

RENDERED: February 27, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-2390-MR

ALPHONZO R. MORTON

APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 92-CR-736

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: EMBERTON, GARDNER and GUIDUGLI, Judges.

GARDNER, JUDGE: Alphonzo Morton (Morton) appeals from an order of the Fayette Circuit Court denying his motion for relief pursuant to Kentucky Rule of Civil Procedure (CR) 59.05 from a previous order denying his motion for relief pursuant to CR 60.02. The circuit court had revoked Morton's probation, and Morton sought to have that revocation set aside. We affirm the circuit court.

Morton was indicted in September 1992, for driving under the influence, fourth offense, and operating a motor vehicle on a suspended license, third offense. In December 1992, Morton pled guilty to the DUI charge and to an amended charge of operating a vehicle on a suspended license, second offense. On January 8,

1993, Morton was sentenced to one year on the DUI charge and twelve months on the suspended license charge. The court placed Morton on probation for two years. Judgment was filed and entered in the record on January 14, 1993.

On January 11, 1995, Morton's probation officer filed a request for modification of his probation because of Morton's failure to pay an arrearage in drug supervision fees. The officer requested that Morton's probation be extended one year. A hearing was set for January 27, 1995. Morton was sent a criminal summons regarding the requested modification and the hearing. The circuit court in an order of February 1, 1995, noted that after conducting the hearing, Morton's probation would be extended for one more year.

On October 17, 1995, an affidavit was filed seeking to revoke Morton's probation based upon the fact that he had pled guilty to wanton endangerment on October 6, 1995. A revocation hearing was held on October 27, 1995. On November 3, 1995, the court issued a final judgment revoking Morton's probation and sentencing him to one year in prison.

Morton, on July 23, 1996, filed a motion pursuant to CR 60.02 seeking relief from the court's judgment revoking his probation. He argued that he had completed his probation sentence when the court revoked his probation. The circuit court in a July 29, 1996 order, denied Morton's motion for CR 60.02 relief. On August 7, 1996, Morton filed a motion pursuant to CR 59.05 asking the court below to alter, amend or vacate its July 29, 1996 order.

On August 15, 1996, the circuit court denied Morton's motion. Morton subsequently brought this appeal.

Morton argues to this Court that the circuit court was required to grant relief from the revocation of his probation, because he alleges the court failed to provide written notice of a hearing, failed to provide counsel for him, failed to make written findings as reasons for revocation, and failed to revoke probation prior to the time that his sentence had been completed. We reject Morton's arguments, because the record refutes his claims or the contentions were not properly raised below.

First, the issues raised by Morton should have been raised pursuant to a direct appeal or through a motion for relief pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. CR 60.02 is for relief that is not available by direct appeal or under RCr 11.42. Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856 (1983). A movant must demonstrate why he is entitled to the special, extraordinary relief available under CR 60.02. Id. To be entitled to an evidentiary hearing, a movant must affirmatively allege facts, which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief. Id.

In the case at bar, Morton did not directly appeal the circuit court's decision to revoke his probation and has not alleged any facts which would entitle him to CR 60.02 relief. Further, the record shows that Morton really raised to the circuit court only the issues about his sentence of probation having expired before the court revoked his probation, and his lack of

knowledge regarding the earlier proceedings to modify his probation. See Daugherty v. Commonwealth, Ky., 572 S.W.2d 861, 863 (1978).

Kentucky Revised Statute (KRS) 533.050(2) provides that a court may not revoke or modify the conditions of a sentence of probation or conditional discharge except after a hearing with defendant represented by counsel and following a written notice of the grounds for revocation or modification. See McMillen v. Commonwealth, Ky. App., 717 S.W.2d 508, 509 (1986). The record in the instant case clearly shows that Morton was properly notified regarding the first motion to modify his probation and the later motion to revoke his probation. The record shows that he was personally served with the motions and grounds alleged for modification or revocation, and was notified of hearing dates. The record reveals that Morton was present and was represented by counsel at the modification hearing. The court also found in its order modifying probation that Morton had stipulated to a violation of the conditions of his probation.

Further, the record shows that the court's orders modifying and revoking probation both occurred within the proper time frames. Morton's original final judgment and sentence of two years probation was entered by the clerk of the court on January 14, 1993.¹ An affidavit was filed with the circuit court on January 11, 1995, to modify Morton's probation, because of Morton's

¹This date rather than the date the circuit court signed the judgment controls. See Ramey v. Commonwealth, Ky., 824 S.W.2d 851, 853 (1992); Paul v. Butler, Ky. App., 557 S.W.2d 443, 444 (1977).

failure to pay drug testing and supervision fees. The circuit judge on January 11, 1995, issued an order setting the matter for a preliminary hearing. Thus, this occurred within the original two year probation period. In an order entered February 1, 1995, the circuit court modified Morton's probation by extending it one more year. On October 17, 1995, an affidavit seeking to revoke Morton's probation was filed. A hearing was held on October 27, 1995, and the court on November 3, 1995, revoked Morton's probation. Thus, all of the dates fell within the original two year period or the extended three year period of probation.²

For the foregoing reasons, the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

²Morton's contention that he was not apprised of the grounds for revocation is clearly refuted by the record, as the affidavit filed with the court states that he had committed another crime, thus leading to a motion to revoke probation.

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