

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002289-MR

CLINTON K. REGAN

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 01-CR-00195

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AND ORDER DISMISSING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; ACREE, JUDGE; HENRY,¹ SENIOR JUDGE.

ACREE, JUDGE: Clinton Regan appeals, *pro se*, from an order of the Laurel Circuit Court denying his motion to proceed *in forma pauperis* and for the appointment of counsel to perfect his appeal. Regan's notice of appeal incorrectly names this order, entered August 30, 2006, rather than the order denying his request for relief under Kentucky Civil Rule (CR) 60.02, entered August 21, 2006. Due to his error, this Court never obtained jurisdiction to hear an appeal from the denial of CR 60.02 relief.

Consequently, this appeal is dismissed.

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

Regan was indicted on charges of murder, first-degree robbery, first-degree burglary, felony theft, and being a persistent felony offender in the first degree after he and a co-defendant escaped from prison, broke into a home, killed the homeowner, and stole his car. The Commonwealth filed notice of its intent to seek the death penalty. Regan's counsel was able to negotiate a plea bargain for a total sentence of thirty-five years. After more than two years had passed, Regan filed a motion for post-conviction relief, pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42, alleging ineffective assistance of counsel and claiming that his guilty plea was involuntary. The trial court denied his RCr 11.42 motion, and he appealed to this Court.

While his appeal on the RCr 11.42 motion was pending, Regan filed a motion to vacate his conviction under CR 60.02. This motion contained similar allegations of ineffective assistance of counsel and involuntariness of his guilty plea. This Court placed the appeal of the order denying RCr 11.42 relief in abeyance while the trial court considered Regan's CR 60.02 motion. The trial court's order of May 8, 2006, denied Regan's CR 60.02 motion on the grounds that the issues he raised were more appropriately addressed in his RCr 11.42 proceeding. Unfortunately, the trial court's order was apparently mailed to the wrong correctional facility, and Regan did not receive notice that the trial court had denied his CR 60.02 motion in time to file an appeal. After the trial court ruled on Regan's CR 60.02 motion, this Court placed the appeal from the denial of RCr 11.42 relief back on the active docket. It was at this point that Regan became aware of the trial court's order denying his CR 60.02 motion. We denied his

request to reconsider returning his RCr 11.42 appeal to the active docket and, in an unpublished opinion, affirmed the trial court. *Regan v. Commonwealth*, No. 2005-CA-000586-MR, 2005 WL 2033693 (Ky.App. July 21, 2006).²

Regan then filed a second CR 60.02 motion asking the trial court to vacate its previous order denying his first CR 60.02 motion and to enter a new order from which he could file a timely appeal. The trial court denied this motion in an order entered on August 21, 2006. No notice of appeal was filed; however, Regan filed a motion to proceed on appeal *in forma pauperis* and for appointment of counsel. The trial court's next order, dated August 30, 2006, denied Regan's requests because he failed to attach an inmate account statement as required. He was given leave to refile his motion, with the appropriate documentation, which he did. The trial court partially sustained the motion, ordering Regan to pay a fifty dollar filing fee. Regan filed a notice of appeal "from the Order Denying the Movant's motion to proceed on appeal *in forma pauperis* and for the Appointment of Counsel to perfect his appeal, entered August 30, 2006." No appeal of the August 21, 2006, order denying his second CR 60.02 motion was ever filed.

On appeal, Regan argues in support of his CR 60.02 motion. He contends the trial court erroneously relied on *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983), when it determined the claims in his CR 60.02 motion were not appropriate for review under the rule. This argument, however, is irrelevant because Regan never perfected an appeal from the trial court's order denying his CR 60.02 motion. It is well-established that the filing of the notice of appeal is mandatory and that the appellate court

² The caption in this case misspelled the appellant's name as "Reagan."

lacks jurisdiction unless such notice is timely filed. *Demoss v. Commonwealth*, 765 S.W.2d 30, 32 (Ky.App. 1989)(citing *Cobb v. Carpenter*, 553 S.W.2d 290 (Ky.App. 1977) and *Commonwealth v. Cobb*, 728 S.W.2d 540 (Ky.App. 1987)). Since Regan's notice of appeal failed to name the order denying his CR 60.02 motion, this Court never obtained jurisdiction to consider the merits of that appeal. Further, the trial court gave Regan leave to refile his motion to proceed *in forma pauperis* with proper documentation and a subsequent motion was, in fact, filed and partially granted. Consequently, this appeal is moot.

For the foregoing reasons, the appeal from the trial court's order of August 21, 2006, is DISMISSED.

ALL CONCUR.

ENTERED: December 7, 2007

/s/ Glenn E. Acree
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

Clinton K. Regan, *pro se*
Eddyville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky