

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000093-MR

MICHAEL T. FORD

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NO. 00-CR-00075

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: SCHRODER, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: This is an appeal from an order entered by the Laurel Circuit Court denying appellant Michael T. Ford's motion seeking CR 60.02(a) relief from a judgment of conviction. For the reasons stated hereafter, we affirm.

Ford pled guilty in March 2001 to two counts each of kidnapping and complicity to murder, and he received four sentences of life without the possibility of parole. The court dismissed several other charges pending against him.

In February 2003, Ford filed an RCr 11.42 motion seeking to vacate the judgment against him on grounds of ineffective assistance of counsel. He later moved to supplement his motion with additional grounds for relief. On October 13, 2003, the court entered an order stating that Ford's motion raised "the issue of whether he possessed the requisite mental competency to enter a valid plea of guilty." The court noted that it previously had addressed the issue of competency and had found that Ford "freely, voluntarily, knowingly and intelligently" entered his plea without ever raising the issue of his sanity. Nevertheless, the court scheduled a "short hearing" which was to be "strictly for the limited purpose of obtaining testimonial evidence" from Ford, his trial counsel, and the Commonwealth's Attorney "as to exactly what knowledge each of them possessed, prior to entering the guilty plea herein, regarding Mr. Ford's mental competency to stand trial or to enter a plea of guilty," and as to whether any of them "had reason to form an opinion that Mr. Ford may have or may not have been competent to enter a guilty plea, what that opinion was at the time of the guilty plea, and whether it was based upon more than mere speculation."

After a limited hearing the trial court entered a final order on October 31, 2003, denying Ford's motions for relief on all grounds. More particularly, the court found that

Ford stated on the record at the time of his guilty plea that he did not suffer from a mental disease or psychiatric defect, and that there was nothing in the record to indicate otherwise. Further, during the hearing Ford's trial counsel tendered a copy of an evaluative psychiatric report, based on an interview conducted several months before Ford entered his guilty plea, which indicated that he fell into the average range of intellectual functioning and that there were no "findings suggestive of impairment" in Ford's functioning "that would provide a basis for a psychological-legal defense." The court concluded that

any and all assertions made by the Movant as they relate particularly to his claim of incompetency are baseless and entirely without merit or substance. In addition, this Court finds that the Movant has failed to demonstrate any actual prejudice that would entitle him to any post-conviction relief. Based upon [counsel's] representations and the tendered Neuropsychological Evaluation, this Court is of the opinion that the Movant Mr. Ford was competent to stand trial or to enter into a guilty plea herein.

On November 19, 2003, Ford filed a motion "pursuant to CR 60.02(a) for the court to re-conduct its October 27, 2003 hearing with appointment of DPA counsel." On December 12 the court denied the motion, noting that it was authorized to exercise discretion in determining whether to award CR 60.02(a) relief, and that Ford's assertions lacked merit or substance.

The court found that it was not obligated to grant the verbal request Ford made during the RCr 11.42 hearing for the appointment of counsel to represent him during that hearing, and that in any event Ford was not prejudiced by the denial of the request. On January 13, 2004, Ford filed a notice of appeal "from the ORDER denying RCr 11.42 Relief, that was entered on December 15th, 2003."

Despite the statement in Ford's notice of appeal that RCr 11.42 relief was denied on December 15, the order denying such relief in fact was entered on October 31, 2003. The notice of appeal filed on January 13, 2004, therefore was not timely since it was not filed within thirty days "after the date of entry of the judgment or order from which it [was] taken." Moreover, it cannot be said that the time for filing the notice of appeal was stayed by the filing of Ford's motion seeking CR 60.02 relief, as the running of time for filing an appeal from a final judgment may be stayed only by a timely motion for a new trial or to alter, amend or vacate a judgment.¹ Even if we were persuaded by Ford's argument that his pro se motion for CR 60.02 relief should be treated as a motion to alter the judgment which stayed the running of time for appeal, his appeal still could not be considered timely since not even the CR 60.02 motion was

¹ See CR 73.02(1)(e), applicable to criminal cases by virtue of RCr 13.04, which permits the abatement of the running of time for appeal only upon the timely filing of a motion pursuant to CR 50.02, 52.02, or 59.

filed within the requisite ten-day period after entry of the order denying RCr 11.42 relief. Thus, Ford's appeal from the trial court's denial of RCr 11.42 relief was not timely, and the issues raised in that motion are not properly before us on appeal.

Finally, Ford would not be entitled to relief even if we treated his pro se notice of appeal as having been intended to apply to the order denying CR 60.02(a) relief. Ford alleged in his CR 60.02 motion that the trial court should have granted his oral request to appoint counsel to represent him during the RCr 11.42 evidentiary hearing which addressed his mental competency to enter a guilty plea. However, RCr 11.42(5) specifically provides that a trial court need not appoint counsel to represent a movant in an RCr 11.42 proceeding unless that movant requests such an appointment by a "specific written request."² Here, such a written request was not made. Further, since Ford's trial counsel testified and produced evidence to show that the psychological and neuropsychological evaluation conducted before Ford entered his guilty plea did not support a psychological defense, there is nothing to suggest that Ford was prejudiced by the court's failure to appoint counsel to represent him during the RCr 11.42 hearing. Thus, it is clear from the record that there was no "mistake, inadvertence,

² See also *Fraser v. Commonwealth*, 59 S.W.3d 448, 453 (Ky. 2001).

surprise or excusable neglect"³ which would entitle Ford to relief herein, and the trial court did not abuse its discretion by denying his motion for CR 60.02 relief.

The court's order is affirmed.

ALL CONCUR.

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³ CR 60.02(a).