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THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE
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ACTION.

Supreme Court of Kentucky

2011-SC-000555-DG

COMMONWEALTH OF KENTUCKY

APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2009-CA-000502-MR
JEFFERSON CIRCUIT COURT NO. 04-CR-001298

BRYCE R. BONNER

APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING

Kentucky Rules of Civil Procedure (CR) 60.02(f), like its antecedent the ancient writ of *coram nobis*, allows relief from a final judgment when a court finds the existence of facts that “render[] the original trial tantamount to none at all” such that enforcing the judgment “would be an absolute denial of justice and analogous to the taking of life or property without due process.”¹

Disturbing the finality of a judgment under CR 60.02(f) is carefully limited to the “most unusual”² and extraordinary circumstance. An alleged error that could have been corrected on appeal cannot be raised by a motion under CR 60.02(f).³

¹ *Jones v. Commonwealth*, 108 S.W.2d 816, 817 (Ky. 1937).

² *Howard v. Commonwealth*, 364 S.W.2d 809, 810 (Ky. 1963).

³ *Wimsatt v. Haydon Oil Co.*, 414 S.W.2d 908, 910 (Ky. 1967).

With that bedrock principle in mind, we granted discretionary review to examine the holding of a divided panel of the Court of Appeals that reversed the trial court's denial of post-appeal CR 60.02(f) relief to Bryce Bonner's trial counsel. Bonner's trial counsel did not use a CR 60.02(f) motion to attack the judgment rendered in Bonner's case but as the vehicle for her to be relieved of any duty to pay for DNA testing fees incurred for Bonner's defense at trial. Because we conclude that the trial court did not abuse its discretion by denying this motion, we reverse the opinion of the Court of Appeals and reinstate the trial court's order denying CR 60.02 relief.⁴

I. FACTUAL AND PROCEDURAL BACKGROUND.

A circuit court jury convicted Bonner of numerous felony offenses resulting in a judgment of conviction and sentence of imprisonment. On appeal, this Court affirmed that judgment.⁵ The facts of Bonner's case are not relevant to the resolution of the issue before us now. Our singular focus is on the facts surrounding the payment for DNA testing services performed on Bonner's behalf, which is the subject of the CR 60.02 motion at the center of this controversy.

Bonner's privately retained trial counsel filed a number of pre-trial motions, including a "motion to secure indigency status for purposes of KRS 31.110(b) only," with the trial court. According to the motion, counsel

⁴ This is a criminal case, but the civil rules are made applicable to criminal cases via Kentucky Rules of Criminal Procedure (RCr) 13.04.

⁵ *Bonner v. Commonwealth*, 2008 WL 4291669 (No. 2006-SC-000437-MR Sept. 18, 2008).

sought funding for expert witnesses and DNA testing. Counsel argued that Bonner qualified to receive these funds because he was a “needy person” and he only had private counsel because his family was paying the fee. The trial court conducted a hearing on the issue, and Bonner testified regarding his indigent status. On February 23, 2005, the trial court entered the first of a series of orders granting Bonner partial indigent status and allowing the expenditure of public funds “specifically [for] DNA analysis.”

Apparently, the DNA Diagnostic Center required a more specific identification of who was responsible for paying. So in March 2005, Bonner’s counsel sought to amend the trial court’s earlier order to make it more specific regarding payment. The trial court entered a new order on March 31, 2005, allowing funding for “DNA analysis and any testimony regarding same.” Bonner’s counsel, in April 2005, requested the trial court further amend its previous order. This time, the trial court issued a sealed order, the third on the subject of funding for DNA testing, specifically indicating the Jefferson Fiscal Court would pay DNA Diagnostic Center. The DNA testing was later performed. Approaching trial, Bonner’s counsel moved the trial court for increased funding to cover the cost of expert witnesses in Bonner’s defense. But the trial court denied the motion on March 9, 2006. Bonner’s jury trial proceeded on March 14-22, 2006, concluding with a guilty verdict against Bonner. Following the trial, but before sentencing, the trial court entered yet another order regarding the expenditure of public funds for Bonner’s defense. On April 13, 2006, the trial court made clear all prior orders regarding Bonner’s indigent

status and entitlement to public funds for DNA testing were voided with the order on March 9, and that order resolved the issue. Furthermore, the trial court made clear that Bonner was “not entitled, under the current state of law in this Commonwealth, to have any expert fees or costs paid under KRS Chapter 31 if he has retained counsel.” Bonner was sentenced and final judgment was entered on May 2, 2006.

Bonner directly appealed the judgment of conviction and sentence to this Court resulting in a decision rendered in September of 2008. In March of 2008, while Bonner’s direct appeal was pending with this Court, Bonner’s trial counsel⁶ filed the motion at issue in this case. Citing CR 60.02(f),⁷ Bonner’s counsel requested the trial court honor its initial order granting Bonner indigent status and allowing the expenditure of public funds for DNA testing. According to Bonner’s trial counsel, in the fall of 2007, DNA Diagnostic Center began demanding payment directly from her. The trial court denied the motion in February 2009, again noting that the earlier orders allowing use of public funds were superseded by the orders of March 9 and April 13, 2006. Additionally, the trial court found that the circumstances presented did not merit the extraordinary relief afforded by CR 60.02(f). In the trial court’s view, the services were obtained by private counsel on behalf of her client and public funds were not warranted.

⁶ Bonner was represented by the Department of Public Advocacy (DPA) on appeal.

⁷ Bonner’s trial counsel actually filed the motion citing CR 60(b)(6), but that is the codification of Kentucky’s federal counterpart. The correct designation is CR 60.02(f).

Bonner's counsel appealed the CR 60.02(f) denial to the Court of Appeals. The Court of Appeals, in a 2-1 decision, held the trial court abused its discretion by denying CR 60.02 relief, reversing and remanding the case with directions to the trial court to reinstate the order requiring payment by the Jefferson Fiscal Court. Further, the Court of Appeals ordered that Jefferson Fiscal Court be held in contempt if it refused to pay. The Court of Appeals also held that an order providing expenses to an indigent defendant operates prospectively only. Accordingly, under the rule established by the holding of the Court of Appeals, the trial court is without authority to rescind prior orders approving expenses for an indigent defendant.

II. ANALYSIS.

We are unconvinced that Bonner's counsel has presented sufficient evidence to merit relief under CR 60.02. More importantly, we do not find an abuse of the trial court's discretion.

We begin our review with a reminder that an alleged error that could have been corrected on an appeal cannot be raised by a motion under CR 60.02.⁸ To be clear, "CR 60.02 is not a supplemental appeal procedure."⁹ The intended relief afforded by CR 60.02 is extraordinary in nature, mandating extraordinary circumstances to bring about its application. And we find nothing extraordinary about the circumstances presented by Bonner's counsel. The circumstances may be unusual—even unfortunate—but they certainly do

⁸ *Wimsatt*, 414 S.W.2d at 910.

⁹ *Id.*

not reach the level of what we have previously deemed extraordinary.¹⁰ We do not afford relief under CR 60.02 if the claims were known or could have been known to the moving party by exercise of reasonable diligence in time to have been otherwise presented to the court. The proper juncture for Bonner's counsel to complain of any confusion surrounding the payment for DNA services was on direct appeal in conjunction with the lot of Bonner's claims of error pertaining to his trial. The purpose behind CR 60.02 does not envision post-judgment relief simply because the proper avenue or method of resolving the issue was overlooked or mishandled. If Bonner's counsel believed the trial court acted erroneously, the issue should have been presented to Bonner's appellate counsel and raised on direct appeal.

It bears reinforcing that CR 60.02 is designed to operate in a manner that is "organized and complete," not "haphazard and overlapping."¹¹ "The rule is not intended as merely an additional opportunity to raise claims which could and should have been raised in prior proceedings, but, rather is for relief that is not available by direct appeal[.]"¹² Perhaps enticing, more nuanced issues lurk in this litigation, but we find this historic principle to be controlling.

Bonner's counsel attempts to portray this action as a crusade for the preservation of the ability of members of the bar to act in reliance on trial court orders. While this is a dramatic narrative, we fail to see the forecasted dreadful

¹⁰ See *Sanders v. Commonwealth*, 339 S.W.3d 427, 437 (Ky. 2011) (rejecting claims of the "usual procedural, evidentiary, and ineffective assistance of counsel variety" similar to the claim brought by Bonner's counsel).

¹¹ *Id.*

¹² *Id.*

consequences eroding the bar's confidence in the bench. Instead, we are presented with a case in which a trial court acted fully within its inherent authority to modify or vacate its interlocutory orders at any point in the proceedings before final judgment. Members of the bar are free to rely on an order of a trial court and should feel confident to do so. But simply finding the result or modification of a trial court's order disagreeable is not grounds for relief under CR 60.02.

We do not find our decision today to have a chilling effect on defense counsel's ability to prepare an adequate defense. The bar is simply reminded that CR 60.02 is an extraordinary remedy and is not a backstop for failing to raise all issues on direct appeal. Here, the fatal flaw is the improper use of CR 60.02, not the trial court's actions in the underlying matter. We take no position on whether the trial court was correct or incorrect in ruling Bonner was not entitled to public funds because he retained private counsel. The issue is not necessary for a proper resolution of the case. We reverse the Court of Appeals and reinstate the trial court's order denying the CR 60.02 motion of Bonner's counsel.¹³

¹³ As an aside, we point out the Court of Appeals was also in error to order the Jefferson Fiscal Court to pay for the DNA testing. Under a previous statutory system, the fiscal court was responsible for the payment of such expenses. But now, KRS 31.185 directs the local government, fiscal court of each county, or legislative body of an urban-county government to pay into a fund out of which such expenses as at issue in this case are paid. The Finance and Administration Cabinet is responsible for disbursing payments from the special account. Additionally, the Jefferson Fiscal Court is no longer in existence as a result of the merger of Jefferson County and City of Louisville governments in 2003.

III. CONCLUSION.

For the foregoing reasons, we reverse the Court of Appeals. Relief under CR 60.02 is not warranted in the circumstances presented. The issue of whether the trial court erred or abused its discretion in denying public funds to Bonner could have been raised on direct appeal. CR 60.02 is not a vehicle for raising issues forgotten or lost on direct appeal.

All sitting. All concur.

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