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Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002372-MR

CHARLES HELTON APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DANIEL J. VENTERS, JUDGE
ACTION NOS. 82-CR-00061 AND 82-CR-00121

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
VACATING AND REMANDING
** ** ** ** **

BEFORE: BUCKINGHAM, JOHNSON AND TACKETT, JUDGES.

JOHNSON, JUDGE: Charles Helton, pro se, has appealed from an order of the Pulaski Circuit Court entered on September 14, 1999, which summarily denied his "motion for modification of sentence pursuant to CR[1] 60.02 and/or KRS[2] 532.070" on the grounds that "[t]he Judicial branch of government, and therefore this Court, has no jurisdiction to modify a final judgment beyond the time limits allowed for a shock probation motion." Having concluded

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[1]Kentucky Rules of Civil Procedure.

[2]Kentucky Revised Statutes.

that the trial court erred as a matter of law as to Helton's CR 60.02 motion, we vacate its order and remand for further proceedings.

The record on appeal is very limited. The underlying convictions in this case occurred on February 24, 1983, but the record begins with an order by the Pulaski Circuit Court entered on November 13, 1986.[3] The first document of record that is relevant to this appeal is Helton's motion for modification of sentence, which was filed on September 7, 1999. In his motion and memorandum in support, Helton alleged that he had received two concurrent life sentences for two convictions of rape in the first degree. Helton requested relief pursuant to CR 60.02(f) and KRS 532.070. Helton alleged three separate grounds that supported his claim for relief: (1) that on the date of the crime, February 1, 1982, the two rape victims were 13 and 15 years old, whereby he could not have been guilty of rape in the first degree, which required a victim to be 12 years of age or younger — thus, he claims he should have been charged with rape in the second degree; (2) that he received ineffective assistance of counsel from the person (James Louis Cox) who served as his attorney before the trial court, because Cox was not admitted to the bar during part of his representation of Helton and a second attorney, who claimed to represent Helton had never talked to

[3]The order concerned a Federal Magistrate's order that the state court's record be filed in the U.S. District Court in Helton's Habeas Corpus action.

Helton and that as a result of this ineffective representation, his case was not properly investigated; and (3) that he was unable to adequately participate in his own defense because he was impaired by severe depression, paranoia and prescription medication.

The Commonwealth did not respond to Helton's motion, which was summarily denied by the trial court on September 14, 1999. This appeal followed.

Unfortunately, in his three-page brief, Helton adds nothing to the arguments that he made before the trial court. Similarly, the Commonwealth, in its three-page brief, has provided very little assistance in deciding this case. The Commonwealth cites Commonwealth v. Gross,[4] and Silverburg v. Commonwealth,[5] for its argument that "[t]he law [ ] has been well settled that the trial court lost jurisdiction over the criminal sentence ten days after entry of judgment in 1983." As we will demonstrate herein, this simple statement merely scratches the surface of this area of the law.

KRS 532.070(1) provides as follows:

> When a sentence of imprisonment for a felony is fixed by a jury pursuant to KRS 532.060 and the trial court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that a sentence of imprisonment is necessary but that the

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[4]Ky., 936 S.W.2d 85 (1996)(appellant's name was Charles J. Gross, II).

[5]Ky., 587 S.W.2d 241 (1979).

> maximum term fixed by the jury is unduly harsh, the court may modify that sentence and fix a maximum term within the limits provided in KRS 532.060 for the offense for which the defendant presently stands convicted.

We agree with the Commonwealth that in Silverburg the Supreme Court held that 38 days after the entry of the judgment and sentence the trial court had "lost jurisdiction of the case and the entry of the order modifying the sentence is void."[6]

However, numerous cases have held that it is proper for the trial court to consider a movant's claim for relief from a sentence pursuant to CR 60.02[7] well after the ten-day period provided for in CR 59.05. In Gross v. Commonwealth,[8] our Supreme Court provided a comprehensive summary of the post-judgment

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[6] Id. at 244.

[7] CR 60.02(f) provides:

> On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds:
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> . . .
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> (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.

[8] Ky., 648 S.W.2d 853 (1983)(appellant's name was Arnold Gross).

remedies that are available to a movant. Since Gross approached these issues in such a complete manner, we quote liberally from it:

> The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete. That structure is set out in the rules related to direct appeal, in RCr 11.42, and thereafter in CR 60.02. CR 60.02 is not intended merely as an additional opportunity to raise Boykin[9] defenses. It is for relief that is not available by direct appeal and not available under RCr 11.42. The movant must demonstrate why he is entitled to this special, extraordinary relief. Before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.
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> CR 60.02 was enacted as a substitute for the common law writ of coram nobis. The purpose of such a writ was to bring before the court that pronounced judgment errors in matter of fact which (1) had not been put into issue or passed on, (2) were unknown and could not have been known to the party by the exercise of reasonable diligence and in time to have been otherwise presented to the court, or (3) which the party was prevented from so presenting by duress, fear, or other sufficient cause. Black's Law Dictionary, Fifth Edition, 487, 1444.
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> In Harris v. Commonwealth, Ky., 296 S.W. 2d 700 (1956), this court held that 60.02 does not extend the scope of the remedy of coram nobis nor add additional grounds of relief. We held that coram nobis "is an extraordinary and residual remedy to correct or vacate a judgment upon facts or grounds, not appearing on the face of the record and

[9]Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

not available by appeal or otherwise, which were not discovered until after rendition of judgment without fault of the party seeking relief."

In Jones v. Commonwealth, 269 Ky. 779, 108 S.W.2d 816, 817 (1937), this court held that the purpose for the writ is to obtain a new trial in situations in "which the real facts, as later presented on application for the writ, rendered the original trial tantamount to none at all, and when to enforce the judgment as rendered would be an absolute denial of justice and analogous to the taking of life or property without due process of law."

Thus, while the remedies formerly available in criminal cases by writ of coram nobis have been preserved by CR 60.02 (Balsley v. Commonwealth, Ky., 428 S.W.2d 614, 616 (1967)), the remedies have not been extended, but have been limited by the language of that rule.

. . .

We hold that the proper procedure for a defendant aggrieved by a judgment in a criminal case is to directly appeal that judgment, stating every ground of error which it is reasonable to expect that he or his counsel is aware of when the appeal is taken.

Next, we hold that a defendant is required to avail himself of RCr 11.42 while in custody under sentence or on probation, parole or conditional discharge, as to any ground of which he is aware, or should be aware, during the period when this remedy is available to him. Final disposition of that motion, or waiver of the opportunity to make it, shall conclude all issues that reasonably could have been presented in that proceeding. The language of RCr 11.42 forecloses the defendant from raising any questions under CR 60.02 which are "issues that could reasonably

> have been presented" by RCr 11.42 proceedings.[10]

We recognize that Commonwealth v. Gross, supra, which is relied upon by the Commonwealth, limited the application of CR 60.02. The Supreme Court stated that KRS 439.265, the shock probation statute, does not "authorize 'continuing jurisdiction' or any other type of change in the original sentence." The Court also stated that "[a]ll other types of amendments or modifications are subject to the limitations of CR 59.05 and CR 60.02." The Court held that "Silverburg and McMurray[11] are applicable, and the trial court acted beyond its jurisdictional authority in granting probation under the auspices of KRS 439.265, in that the ten-day time limit of CR 59.05 had expired."[12] The Supreme Court addressed the trial court's application of CR 60.02, which had been based on the trial court's error in refusing to consider a suspended sentence as required by KRS 533.010, as follows:

> It is questionable whether the issue of mistake in the pre-sentence investigation report can be properly brought to this Court pursuant to CR 60.02. As stated in previous opinions of this Court, the purpose of CR 60.02 is to allow the trial court a method to correct errors in judgments upon a showing of "facts or grounds, not appearing on the face of the record and not available by appeal or otherwise, which were discovered after rendition of judgment without fault of the

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[10]Id. at 856-57.

[11]McMurray v. Commonwealth, Ky.App., 682 S.W.2d 794 (1985).

[12]Commonwealth v. Gross, supra at 87.

> party seeking relief." Harris v. Commonwealth, Ky., 296 S.W.2d 700, 701 (1956); see also Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856 (1983). The trial court order modifying this sentence indicated that in its original sentencing hearing the required pre-sentence investigation report opined that Gross was not eligible for probation as a result of his convictions. This opinion was not challenged at that sentencing hearing nor was it challenged on direct appeal in his first appeal to the Court of Appeals. It is only after the passage of two years that Gross advanced the argument to which the trial court agreed that his convictions were in fact eligible for probation. Whether Gross was eligible for probation or not is immaterial in this adjudication in that the issue did appear on the face of the record and was not challenged by Gross at the sentencing hearing. Therefore, the issue appears to be barred from any collateral attack whether by CR 60.02 or otherwise.[13]

Thus, Commonwealth v. Gross is consistent with Gross v. Commonwealth, and in fact, relied upon it. Both cases recognized, pursuant to Harris, that the circuit court which sentenced the defendant had jurisdiction to hear certain claims of relief "to correct or vacate a judgment upon facts or grounds, not appearing on the face of the record and not available by appeal or otherwise, which were not discovered until after rendition of judgment without fault of the party seeking relief."[14]

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[13]Id. at 88-89.

[14]Harris v. Commonwealth, Ky., 296 S.W.2d 700, 701 (1956). (See also these recent cases which applied CR 60.02: Cardwell v. Commonwealth, Ky., 12 S.W.3d 672 (2000); Land v. Commonwealth, Ky., 986 S.W.2d 440 (1999); Barnett v. Commonwealth, Ky., 979
(continued...)

As we discussed previously, the record in this case is so limited that it does not include any relevant documents from the indictment in 1982 until Helton's motion in 1999. It is not even clear from the record on appeal if Helton pled guilty or was convicted by a jury. There are no documents concerning his direct appeal or whether he filed a RCr 11.42 motion. Since the circuit court erred as to its jurisdiction of Helton's CR 60.02 motion, and since the record does not allow us to make a determination as to whether or not that error was harmless, we vacate the order of the Pulaski Circuit Court and remand this matter for further proceedings consistent with this Opinion. This remand does not mean that the trial court is required to conduct an evidentiary hearing. "Before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief."[15] However, if the record on remand is incomplete, it may be necessary for the trial court to conduct a hearing to "reconstruct the record."

ALL CONCUR.

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[14](...continued) S.W.2d 98 (1998); and Fryrear v. Parker, Ky., 920 S.W.2d 519 (1996)).

[15]See Gross, supra at 856.

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