RENDERED: February 19, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

1997-CA-003275-MR

AND

1998-CA-000129-MR

LEON ALCORN — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES E. KELLER, JUDGE
ACTION NO. 76-CR-000241

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
*** * * * * * * * * * * * ***

BEFORE: BUCKINGHAM, JOHNSON, and KNOX, Judges.

BUCKINGHAM, JUDGE. Leon Alcorn (Alcorn) filed separate appeals from orders of the Fayette Circuit Court. Finding no error, we affirm.

In 1976, Alcorn was convicted of first-degree sodomy and of being a first-degree persistent felony offender (PFO) after a jury trial and was sentenced to fifty years in prison. The PFO conviction was vacated in 1987, and Alcorn was resentenced on the primary charge to ten years in prison. He filed motions for post-conviction relief under RCr 11.42 on two

prior occasions, and the trial court denied each motion. Alcorn's latest motion for post-conviction relief was filed pursuant to CR 60.02. By order entered on December 10, 1997, the trial court denied Alcorn's motion, and by amended order entered January 7, 1998, the trial court again denied Alcorn's motion to vacate. The trial court indicated in the latter order that the initial order was entered by "clerical mistake" and that the latter order was entered "in lieu of" the initial order. Alcorn then appealed from both orders.

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Alcorn alleges in this appeal that the trial court erred in denying his CR 60.02 motion in its order entered December 10, 1997. Alcorn states that the semen taken from the victim's person was not tested, analyzed, and compared to determine whether it could have come from an individual with Alcorn's blood type.[1] Alcorn argues that he had a right to have his blood analyzed before trial, that he was not made aware of that right, and that he was thereby deprived of a fair trial. He contends that he is entitled to have the judgment against him vacated on the grounds of this "newly discovered evidence." See CR 60.02(b).

First, Alcorn's motion was not timely filed. CR 60.02 states in pertinent part that "[t]he motion shall be made within a reasonable time, and on grounds (a) [mistake], (b) [newly-discovered evidence], and (c) [perjury] not more than one year

[1] Alcorn states that following the alleged crime, semen was taken from the victim but blood was not drawn from him (Alcorn) for testing and comparison.

after the judgment, order, or proceeding was entered or taken." Assuming the circumstances alleged by Alcorn constitute "newly discovered evidence" as he alleges, his motion on that ground should have been brought within one year of the judgment and is, therefore, untimely.[2] If the motion was brought pursuant to CR 60.02(d) (fraud), (e) (a void or satisfied judgment), or (f) (any other reason of an extraordinary nature), we conclude that it was nonetheless untimely, as it was not brought within a reasonable time as required by the rule. Furthermore, Alcorn has neither cited us to any authority nor are we aware of any which would support his argument that the failure to conduct scientific testing to determine whether the semen came from him constituted prejudicial error or violated his right to a fair trial.

Alcorn also argues that he received ineffective assistance of counsel because the counsel appointed to represent him on his CR 60.02 motion had represented the victim in a civil suit against the county jail which arose out of this crime. We find no error in this regard, as the counsel about whom Alcorn complains was replaced by substitute counsel prior to Alcorn's hearing. Alcorn's complaint in this regard is that his appointed counsel did not "supplement" his motion. However, Alcorn does not indicate in what manner the motion should have been supplemented. In short, we find no error.

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[2] We do not agree that the circumstances amount to "newly discovered evidence" at any rate.

Alcorn alleges in this appeal that the trial court's order entered on January 7, 1998, was void under CR 59.05, as the trial court had lost jurisdiction to alter, amend, or vacate the order entered on December 10, 1997. The trial court stated in its order entered on January 7, 1998, that it was entered due to "clerical mistake" in the order entered on December 10, 1997. CR 60.01 states in pertinent part that "[c]lerical mistakes in judgments, orders or other parts of the record and errors therein . . . may be corrected by the court at any time . . . ." (Emphasis added.) We determine that the trial court had the authority under that rule to correct a clerical mistake in the prior order.[3]

Alcorn also argues in this appeal that the trial court erred when it failed to credit him with time served. We have examined the record and find no pleading which would indicate that Alcorn moved the trial court to change the credit which he was given by either the trial court or the Corrections Cabinet, although this matter was discussed and a determination was made by the trial court on the video tape record. We have examined the resident record card of the Corrections Cabinet and have reviewed the record of the hearing before the trial court, and we determine that the trial court committed no error.

The orders of the Fayette Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT: BRIEF FOR APPELLEE:

[3] In reviewing the orders entered on December 10, 1997, and on January 7, 1998, we fail to see why the latter order was necessary, as each order "overruled" Alcorn's CR 60.02 motion.

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No Briefs Filed