

RENDERED: May 2, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-1621-MR

DONALD N. WALL

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES E. KELLER, JUDGE
CRIMINAL ACTION NO. 91-CR-000099

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: DYCHE, GUIDUGLI and MILLER, Judges.

GUIDUGLI, JUDGE. Appellant, Donald N. Wall (Wall), an inmate at the Kentucky State Reformatory in LaGrange, Kentucky, appeals pro se from the May 23, 1996, order of the Fayette Circuit Court granting the Commonwealth's CR 60.02 motion for relief from a prior order of the court requiring the Commonwealth to return certain property to Wall. Wall also appeals that part of the order which denied his motion to hold the Commonwealth in contempt for failing to return the property to him.

In 1991 Wall was convicted by a Fayette County jury of two counts of murder and one count of second-degree assault (91-CR-99). He was sentenced to two life terms without possibility of parole for 25 years for the two murders and ten

years for the second-degree assault. Wall murdered his ex-girlfriend, Carolyn Shaw, and her male companion, Bobby Gray, by shooting them both at point-blank range. Wall's conviction was upheld by the September 24, 1992, opinion and order of the Kentucky Supreme Court (91-SC-840-MR).

At the time of his arrest, items of Wall's property were seized for evidence. Additional items were seized from his work locker. On February 17, 1994, Wall wrote the Fayette Circuit Clerk a letter requesting a copy of the video tape of his trial including jury selection and post-trial proceedings. Wall also asked:

Would you please prepare a copy of all documented items on the Defendants [sic] Criminal Docket Sheet and Exhibits, including specifically a copy of all photo's [sic] and papers in the red tool box of the Defendants [sic]. All test [sic] of Ballistics, receipt [sic] of Defendants [sic] gun.

The Fayette Circuit Court treated the letter as a motion and denied the request. Wall responded with an open records request wherein he repeated his request and offered to pay the cost of providing the items to him. Wall eventually paid one hundred twenty (\$120.00) dollars and received copies of the videotapes.

On January 26, 1995, Wall filed a second open records request asking for, inter alia, "Photocopies of all items contained TOOL BOX [sic] introduced as evidence PHOTOGRAPHS of SPENT BULLETS and Photocopies of Commonwealth's Exhibits #7, 8, 9, 10, 11, & 15..." (emphasis in original). Wall was advised on February 15, 1995, that his request had been turned over to the

Fayette County Commonwealth Attorney's office. On February 21, 1995, Wall filed a "Motion for Return of Property." On June 8, 1995, the Commonwealth requested a two week continuance to respond to the motion which was granted by order of June 20, 1995. On July 17, 1995, Wall filed a "Demand For Judgment Pursuant to CR 54.03" claiming the Commonwealth was in default by failing to respond.

On August 29, 1995, Wall filed a Petition for Writ of Mandamus in the Court of Appeals (95-CA-2312) seeking a writ requiring the Fayette Circuit Court to rule on his pending motions. By order entered August 31, 1995, the Fayette Circuit Court granted Wall's motion and ordered the Commonwealth to return the property.

On September 6, 1995, the Commonwealth filed a motion requesting the court review the property which was the subject of the order to determine whether the property was contraband. The Commonwealth informed the court that the property included a bottle of liquor, several bottles of pills, photographs of Barbara Shaw (one of Wall's murder victims) engaged in sexual acts with Wall which the Commonwealth deemed "pornographic" and therefore inappropriate for an inmate at a penal institution.

On September 12, 1995, the Commonwealth filed a "Motion To Reconsider" the order for return of Wall's property. On September 19, 1995, Wall filed his response arguing the Commonwealth's motion to reconsider was not filed within ten days

as required by CR 59.05. By order of September 25, 1995, the Commonwealth's motion to reconsider was overruled as out of time.

On April 3, 1996, Wall filed a "Motion for Show Cause" requesting the court to conduct a hearing to determine why the Commonwealth should not be held in contempt for failing to return his property as previously ordered. By order of April 9, 1996, the Commonwealth was ordered to respond to the motion within thirty days. On May 8, 1996, the Commonwealth responded to the show cause motion with an explanation of the circumstances surrounding the handling of Wall's motions. The Commonwealth also filed a motion under CR 60.02 requesting relief from the August 31, 1995, order. By order of May 23, 1995, the court granted the motion to reconsider, set aside the August 31, 1995, order and declined to return the property to Wall. The court also denied Wall's motion to hold the Commonwealth in contempt. This appeal followed.

Appellant contends that the trial court erred to his substantial prejudice by granting the Commonwealth's CR 60.02 motion. Appellant does not, however, demonstrate the substantial prejudice he claims to suffer. Appellant claims that the Commonwealth should have filed a direct appeal from the August 31, 1995, order of the court rather than a CR 60.02 motion to reconsider. We disagree.

The standard for reviewing an order granting or denying relief under CR 60.02 is whether the trial court abused its discretion. Bethlehem Minerals v. Church & Mullins, Ky., 887

S.W.2d 327 (1994). Absent an abuse of discretion, the ruling will not be reversed. Id. With this standard in mind, we turn to the opinion and order appealed from which states, inter alia:

On August 31, 1995, this court entered an order for the Commonwealth to return to the defendant items which were entered by the defendant as evidence in his trial. Through no fault of its own, the Commonwealth was unable to verify the nature of the property at that time. Now the Commonwealth has in fact verified that said items would constitute contraband if delivered to the incarcerated defendant. We decline to order the Commonwealth to violate the facility's rules, and therefore grant the relief requested.

Because the delays were due first to the unavailability of the evidence and second to a medical condition of the Assistant Commonwealth's Attorney assigned to this case, we find that the Commonwealth has shown good cause for failing to comply with the order dated August 31, 1995.

We note from the Exhibit list attached to the Commonwealth's motion that although the August 31, 1995 order did not encompass any photographs (because the **defendant** did not enter any photographs), we would not be inclined to order the photographs returned in the future. Given the nature of the photographs, their return to the defendant would be a gross miscarriage of justice in which this Court declines to participate. (Emphasis in original).

CR 60.02 exists to provide a party with a means to gain relief from a final judgment which is unwarranted, onerous or otherwise erroneous. The August 31, 1995, order at issue was, in essence, a default judgment. The trial court indicated in the August 31, 1995, order that the requested relief was granted because the Commonwealth did not respond.

CR 55.02 states that for good cause shown, the court may set aside a judgment by default in accordance with CR 60.02, however, the moving party must show: (1) a valid excuse for default; (2) a meritorious defense to the claim; and, (3) absence of prejudice to the non-defaulting party. All three elements must be present to set aside the judgment. S.R. Blanton Development v. Investors Realty, Ky. App., 819 S.W.2d 727 (1991).

The Commonwealth had a valid excuse for failing to respond to Wall's motion for return of property. Because of the amount of time that had passed since Wall's initial prosecution, responsibility for Wall's case had been transferred several times. The Assistant Commonwealth's Attorney to whom the case was assigned during the relevant time period had medical problems which prevented her from responding to the motion. We hold that these facts amount to excusable neglect. CR 60.02(a).

The Commonwealth had a meritorious defense to the motion for return of property. Upon examining the items requested, the Commonwealth was concerned that all or most of the items were contraband which should not be provided to a prison inmate. It appears to this Court that Wall's efforts to obtain transcripts and then evidence was nothing more than a subterfuge to secure return of the confiscated photographs. The photographs depicted Wall engaged in explicit sexual acts with Barbara Shaw, one of his murder victims. Other items of property included a bottle of liquor, several bottles of pills, and gun parts. We agree that none of these items should be returned to Wall while

incarcerated. We further agree with the trial court that, given the nature of the photographs, their return to the defendant, at any time, would be a "gross miscarriage of justice."

The third element necessary to set aside a judgment by default in accordance with CR 60.02, is satisfied by Wall's failure to demonstrate any prejudice to him by entry of the order granting CR 60.02 relief. The order granting the Commonwealth relief under CR 60.02 was proper in all respects.

Implicit in the trial court's finding that the Commonwealth had shown "good cause" for not providing the property to Wall, is that the Commonwealth was not in contempt of the court. The trial court's powers of contempt are left to its sound discretion which was not abused in this case by declining to hold the Commonwealth in contempt.

For the foregoing reasons, we affirm the judgment of the Fayette Circuit Court in all respects.

DYCHE, JUDGE, CONCURS.

MILLER, JUDGE, CONCURS IN RESULT ONLY.

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