RENDERED: NOVEMBER 16, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-000810-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 98-CR-002950

TAMMY SHARP — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: HOWARD, NICKELL, AND TAYLOR, JUDGES:

NICKELL, JUDGE: The Commonwealth has appealed from the December 19, 2006, order of the Jefferson Circuit Court denying its motion to reconsider the March 18, 2005, and April 26, 2005, orders setting aside and vacating Tammy Sharp's ("Sharp") 1999 conviction for manufacturing methamphetamine,[1] trafficking in methamphetamine,[2] trafficking in marijuana over eight ounces,[3] and illegal use or possession of drug paraphernalia.[4] For the following reasons, we reverse and remand.

[1] Kentucky Revised Statutes (KRS) 218A.1432, a Class B felony.

[2] KRS 218A.1435, a Class C felony.

[3] KRS 218A.1421, a Class D felony.

[4] KRS 218A.500, a Class A misdemeanor.

Initially, we note Sharp has not filed a brief with this Court. The decision on how to proceed in imposing penalties for such a failure resides in the discretion of this Court. *Roberts v. Bucci*, 218 S.W.3d 395 (Ky.App. 2007). Pursuant to Kentucky Rules of Civil Procedure (CR) 76.12(8)(c), we have three courses of action:

> If the appellee's brief has not been filed within the time allowed, the court may: (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

We hold the Commonwealth's brief reasonably appears to support reversal and will limit our discussion to only those matters necessary to ensure proper resolution upon remand. CR 76.12(8)(c)(ii).

On April 5, 1999, Sharp entered a negotiated guilty plea to all counts charged against her. On May 18, 1999, Sharp was sentenced to twelve years' imprisonment, probated for a period of five years. Following completion of her probation, in February 2005, Sharp filed a motion pursuant to KRS 218A.275, 431.076, and 431.078, to set aside and void her conviction and to expunge her criminal record. As reasons therefore, Sharp stated she had successfully completed the Drug Court Program, had not been charged with any additional criminal offenses, had remarried, had enrolled in community college, and was serving her community by working with several charitable organizations. The Commonwealth filed a response in opposition. On March 18, 2005, the circuit court entered an order setting aside and voiding Sharp's convictions

pursuant to KRS 218A.275 but denied her motion to expunge her criminal record.[5] The Commonwealth timely filed a motion to reconsider on March 23, 2005.

Prior to obtaining a ruling on its motion to reconsider, the Commonwealth filed a notice of appeal. Subsequently, on April 26, 2005, the trial court ruled on the motion to reconsider. In its order, the circuit court agreed with the Commonwealth that KRS 218A.275 was inapplicable to the facts at bar and would not authorize voiding Sharp's convictions, but refused to reverse its earlier ruling. Instead, the circuit court held that CR 60.02(f), made applicable to criminal cases by Kentucky Rules of Criminal Procedure (RCr) 13.04, authorized the extraordinary relief granted because Sharp had taken "considerable actions to turn around her life."

The Commonwealth then filed a second notice of appeal. However, because the circuit court had lost jurisdiction prior to entering its April 26, 2005, order, *Johnson v. Commonwealth*, 17 S.W.3d. 109 (Ky. 2000) (as a general rule, the filing of a notice of appeal divests a trial court of jurisdiction to rule on any motion while appeal is pending), we dismissed the second appeal and remanded the matter with directions for the circuit court to adjudicate the Commonwealth's motion to reconsider before proceeding with the instant appeal. On December 19, 2006, the circuit court entered an order adopting and reiterating its March 18, 2005, order *in toto*.[6] This appeal proceeded.

[5] Although neither party challenged the trial court's refusal to expunge Sharp's criminal record, we believe it important to note the ruling was correct as the plain language of the expungement statutes limits such relief to certain violation, misdemeanor, and felony drug possession convictions. KRS 431.076, 431.078.

[6] We note that the March 18 and April 26, 2005, orders were entered by Judge Stephen P. Ryan. However, in the interim, Judge Ryan retired and was succeeded by Hon. W. Douglas Kemper,

The sole question presented in this appeal is whether a criminal defendant's reform is sufficient to void a prior conviction under the "extraordinary circumstances" exception of CR 60.02. Although we believe it is not, we need not reach that question as the trial court improperly invoked CR 60.02 as a matter of law. It is axiomatic that a party must affirmatively request relief under CR 60.02 and must affirmatively demonstrate entitlement to the extraordinary relief requested. *See McQueen v. Commonwealth*, 948 S.W.2d 415 (Ky. 1997), *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983). No motion for such relief was presented to the trial court. There was no mention of CR 60.02 until after the Commonwealth notified the circuit court of the erroneous reasoning contained in its March 18, 2005, order. The trial court then, *sua sponte*, invoked CR 60.02.

As a question of law, the circuit court's decision to void Sharp's conviction pursuant to CR 60.02 is reviewed *de novo* and we give no deference to its interpretation and decision. *Cinelli v. Ward*, 997 S.W.2d 474 (Ky.App. 1998). We hold the trial court abused its discretion in finding Sharp was entitled to relief under CR 60.02, an avenue of relief she did not request. The rule requires affirmative action by a party aggrieved by a judgment. The trial court's discretion is limited to determining whether to then grant the relief sought. We are unable to locate any precedent giving a trial court discretion to *sua sponte* grant CR 60.02 relief, and thus hold such authority does not exist. Therefore, we are compelled to reverse the erroneous order.

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who actually entered the December 19, 2006, order.

Even were we not compelled to reverse the decision based upon the trial court's erroneous *sua sponte* invocation of CR 60.02, we are convinced reversal would still be necessary as Sharp's claims of reform simply do not rise to the level of "extraordinary circumstances" as required by the rule. While her alleged reformation is certainly laudable, it is not extraordinary, but merely expected in a society of law-abiding citizens. If mere reform were sufficient to overturn an otherwise valid judgment, no criminal conviction could ever truly be considered final. Relief under CR 60.02 requires substantially more than turning one's life around. Arguments such as those presented by Sharp are "more properly addressed in a plea to the executive for clemency under Section 77 of our Constitution." *McQueen, supra*, 948 S.W.2d at 418.

For the foregoing reasons, the opinion and order of the Jefferson Circuit Court is reversed and remanded for reinstatement of Sharp's criminal convictions.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

No brief filed.