RENDERED: July 8, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 1999-CA-002042-MR

WILLIAM A. HERNDON APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY
NO. 2002-SC-000452-DG

APPEAL FROM BULLITT CIRCUIT COURT
v. HONORABLE THOMAS WALLER, JUDGE
ACTION NO. 95-CI-00506

MARCELLA A. HERNDON (NOW VIERS) APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: BARBER AND DYCHE, JUDGES; MILLER, SENIOR JUDGE.[1]

BARBER, JUDGE: This case is before us on remand from the Kentucky Supreme Court's decision in Herndon v. Herndon, 139 S.W.3d 822 (Ky. 2004) in which it was held that the appellant's claim that the circuit court's adoption of a domestic relations commissioner's recommendation to deny his CR 60.02 motion should have been considered by this Court under a palpable error

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

standard. Id. at 826-827. The Supreme Court remanded the case for a review of the merits of the claim. Id. at 827. Having reviewed the entire record on appeal as well as carefully examining the Supreme Court's directive, we reverse and remand.

On November 15, 1995 an amended decree of dissolution was entered ending the marriage of William A. Herndon (hereafter William) and Marcella A. Herndon (now Viers) (hereafter Marcella). Although the decree dissolved the marriage it reserved all other issues such as custody, visitation, and property distribution to be decided at a later time. The case was referred to the domestic relations commissioner (DRC).

A hearing before the DRC was scheduled for June 25, 1998. Instead of conducting a hearing the parties attempted to reach a settlement with the DRC serving as mediator. Marcella and her counsel as well as counsel for William were present. William was not present due to his incarceration in Florida. However, it is undisputed that he had frequent telephone contact with his attorney throughout the proceeding. It is also undisputed that William's attorney dictated the terms of an "agreed" settlement and Marcella's attorney had it transcribed.

Once the transcribed settlement was presented to William he refused to sign it claiming it contained terms and conditions to which he had not agreed. Marcella maintains the settlement was transcribed verbatim from the dictation of

William's attorney and that William's attorney represented that he had the authority to enter into the agreement on his client's behalf. Nowhere in the record that we can discern does there appear an assertion of exactly what terms of the transcribed settlement agreement William opposes.

In response to William's refusal to sign the settlement agreement, Marcella moved the circuit court to enforce it. The motion was filed Wednesday, July 29, 1998 and noticed to be heard the following Monday, August 3, 1998 at 9:00 a.m. The motion was served by mail to William's attorney[2] on July 29, 1998.

On August 3, 1998 William's attorney arrived at motion hour 15 minutes late. The court had already entered the settlement agreement as the court's own order, thus, granting Marcella's motion to enforce the settlement agreement. William's attorney learned this from Marcella's attorney whom he ran into on the way into court.

On August 17, 1998 William filed a motion pursuant to CR 60.02 to have the court's order adopting the settlement agreement set-aside.[3] The court referred the matter to the DRC

[2] William's attorney on appeal is different than the one in the circuit court.

[3] We note that the clerk's date and time stamp on the motion mark it as filed on August 17, 1998 at 2:26 p.m. although the motion was noticed to be heard that same day at 1:45 p.m. Further it appears that it was served by hand-delivery to Marcella's attorney on August 17, 1998 in open court. William obviously did not comply with the local rules of the circuit court regarding filing deadlines on motions, but no objection appears of record and there is

who held a hearing in December 1998 and in June 1999 recommended William's CR 60.02 motion be denied. No one filed objections to the DRC's recommendation pursuant to CR 53.06(2). Thus, on July 25, 1999 the circuit court adopted the DRC's recommendation and denied William's motion. William appealed the ruling.

In its first stop before this Court we dismissed the case on the basis of Eiland v. Ferrell, 937 S.W.2d 713, 716 (Ky. 1997). Eiland held that, "[i]n general, a party who desires to object to a [domestic relations commissioner's] report must do so as provided in CR 53.06(2) or be precluded from questioning on appeal the action of the circuit court in confirming the commissioner's report." Id. at 716. Since William failed to object to the DRC's recommendation that his CR 60.02 motion be denied, we dismissed the case ruling that the error he claimed was unpreserved.

The Supreme Court granted discretionary review and made clear in its opinion that decisions of a circuit court adopting a DRC's recommendation are still reviewable under the substantial error standard in CR 61.02 even if the claimed error is insufficiently preserved for review. Herndon, supra.

Now – to the heart of this appeal. William has maintained throughout the appellate process that it was palpable error for the circuit court to refuse to set aside its order

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no evidence of prejudice to Marcella. Tri-State Consolidated Gas Co. v. Campbell, 329 S.W.2d 571, 573 (Ky. 1959).

adopting the transcribed settlement agreement. He bases this claim on the assertion that he was given insufficient notice of the date and time it was to be heard.[4] It will be recalled from above that Marcella filed her motion to enforce the agreement on Wednesday, July 29, 1998 to be heard the following Monday, August 3, 1998 at 9:00 a.m. Service on William was accomplished by first class mail to his attorney on July 29, 1998. It is unknown when William's attorney actually received notice. What is known is that William's attorney gained knowledge of the motion sometime before the 9:00 a.m. motion hour since he appeared, albeit 15 minutes late.

CR 6.04 contains guidelines for the service of most written motions and requires that "notice of the hearing thereof shall be served a reasonable time before the time specified for the hearing. . . ." CR 6.04(1). And, if the motion includes supporting affidavits, (as did the motion to enforce the settlement agreement filed by Marcella) then the opposing party must be given the opportunity to file opposing affidavits. CR 6.04(2). The crux of the case is dependent on the construction of a "reasonable time."

The motion in this case was filed and served by Marcella on Wednesday, July 29, 1998. Filing and service are

[4] William did not make this assertion to the circuit court. However, CR 61.02 allows an appellate court to consider whether it is a palpable error even though insufficiently raised or preserved.

two different things; a notice, motion, or other paper may be served at a different time than it is filed. Thus, Marcella's contention that service of the motion was *per se* reasonable since it was filed within the constraints of the Local Rules of the Bullitt Circuit Court is not convincing.

CR 6.01 requires the computation of time in this case to exclude Saturday, August 1 and Sunday, August 2, 1998 because the time frame allowed between the service of the motion and the hearing on the motion was less than 7 days. It also does not include Wednesday, July 29, 1998 since that was the date "after which the designated period of time [allowed] begins to run." CR 6.01. It does not seem equitable to include Monday, August 3, 1998 in the days that William had notice since the hearing was set for 9:00 a.m. although CR 6.01 appears to direct its inclusion. CR 6.01 ("The last day of the period so computed is to be included. . . ."). But cf. Rexing v. Doug Evans Auto Sales, Inc., 703 S.W.2d 491, 493 (Ky.App. 1986) (requiring 10 full 24 hour days of notice prior to a hearing on a motion for summary judgment).

Thus, under the Rules, William had a maximum of three days notice prior to the hearing.

The purpose of sending notice of a motion to be heard is to provide a reasonable opportunity for the opposing party to appear, respond, and have a meaningful opportunity to be heard

prior to the entry of any order. 60 CJS Motions and Orders §13. In commenting on the reasonable time component of CR 6.04, Kurt A. Phillips notes:

> The "reasonable time" requirement of this Rule is a practical one, and its application would depend upon the nature of the motion and the attendant circumstances. Since the object is fair notice, a reasonable time would be that which would give the adverse party a reasonable opportunity to prepare his opposition and to arrange to be present at the hearing. . . . If the motion is supported by affidavit, the time should be sufficient to enable the adverse party to obtain counter-affidavits.

6 Kurt A. Phillips, Jr., Kentucky Practice, CR 6.04, cmt. 2 (5th ed. 1995).

In another context Kentucky's highest court has held a notice on Friday to take depositions the following Monday was unreasonable under the Civil Code of Practice considering that those particular depositions required travel from Whitesburg, Kentucky to Hamilton, Ohio. Consequently, the Court held they should not have been admitted into evidence. Adams v. Letcher County, 299 Ky. 171, 174-175, 184 S.W.2d 801, 803 (1944). See also, Koehler v. Commonwealth by and ex rel. Luckett, 432 S.W.2d 397, 399 (Ky. 1968)(3 days notice of motion to dismiss is not reasonable); Armstrong v. Biggs, 275 S.W.2d 60, 62 (Ky. 1955)(3 days notice for taking depositions is not reasonable); Rexing,

supra 703 S.W.2d at 493 (10 days notice required for summary judgment motions means 10 full 24 hour days).

Applying the above principles to the case at hand, we believe that 3 days notice on Marcella's motion to enforce the settlement agreement is unreasonable. The purpose of CR 6.04 requiring reasonable notice is to allow adequate time to prepare, appear, and be heard in opposition. Where the motion includes supporting affidavits, as it did here, that time should include a sufficient amount of time to obtain counter-affidavits. The only affidavits that could have been submitted on behalf of William in this situation would be his attorney's and/or his. There can be no doubt that acquiring an affidavit from William within the time allowed would be very difficult in view of his incarceration in another state.

Even though the time allowed between the service of notice and the hearing on the motion is not reasonable, William must still meet the standard contained in CR 61.02 for reversal to be the result.[5] That standard requires William to show a palpable error affecting his substantial rights that resulted in manifest injustice. Deemer v. Finger, 817 S.W.2d 435, 437 (Ky. 1990); CR 61.02.

[5] Since we have held 3 days unreasonable notice in these circumstances, it is unnecessary to consider whether or not the 3 day mail rule in CR 6.05 applies. At least one authority posits its application to motions is debatable. 6 Kurt A. Phillips, Jr., Kentucky Practice, CR 6.05, cmt. 3 (5th ed. 1995). See also, Arnett v. Kennard, 580 S.W.2d 495, 496 (Ky. 1979)(CR 6.05 only applies to those periods that are triggered by service).

William has made that showing. The settlement agreement finally disposed of the case. Its contents determined substantial rights of the parties such as property distribution. The result, if in fact William did not agree to certain of the provisions in it, would be manifest injustice.

This is not to say that Marcella's motion for the trial court to enforce the settlement agreement is not well-taken. The factors taken into account on such a motion, however, are different than those regarding whether or not to grant a CR 60.02 motion.

Here, William has argued throughout that his attorney did not have the authority to bind him to the terms of the settlement. In response Marcella has maintained that the written settlement agreement is a verbatim transcription of what William's attorney dictated. Further, she states that she relied on William's attorney's representation that he possessed the authority to enter into a settlement agreement. There is also the matter of William's communication with his attorney during the June 25, 1998 proceeding.

In such circumstances the Kentucky Supreme Court has directed trial courts to "summarily decide the facts." Clark v. Burden, 917 S.W.2d 574, 577 (Ky. 1996). If the court finds that William gave express authority to enter into the settlement agreement or that Marcella was substantially and adversely

affected by her reliance, then it is free to enforce the settlement agreement. Id.

The order of the Bullitt Circuit Court denying William's CR 60.02 motion is reversed. The case is remanded with directions for the court to set-aside the settlement agreement entered as its own order and to rehear Marcella's motion to enforce it in accordance with the guidelines in Clark, supra.

ALL CONCUR.

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