

RENDERED: MARCH 17, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002106-MR

DIRK WASHINGTON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 03-CR-01154

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TACKETT AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹
EMBERTON, SENIOR JUDGE: The single question in this appeal is whether the trial court erred in denying appellant's CR 60.02 and RCr 10.26 motions for relief from a judgment based upon his guilty plea to one count of flagrant non-support, one count of criminal non-support and to being a first-degree persistent felony offender. We affirm.

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

In 1992, after acknowledging paternity of D.W. in open court, appellant was declared to be the legal father of D.W. and ordered to pay \$25.00 per week for support of the child. In 1997, he acknowledged paternity of D.B. and was ordered to pay support for that child in the amount of \$25.00 per week. A Fayette County grand jury indicted appellant on September 22, 2003 on two counts of flagrant non-support for failing to support D.W. and D.B. Based upon two previous convictions for flagrant non-support in 1994 and 1996 and a 1986 conviction for second-degree robbery, appellant was also indicted for being a persistent felon in the first degree.

On November 7, 2003, appellant accepted the Commonwealth's offer to amend count II of the indictment charging felony non-support of D.W. to criminal non-support in exchange for his plea of guilt to one count of flagrant non-support, one count of criminal non-support and PFO I. The trial judge accepted appellant's plea in open court and noted that appellant was in arrears in the amount of \$13,700.00 in his support obligation. He was subsequently sentenced to one year on the flagrant non-support count, enhanced to ten years by virtue of the persistent felon count. The trial judge also sentenced appellant to twelve months on the criminal non-support charge to run concurrently with the other charges. Appellant

was placed on probation for five years or until the child support arrearage was paid in full.

On July 2, 2004, appellant's probation was revoked for failing to report to an assigned treatment program and absconding supervision. Although he offered no explanation for his failure to report to the program, appellant indicated to the trial court that D.W. was not his child. The trial judge thereafter sentenced appellant to his original sentence of ten years' imprisonment. Shortly thereafter, appellant filed a CR 60.02 motion in which he alleged that a paternity test had proven that he was not the father of D.W. After determining that appellant's guilty plea to flagrant non-support had been voluntary, knowing and willing, the trial judge denied the CR 60.02 motion on August 16, 2004.

On September 27, 2004, appellant filed a motion to "vacate or correct judgment pursuant to RCr 10.26 substantial error," contending that his due process rights were violated when the trial court accepted his guilty plea without confirmation that D.W. was in fact his child. He also alleged that a paternity test administered to D.W., D.W.'s mother, and a third party revealed the third party to be D.W.'s father. The denial of that motion precipitated this appeal.

Although the Commonwealth initially cites procedural impediments as to the timeliness of the appeal and the propriety

of advancing his arguments via RCr 10.26, we are convinced that the interests of judicial economy are best served by disposing of this case on the merits. The trial judge properly ruled that appellant had acknowledged paternity of the two children involved in the non-support prosecution over twelve years earlier. Once paternity was established, his obligation to support the children was fixed. We find no error in the trial judge's assessment that appellant's entry of a guilty plea in the non-support prosecution, which constituted an admission of the truth of the factual underpinnings of the amended charges, precludes his current challenge to his paternity of D.W.

Furthermore, we are convinced that the filing of CR 60.02 and RCr 10.26 motions in his non-support prosecution is not the appropriate vehicle for challenging the paternity of one the children. If appellant's unsubstantiated allegations concerning the child's paternity are to be tested, the underlying paternity action is the proper forum, although it should be stressed that that avenue of relief is not without potential problems for appellant.²

More important, however, is the propriety of trial judge's determination that, even if appellant's allegations

² See S.R.D. v. T.L.B., 174 S.W.3d 502, 510 (Ky.App. 2005) in which this court held that the appellant was estopped to deny paternity in light of his past conduct.

concerning D.W. were to prove true, it would be of no avail to him in light of his guilty plea to flagrant non-support concerning D.B. It was the one-year sentence entered upon his guilty plea to flagrant non-support concerning D.B which was enhanced to 10 years by virtue of the PFO I component of his plea. Thus, removal of the amended charge of criminal non-support concerning D.W. can have no impact on his status as a persistent felony offender.

Unfortunately for appellant, it was his failure to abide by the lenient conditions of probation imposed by the trial judge that precipitated his present predicament. We find no error.

Accordingly, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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