

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-003016-MR

EVERETT ALPHONSA FORD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 102161

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: EMBERTON, MILLER, AND TACKETT, JUDGES.

TACKETT, JUDGE: Everett Alphonsa Ford appeals from an order of the Jefferson Circuit Court denying his Kentucky Rule of Civil Procedure (CR) 60.02 motion seeking release from prison following his re-commitment for a parole violation. After careful review, we affirm.

In April 1955, Ford was sentenced to life without parole after being convicted by a jury of rape pursuant to Kentucky Revised Statute (KRS) 435.090. His conviction was affirmed on direct appeal. Ford v. Commonwealth, Ky., 286 S.W.2d 518 (1956). In February 1973, the former Court of Appeals, now the Kentucky Supreme Court, affirmed the denial of his Kentucky

Rule of Criminal Procedure (RCr) 11.42 post-judgment motion. In 1978, another RCr 11.42 motion was denied by the circuit court and an appeal was not perfected.

Although the record contains no documentary evidence, Ford indicates that his sentence was commuted to life imprisonment, and he was granted parole in December 1979. In April 1987, Ford's parole was revoked for violating the condition that prohibited the possession of firearms.

In November 1997, Ford sought a writ of mandamus under CR 81 seeking to have his original unsigned 1955 judgment of conviction signed by a circuit court judge, which was denied by this Court in January 1998. In February 1998, Ford sought to vacate his sentence pursuant to RCr 9.26, RCr 10.26, and CR 61.02, again based on the fact that the trial judge failed to sign the final judgment and sentence. These motions were all denied by the circuit court in April 1998, as well as the motion to reconsider in May 1998.

In August 1998, Ford filed a motion titled "Motion for Relief From Final Judgment" pursuant to CR 60.02(f) seeking an order from the circuit court declaring that the state had no authority to hold him in custody under the original 1955 judgment and conviction for rape. Ford argued that the state forfeited jurisdiction over him when it paroled him in 1979, and he could not continue to be imprisoned because KRS 435.090 was no longer in effect. In its response, the Commonwealth asserted that Ford's request did not fall within the grounds listed in CR

60.02(f).¹ Following a reply by Ford, the circuit court entered an opinion and order denying the motion because it was untimely as well as defective on substantive grounds. This appeal followed.

Ford argues that the state has no authority to hold him in custody under his 1955 conviction for rape. He asserts that the statute under which he was convicted, KRS 439.090, was repealed in 1975, four years before he was released on parole in 1979. In addition, he notes that KRS 439.090 was not re-enacted, but rather was replaced by KRS 510.040, which imposes less severe penalties for first-degree rape of 10-20 years in prison, rather than the life sentence he received in 1955 under the old statute. Ford concluded that because KRS 439.090 was no longer in effect in 1979 when he was paroled, the state had no authority to re-incarcerate him for parole violation. He claims the state effectively forfeited jurisdiction over him by releasing him without placing him under a statute in effect at the time of his release on parole. He relies on Section 51 of the Kentucky Constitution and Commonwealth v. Cain, 77 Ky. 525 (1879). Ford requests that this court clarify or update the applicable law on situations such as his, given the obvious age of the Cain case.

A post-judgment motion under CR 60.02 is for relief that is not available by direct appeal and not available under RCr 11.42, and the movant must demonstrate why he is entitled to this extraordinary remedy. McQueen v. Commonwealth, Ky., 948

¹ The Commonwealth also stated that Ford had received a forty-year prison sentence after being convicted of murder and being a persistent felony offender in August 1989.

S.W.2d 415, 416 (1997), cert. denied, 521 U.S. 1130, 117 S.Ct. 2535, 138 L.Ed.2d 1035 (1997); Barnett v. Commonwealth, Ky., 979 S.W.2d 98, 101 (1998). Generally, whether to grant relief from a judgment pursuant to CR 60.02 is within the sound discretion of the trial court. Berry v. Cabinet for Families and Children, Ky., 998 S.W.2d 464, 467 (1999); Dull v. George, Ky. App., 982 S.W.2d 227, 229 (1998). A motion brought under CR 60.02(f) is subject to a reasonable time limit. Again, whether a CR 60.02 motion is filed within a reasonable time is within the trial court's discretion. Gross v. Commonwealth, Ky., 648 S.W.2d 853, 858 (1983).

The circuit court concluded that Ford's CR 60.02(f) motion was not filed within a reasonable time. It noted that KRS 435.090 was repealed in 1975, more than 23 years prior to Ford's filing of the motion; he was paroled in 1979, more than 19 years prior to the motion; and his parole was revoked in 1987, more than 11 years prior to the motion. We agree with the circuit court that Ford's delay in bringing the CR 60.02(f) motion on the grounds raised in the motion was unreasonable. He has not presented any reason for the delay. Consequently, the circuit court did not abuse its discretion in finding the motion was untimely.

We also agree that the circuit court did not err in denying the motion on substantive grounds. We note that Ford's reliance on Ky. Const. § 51 and Commonwealth v. Cain, supra, is misplaced. Section 51 merely deals with the titles of statutes and the requirement that in order to reenact a statute, it must

be published at length. It adds little to Ford's position because it is clear that KRS 435.090 was repealed and not reenacted. However, as the circuit court noted, Ford's recommitment for parole violation related back to the original sentence he received in 1955.

Parole is a privilege and a matter of legislative grace, rather than a constitutional right. Morris v. Wingo, Ky., 428 S.W.2d 765 (1968); Fowler v. Black, Ky., 364 S.W.2d 164 (1963); Belcher v. Kentucky Parole Board, Ky. App., 917 S.W.2d 584 (1996). A person on parole remains under the control of the state for the entire term of his sentence. Mahan v. Buchanan, 310 Ky. 832, 221 S.W.2d 945 (1949); KRS 439.346 and KRS 439.348. The parole statutes and regulations do not mandate the granting of parole or require the parole board to release an inmate prior to expiration of his sentence. See Garland v. Commonwealth, Ky. App., 997 S.W.2d 487 (1999). The Kentucky Supreme Court has held that the imposition of a life sentence without the possibility of parole for rape pursuant to KRS 435.090 is constitutional. See Land v. Commonwealth, Ky., 986 S.W.2d 440 (1999). The Commonwealth neither forfeited nor lost jurisdiction over Ford merely by releasing him on parole.

Similarly, Ford's reliance on Commonwealth v. Cain is misplaced. In Cain, the defendant was indicted in 1878 for embezzling funds from his employer, the Louisville Gas Company, on July 1, 1868, in violation of the 1838 statute that created the charter for the company for a thirty-year period. The court held that the act of 1838 expired in 1869 and that the act did

not expressly provide for punishment of offenses committed at a date after it expired. The court affirmed dismissal of the indictment. Cain is distinguishable because the indictment and prosecution of the defendant occurred after the statute supporting the charge was no longer in effect. In our situation, it is clear Ford was indicted, tried, and convicted of violating KRS 439.090 while it was still in effect.

In addition, the common law rule applied in Cain has been superceded by statute. See, e.g., Commonwealth v. Louisville & N.R. Co., 186 Ky. 1, 215 S.W. 938 (1919) and cases cited therein. In 1892, the General Assembly enacted Ky. Stat. § 465, which was recodified in 1942 as KRS 446.110, and provides:

No new law shall be construed to repeal a former law as to any offense committed against a former law, nor as to any act done, or penalty, forfeiture or punishment incurred, or any right accrued or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued or claim arising before the new law takes effect, except that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings. If any penalty, forfeiture or punishment is mitigated by any provision of the new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect.

Under this statute, the repeal of KRS 435.090 did not affect the penalty for or the authority of the state to punish persons for acts committed while it was in effect. See also Land v. Commonwealth, supra (upholding life sentences for persons convicted of rape under KRS 435.090 prior to its repeal). The

Commonwealth did not forfeit jurisdiction or authority over Ford to enforce his 1955 life sentence merely because KRS 435.090 had been repealed in 1975 prior to his release on parole.

Furthermore, KRS 446.110 clearly dictates that the subsequent enactment of KRS 510.040 with lesser sentencing ranges did not affect the sentence or status of Ford's adjudication under KRS 435.090 while it was in effect. Accordingly, the circuit court properly found that Ford's CR 60.02(f) motion lacked substantive merit.

For the foregoing reasons, we affirm the order of the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Everett A. Ford - *Pro Se*
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

William L. Daniel II
Assistant Attorney General
Frankfort, Kentucky