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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000897-MR

JACOB BURNETT — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULZ GIBSON, JUDGE
INDICTMENT NOS. 03-CR-001031; 03-CR-001389; 03-CR-001583;
AND 04-CR-002252

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND VANMETER, JUDGES; KNOPF,[1] SENIOR JUDGE.

CLAYTON, JUDGE: Jacob Burnett appeals from an order of the Jefferson Circuit Court denying his motion to set aside its order under Kentucky Rules of Civil

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Procedure (CR) 60.02 and Kentucky Rules of Criminal Procedure (RCr) 11.42. Our review of the record discloses no error on the part of the trial court, and we therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The facts in this case are convoluted and require a detailed explanation. The case involves three (3) separate indictments and an information. On April 16, 2003, Burnett was indicted in case number 03-CR-1031 (1031) wherein he was charged with three (3) counts of Robbery I, two (2) counts of Burglary I, Kidnapping, two (2) counts of Theft by Unlawful Taking over $300, two (2) counts of Receiving Stolen Property over $300, and Fraudulent Use of a Credit Card (Counts 1, 2, 4, 9, 10, 12, 13, 14, 16, and 23). The case was filed in Division 15[2].

Next, on May 28, 2003, Burnett was indicted in 03-CR-1389 (1389), in Division 10, for three (3) counts of Robbery I. Then, on June 18, 2003, he was indicted in 03-CR-1583 (1583) in Division 12 for Assault II. And, finally, on August 5, 2004, the Commonwealth filed an information, 04-CR-2252 (2252) in Division 15 on three (3) counts of Robbery I, two (2) counts of Burglary I, Kidnapping, Fraudulent Use of a Credit Card, and Theft or Receipt of a Stolen Credit/Debit card. This included a recharge of counts 1, 2, 4, 9, 10, 12, and 23 of

[2] During the pendency of these actions, the divisions of Jefferson Circuit Court were renumbered. The guilty plea in 2252, involving the charges dismissed in 1031, was in Division 15, thereafter Division 12 when the RCr 11.42 motion was filed. The guilty plea in 1583 was in Division 12, thereafter Division 10 when the RCr 11.42 motion was filed. And the judgment of conviction in 1389 was entered in Division 10, thereafter Division 8 when the RCr 11.42 motion was filed.

1031, which had been dismissed without prejudice following the Commonwealth's motion on April 5, 2004.

To illustrate further, a historical review shows that initially, on April 16, 2003, the Jefferson County Grand Jury handed down a forty-one (41) count indictment, 1031. Subsequently, on April 5, 2004, as previously mentioned, by motion of the Commonwealth, the charges were dismissed without prejudice. On May 17, 2004, Burnett went to trial in 1389 and was convicted of one (1) count of Robbery I. Prior to the penalty phase, Burnett reached a plea agreement with the Commonwealth. In the agreement, he pled guilty not only to 1389 but also agreed to plead guilty to the charges in 1031 and 1583.

Later, on August 5, 2004, the Commonwealth filed the information (2252) in Jefferson Circuit Court, Division 15, incorporating most of the charges from the previous indictment (1031). Ultimately, in 2252, Burnett accepted the Commonwealth's offer of fifteen (15) years on the guilty plea. Regarding the recommended fifteen- (15) year sentence, the plea agreement stated:

> This sentence shall run concurrent to the 10 year sentence that defendant is currently serving in case number 03-CR-1389 (out of Division 10) and shall run concurrent to 5 year sentence in 03-CR-1583 (Division 12) for a total sentence of 15 years to serve.

Moreover, the guilty plea in 1583 specifically provided that the sentence was to run consecutive to 1389 and concurrent with 2252. The court entered its final judgment on September 3, 2004, in accordance with the aforementioned plea agreements.

Two (2) years later, on August 30, 2006, Burnett, filed a pro se motion to vacate pursuant to RCr 11.42 in all three (3) cases, 1389, 1583, and 2252, claiming ineffective assistance of counsel. Following Burnett's filing of the RCr 11.42 motion in 1389 (Division 8), the court ordered the appointment of a public defender and gave Burnett forty-five (45) days to amend or supplement his pleadings. Neither Division 10 (1583) nor Division 12 (2252) entered any orders relative to the motion.

Meanwhile, on October 12, 2006, Burnett's father hired counsel, Bruce A. Brightwell, to represent his son. The only paperwork, however, given to Brightwell was relevant to 1389, and thus, he did not know about the other cases. Later, when he filed a motion for substitution of counsel and extension of time in 1389, he discovered that the court did not have the case file. Brightwell then filed a motion to require the clerk's office to find the file. While this motion was not granted, the court assured Brightwell that the clerk's office would continue to look for the file.

On February 7, 2007, Brightwell filed a second motion for extension of time in the 1389 case. The court informed him that the file had been found, but an order had been entered in the case denying the RCr 11.42 motion. Apparently, with regard to the three (3) cases listed in Burnett's pro se RCr 11.42 motion, the Commonwealth filed a response on November 20, 2006, and on January 10, 2007, the Jefferson Circuit Court, Division 12, denied the RCr 11.42 motion in both 1389 and 2252, and sent 1583 back to Division 10 for further proceedings.

After Brightwell learned the fate of the RCr 11.42 motion, he moved under CR 60.02 to set aside the order of January 10, 2007. Following his motion and the Commonwealth's response, the court in Division 12 held a hearing on March 5, 2007. On April 25, 2007, the court entered an order, which granted the CR 60.02 motion as to 1389 and remanded it to Division 8 for further proceedings. Additionally, the court remanded 1583 to Division 10 for further proceedings but did not set aside its ruling on 1031/2252. We surmise from a review of the files and the video of the March 5, 2007, hearing that the trial judge set aside the order in 1389 because Division 8 had granted Brightwell an extension of time to file a response to the denial of the RCr 11.42 motion. It seems the court considered this fact sufficient to meet the requirements for setting aside an order under CR 60.02(a). However, the court did not grant the CR 60.02 motion as it relates to 2252, and Burnett appeals this part of the court's decision.

ANALYSIS

1. CR 60.02 Motion

The purpose of CR 60.02 is to permit the court to correct errors in a judgment which: (1) had not been put into issue or passed on; (2) were unknown and could not have been known to the party by the exercise of reasonable diligence and in time to have been otherwise presented to the court; or (3) which the party was prevented from so presenting by duress, fear, or other sufficient cause. *Gross v. Com.*, 648 S.W.2d 853, 856 (Ky. 1983). The first five subsections of CR 60.02 lay out specific grounds for relief, while CR 60.02(f) permits a court to relieve a

party from its final judgment for "any other reason of an extraordinary nature justifying relief." Furthermore, CR 60.02(f) requires a movant to show extraordinary circumstances warranting such relief. *Com.v. Bustamonte*, 140 S.W.3d 581, 583 (Ky. App. 2004).

The standard of review from an order granting or denying relief under CR 60.02 is addressed to the "sound discretion of the court and the exercise of that discretion will not be disturbed on appeal except for abuse." *Richardson v. Brunner*, 327 S.W.2d 572, 574 (Ky. 1959). Rule 60.02(f) "may be invoked only under the most unusual circumstances[.]" *Howard v. Com.,* 364 S.W.2d 809-10 (Ky. 1963); and relief should not be granted, pursuant to Rule 60.02(f), unless the new evidence, if presented originally, would have, with reasonable certainty, changed the result. *See Wallace v. Com.*, 327 S.W.2d 17 (Ky. 1959). Accordingly, this Court can only reverse the denial of a motion pursuant to CR 60.02 if the trial court abused its discretion. *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996).

Burnett contends that 2252 merits relief under CR 60.02(a) and (f) for four (4) reasons: the procedural confusion in the three (3) cases was excusable neglect, to avoid inconsistent results, Burnett was unfairly prejudiced, and the Commonwealth will not be prejudiced by doing so. We will examine each reason individually.

Burnett's argument that the procedural quagmire created by the three (3) cases created the type of mistake, inadvertence, surprise or excusable neglect

warranting relief is not persuasive. Although this matter involved several cases and divisions, this situation is not particularly unusual. And Brightwell had other means for obtaining knowledge about the other cases besides the file in 1389. Additionally, Brightwell learned of Division 12's January 10, 2007, order, cases 1389 and 2252, on February 5, 2007. He still had time under CR 73.02 to appeal the Division 12's decision. Because Brightwell had time to appeal the case, he cannot now legitimately assert his need for relief "of an extraordinary nature." *U.S. Bank, N.A. v. Hasty*, 232 S.W.3d 536, 541 (Ky. App. 2007).

Next, we will consider Burnett's assertion that to avoid inconsistent results it is necessary to grant the motion. He suggests that 1389 is the lynchpin for all the cases since the guilty plea in 1389 allowed Burnett to plead guilty in 2252. As noted, the CR 60.02 motion was granted in 1389 and now the 11.42 motion is undecided. If, according to Burnett, it is later found in the court's impending proceedings that the guilty plea in 1389 was not freely and voluntarily given, this result would directly contradict the court's order in 2252, and this fact alone warrants "extraordinary relief." But, significantly, 1389 has not been decided, and until it is, no reason exists to grant relief, that is, the issue is not ripe. A controversy is not justiciable, or ripe, when it includes questions "which may never arise or which are merely advisory . . . [or] hypothetical[.]" *Curry v. Coyne*, 992 S.W.2d 858, 860 (Ky. App. 1998). Moreover, even though the original plea agreement and judgment referred to three (3) different cases, the guilty pleas were entered independently. If they were interrelated and inseparable, there would not

have been three (3) separate pleas. And, while Burnett cites the interrelatedness of the three (3) separate cases, in fact, only two (2) cases were actually decided by the January 10, 2007, decision – 1389 and 2252. Indictment 1389 has been sent back to Division 8, and 1583 was remanded in the January 10, 2007, decision. Furthermore, the judge ascertained in that order the guilty plea in 2252 was validly entered.

Burnett claims he was unfairly prejudiced by the January 10, 2007, order. We find no merit in this contention. As discussed, two (2) cases have now been returned to their respective divisions for hearing. The 2004 guilty pleas were entered separately and other means existed for Brightwell to access the three (3) cases relevant to his client's CR 11.42 motion. Besides the interrelatedness of the pleas argument, no substantive criticism has been proffered against the judge's decision to not set aside 2252.

Finally, Burnett's assertion that the Commonwealth will not be prejudiced by granting the CR 60.02 motion is not convincing. Contrary to his statement that the Commonwealth had not filed a response to Burnett's 11.42 motion, they filed a twelve (12) page response on November 20, 2006. Therefore, the court was fully advised as to the RCr 11.42 motion when it ultimately denied the motion in 2252. Additionally, such reasoning has no legal bearing as to whether or not this Court should deny Burnett's CR 60.02 motion in 2252. It does not fit any condition necessary for finding that the court abused its discretion in not granting the CR 60.02 motion.

CONCLUSION

This Court can only reverse the denial of a motion pursuant to CR 60.02, if the trial court abused its discretion. No abuse of discretion occurred in the case *sub judice*. The relief sought by way of CR 60.02 must relate to some significant defect in the trial proceeding or to the evidence presented at trial and denial of relief must result in a substantial miscarriage of justice due to the effect of the final judgment. *Wine v. Com.*, 699 S.W.2d 752, 754 (Ky. App. 1985). Clearly, Burnett has not demonstrated any such defect or demonstrated any substantial miscarriage of justice to Burnett in the court's ruling. For this reason, the ruling of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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