having integrated into the community without additional offense for years, having come to the aid of a neighbor to the detriment of his own safety, is equitably entitled to leniency given the unique facts presented here.

Therefore, Hayes requested that the circuit court “amend the life sentence to a 20 year sentence consistent with the present statute and sentencing guidelines, allowing credit for time served.”

The Commonwealth responded to Hayes’s CR 60.02 motion and stated its belief “that there [were] no trial irregularities or any other circumstances that would justify the extraordinary remedy afforded under CR 60.02.” The

³ In the 1970s, the General Assembly repealed KRS 433.140, the statute Hayes was indicted under, and enacted KRS 515.020, which recodified the crime of armed robbery as “robbery in the first degree” and classified it as a “Class B felony,” carrying a maximum penalty of twenty years of imprisonment.

Commonwealth contended that Hayes's assertions failed to meet the high standard of proof required for granting a CR 60.02 motion, as he did not assert any "flaw or error in the sentence he received at the time he entered his guilty plea. Instead, he is seeking to have the judgment amended on the grounds that the law has since changed." The Commonwealth alleged that pursuant to the reasoning in *Wine v. Commonwealth*, 699 S.W.2d 752 (Ky. App. 1985) and *Land v. Commonwealth*, 986 S.W.2d 440, 441 (Ky. 1999), Hayes was not entitled to the relief he sought. Furthermore, the Commonwealth noted that Hayes had "waited over forty (40) years to file this motion" from the date he was convicted, and thirty-five years from the date the law was changed. Thus, the Commonwealth argued that Hayes's motion was not filed within a reasonable time, as required.

The circuit court heard oral arguments concerning the motion. The court then granted Hayes's motion, but in doing so, the only law that the circuit court cited concerned the standard of review of a CR 60.02 motion. Specifically, the court stated: "CR 60.02(f) allows the Court to relieve a party from final judgment if there is a 'reason of an extraordinary nature justifying relief.' It is within the Court's discretion to afford relief under CR 60.02. *Gross v. Commonwealth*, 648 S.W.2d 853, 857 (Ky. 1983)." The circuit court did not address the Commonwealth's argument concerning Hayes's failure to file his motion within a reasonable time, nor its arguments concerning the *Wine* and *Land* cases. The court simply provided the following reasons for granting Hayes's motion:

In his CR 60.02 motion, Hayes emphasizes that he has lived quietly in the community for 28 years, and cooperated fully with police investigation after coming to the aid of another and defending himself. Hayes testified that he resided in a dangerous neighborhood and possessed the gun solely for protection. Additionally, Hayes asserts that he will not return to that neighborhood if he is afforded relief by this Court.

Although the Court certainly recognizes the significance of granting Hayes'[s] Motion, the facts of this particular case require this result. Thus, this Court holds that under the unique facts of this case, and the current sentencing guidelines, the imposition of a life sentence against Hayes is unjust.

Thus, the court ordered: Hayes's "sentences imposed on Indictments No. 131500 and No. 131922 are reduced to a sentence of twenty (20) years, with credit for time served." The court then ordered Hayes to be released from custody.

The Commonwealth now appeals, alleging that the circuit court abused its discretion when it granted Hayes's motion. The Commonwealth continues to contend that *Wine* and *Land* are applicable to the analysis of this case.

II. STANDARD OF REVIEW

On appeal, we review the denial of a CR 60.02 motion for an abuse of discretion. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

We note that CR 60.02(f), upon which Hayes based his motion, provides: “On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding [for] any . . . reason of an extraordinary nature justifying relief. . . .” Moreover, motions brought under CR 60.02(f) are required to be brought within a reasonable time. *See* CR 60.02.

III. ANALYSIS

We first note that Hayes’s CR 60.02 motion was brought more than forty years after his conviction and thirty-five years after the penalty for armed robbery was changed by statute. Hayes asserts on appeal that whether a CR 60.02 motion has been brought within a reasonable time is a matter of discretion for the trial court. However, in the present case, although the Commonwealth asserted in the circuit court that the motion was not brought within a reasonable time, the circuit court failed to address this argument in its order. While this passage of time ordinarily would not meet the standard for “reasonable time,” *see Ray v. Commonwealth*, 633 S.W.2d 71, 73 (Ky. App. 1982), the Commonwealth failed to raise this issue in its opening brief on appeal and failed to discuss it in its reply brief after Hayes addressed it in his response brief. Therefore, the “reasonable time” issue is waived. *See Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 815 (Ky. 2004).

As we previously noted, the circuit court failed to follow binding precedent and failed to cite any law in support of its order granting Hayes’s motion

other than the general standard of review for a CR 60.02 motion. This alone is enough for a finding that the circuit court abused its discretion in granting the motion because it entered a ruling that was “arbitrary, unreasonable, unfair, or *unsupported by sound legal principles.*” *Goodyear Tire and Rubber Co.*, 11 S.W.3d at 581 (emphasis added).

Nevertheless, we will analyze the merits of the case further. Hayes asked the court to “amend the life sentence to a 20 year sentence consistent with the present statute and sentencing guidelines.” Thus, he asked the court to retroactively apply the new law specifying the penalty for armed robbery to his sentence, even though the new law was not enacted until nine years after his conviction. Pursuant to KRS 446.080(3), “[n]o statute shall be construed to be retroactive, unless expressly so declared.” This statute was in effect at the time that KRS 515.020, upon which Hayes based his claim concerning the change in the penalty for armed robbery, was enacted. Further, KRS 515.020 does not contain a provision “expressly declaring” it to be retroactive. Therefore, Hayes is not entitled to have KRS 515.020 retroactively applied to his sentence, and the circuit court abused its discretion in granting Hayes’s motion for relief from judgment on this ground.

To the extent Hayes argued below that it was cruel and unusual punishment and, therefore, a violation of the Eighth Amendment to the United States Constitution to require him to serve a life sentence when the maximum penalty for armed robbery had been changed to twenty years of imprisonment, his

claim lacks merit. In *Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), the United States Supreme Court held that a mandatory life sentence without the possibility of parole was not grossly disproportionate to the crime of possessing more than 650 grams of cocaine and, thus, the sentence did not violate the Eighth Amendment's prohibition regarding cruel and unusual punishment. It stands to reason that if a life sentence without parole is not grossly disproportionate to that crime, then a life sentence with the possibility of parole is not grossly disproportionate to two crimes of armed robbery. Therefore, this claim lacks merit, and the circuit court abused its discretion in granting the relief requested.

Hayes also argued below that a life sentence for armed robbery is contrary to the current social norms. However, we note that the State of Michigan currently has life imprisonment as a possible penalty for armed robbery. *See Mich. Comp. Laws Ann. § 750.529* (West 2004). Moreover, resolution of this issue lays outside the judicial province and lays within the boundaries of the power of the two other branches of government.

The circuit court also abused its discretion in finding that the facts that Hayes lived “in a dangerous neighborhood” and allegedly “possessed the gun solely for protection” were sufficient reasons to support its decision to grant Hayes's motion for relief from judgment. The circuit court's findings that Hayes was an excellent neighbor and that Hayes was justified in possessing a firearm, despite being a convicted felon on parole, are irrelevant because the issue in this

case is whether Hayes is entitled to have his sentence amended to reflect a change in the law following his conviction.⁴ Additionally, even if, as Hayes claims, he lived quietly in the neighborhood without incident for twenty-eight years, this would not render his original life sentence inequitable. Even if Hayes lived a quiet life from the time he was paroled until the firearm incident occurred, that fact would not provide a basis for relieving him from “the punishment legally imposed for the crimes which he has committed.” *McQueen v. Commonwealth*, 948 S.W.2d 415, 418 (Ky. 1997). Rather, we agree with the Court in *McQueen* that “[t]hese are arguments more properly addressed in a plea to the executive for clemency.” *Id.* Therefore, the circuit court abused its discretion and acted arbitrarily when it took the type of neighborhood Hayes lived in, as well as the findings that he had lived quietly in the neighborhood for twenty-eight years and only possessed the firearm for protection, into consideration while analyzing the claim at issue because those findings were irrelevant and they provided no basis for relief.

The Commonwealth asserted in the circuit court, and reasserts on appeal, that the *Land* and *Wine* cases precluded the court from granting Hayes’s motion. In *Land*, the appellant moved to amend the judgment denying his post-

⁴ We pause to note, however, that even if these findings had been relevant to the issue at hand, the circuit court clearly erred in finding that Hayes, a convicted felon who was on parole, was justified in possessing a firearm simply because he allegedly lived in a dangerous neighborhood and had the firearm for his protection. The General Assembly has not provided those circumstances as exceptions to the law that convicted felons may not possess firearms. Therefore, the circuit court erred in finding that those circumstances would constitute exceptions to the law.

conviction petition that challenged his life sentence without the possibility of parole for rape. The Kentucky Supreme Court stated as follows:

Appellant asserts that . . . changes in the law require this Court to revisit previous constitutional challenges and reexamine case precedent established over a decade ago in light of today's "standards of decency." . . . [T]he adoption of the penal code in 1975 by the Kentucky General Assembly abolished the sentence of life without the possibility of parole for the offense of rape. Appellant urges that this change resulted from society's recognition that "such an irrevocable penalty did not fit the crime."

Appellant concludes that given the changes in sentencing laws regarding crimes of violence, and in view of the commutation of the sentences of almost all other offenders sentenced to life without the possibility of parole for rape, his sentence must be deemed cruel punishment and a denial of equal protection and due process in violation of the United States and Kentucky Constitutions. We disagree.

[T]he Court has consistently held that the sentence of life without the possibility of parole for rape imposed prior to the institution of the penal code is constitutional.

Land, 986 S.W.2d at 441.

Therefore, the Supreme Court has held that changes in a sentencing law do not constitute a "reason of an extraordinary nature justifying relief" under CR 60.02(f), and we are bound by this precedent. Accordingly, the change in the sentencing law pertaining to armed robbery also does not provide a basis for Hayes to obtain relief under CR 60.02(f).

The Commonwealth also cited in the circuit court the *Wine* case as a reason why Hayes's CR 60.02 motion should be denied. The Commonwealth

reasserts that reasoning on appeal. In *Wine*, the appellant sought relief under CR 60.02(f), alleging the “extraordinary ground” upon which his motion was based was “the adverse effect [his] incarceration [was] having on his family, particularly his son.” This Court held that

[T]he reasons behind CR 60.02 . . . have to do with some significant defect in the trial proceedings or evidence at trial, etc., such that a substantial miscarriage of justice will result from the effect of the final judgment. . . . The hardships cited by the appellant have no relation to the trial proceedings or any additional undiscovered evidence not presented at trial but only concern the adverse effect the appellant’s incarceration is having on his family. . . .

Further, if changes in family or other conditions were viewed as proper grounds for relief under CR 60.02(f), great uncertainty would arise surrounding the finality of judgments.

In *Cawood v. Cawood*, Ky., 329 S.W.2d 569 (1959), a wife received a lump-sum alimony in a divorce action and after discovering some nine months following the final judgment that she had cancer, sought relief under CR 60.02 to receive additional funds. Although the instant case is a criminal action and *Cawood* is a civil matter involving somewhat different considerations, we find the Court’s reasoning instructive.

However, because of the desirability of according finality to judgments, this clause (CR 60.02(f)) must be invoked with extreme caution, and only under most unusual circumstances. If the courts were to treat subsequent changes of physical condition as reasons of an extraordinary nature warranting the setting aside of alimony judgments, there would be no finality to such judgments. There would be no suitable basis for establishing time limits.

Id. at 571.

We think that finality of judgments is equally important with regard to criminal actions if not more so. Further, if changes in family conditions and other results of incarcerations were to become proper considerations under CR 60.02(f), the courts would be overwhelmed with often meritless CR 60.02 motions by criminals seeking alterations in their sentences.

Wine, 699 S.W.2d at 754 (internal quotation marks omitted).

As the Court stated in *Wine*, relief should be granted under CR 60.02(f) only in the most unusual circumstances, and courts should exercise extreme caution in granting relief under that rule, due to the great desirability in the finality of judgments. The circumstances in Hayes's case do not constitute a "reason of an extraordinary nature justifying relief," as required by CR 60.02(f). Additionally, due to the desirability of the finality of judgments, a post-sentencing change in the sentencing range for a particular crime is not a proper reason to grant relief under CR 60.02(f). Therefore, the circuit court abused its discretion in granting Hayes's CR 60.02 motion.

While Hayes's punishment may at this time appear harsh, he sought relief from the wrong branch of government. Under Kentucky's statutes, caselaw, and civil rules, Hayes is not entitled to the relief he seeks.

Accordingly, the order of the Jefferson Circuit Court is reversed.

ALL CONCUR.

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