

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000502-MR

GARY DAMON STEPHENS

APPELLANT

v.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE RUSSELL D. ALRED, JUDGE
ACTION NO. 97-CR-00005

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: CLAYTON, KELLER, AND MOORE, JUDGES.

MOORE, JUDGE: Gary Damon Stephens appeals the Harlan Circuit Court's order granting the Commonwealth's CR¹ 60.02 motion for relief from judgment. After a careful review of the record, we reverse because Stephens's indictment remained pending during his involuntary hospitalization, thus warranting his award of jail time credit. Alternatively, we reverse because the Commonwealth failed to

¹ Kentucky Rule of Civil Procedure.

bring its motion within a reasonable time and because the Commonwealth's claim could have been raised on direct appeal. We remand with instructions for the circuit court to reinstate the original judgment against Stephens.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1997, Stephens was indicted on two counts of murder, one count of tampering with physical evidence, one count of theft by the unlawful taking of property valued over \$300.00, and one count of third-degree burglary. Stephens initially entered a not guilty plea. The following month, the trial court entered an order directing Stephens to be sent to the Kentucky Correctional Psychiatric Center (KCPC)

for examination to determine whether or not [he was] competent to stand trial (KRS^[2] 504.090) and to determine if he, at the time of the alleged commission of the offenses, 'as a result of mental illness or retardation, . . . lacked substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.' KRS 504.020.

A review of the record before us on appeal reveals that in 1998 the trial court determined that Stephens was not competent to stand trial, so the court ordered him to be involuntarily hospitalized for an initial 360-day period, pursuant to KRS Chapter 202A, in an effort to medicate him and provide him with medical treatment so he would become competent to stand trial. Over the next several years, Stephens was repeatedly re-evaluated to determine his competency. He was returned to his involuntary hospitalization due to his continued incompetency to

² Kentucky Revised Statute.

stand trial and his diagnoses as suffering from chronic paranoid schizophrenia, having a history of substance abuse, and being a danger to himself and others. It does not appear that the indictment against him was dismissed during his multiple hospitalizations. He was ultimately determined to be competent to stand trial in or around December 2001.

In 2002, the Commonwealth made an offer on a plea of guilty but mentally ill. Stephens moved to enter a guilty but mentally ill plea, in accord with the Commonwealth's offer and pursuant to *North Carolina v. Alford*,³ 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). In exchange for his plea, the Commonwealth agreed to recommend a total sentence of twenty years for all of the counts against Stephens.

In November 2002, the trial court entered its judgment. It found Stephens competent to plead guilty, and that his plea of guilty but mentally ill was voluntarily, knowingly, and intelligently entered. The trial court accepted Stephens's plea of guilty but mentally ill and sentenced him to: twenty years of imprisonment for each of the murder convictions; five years of imprisonment for the tampering with physical evidence conviction; five years of imprisonment for the theft by unlawful taking of property valued over \$300.00 conviction; and five years of imprisonment for the third-degree burglary conviction. These sentences were ordered to be run concurrently for a total of twenty years of imprisonment.

³ This type of plea, known as an *Alford* plea, "permits a conviction without requiring an admission of guilt and while permitting a protestation of innocence." *Wilfong v. Commonwealth*, 175 S.W.3d 84, 103 (Ky. App. 2004).

Additionally, and pertinent to the issues raised in the present appeal, the trial court's judgment provided as follows:

[T]he Defendant is hereby credited with time spent in custody prior to sentence, namely 2134 days as certified by the jailer of the Harlan County Detention Center towards service of the maximum term of imprisonment (or toward payment of a fine at the rate of \$5 per day).

Jail time credit includes the days of: 348 for 1997; 365 for 1998; 365 for 1999; 365 for 2000; 365 for 2001 and 326 for 2002.

The "Certification of [the] Harlan County Jailer as to Jail Time Served," which was in the record immediately following the judgment, also provided that "most time served was in K.C.P.C." (Capitalization changed).

More than seven years after the trial court's judgment was entered, the Commonwealth filed a "Motion to Correct Jail Time Credit and Good Time" in the circuit court. (Capitalization changed). The Commonwealth filed its motion pursuant to CR 60.02 and alleged that Stephens "was mistakenly given an excessive amount of jail time credit for which he was not entitled, and that this resulted in a miscalculation not only on the time to be served on his sentence, but on the other credit to which he was not entitled."

The circuit court granted the Commonwealth's motion, finding that the court had improperly awarded Stephens jail time credit "for the time that he was held pursuant to KRS 202(A)," *i.e.*, while he was involuntarily hospitalized, "during the pendency of [his] case. *Commonwealth v. Todd*, 12 S.W.3d 695 (Ky. App. 1999)." The court found that the Involuntary Hospitalization Orders in the

case showed Stephens was held pursuant to KRS 202(A) for the time period of “October 14, 1998 until October 5, 2001.” The circuit court noted that

[t]he Commonwealth Attorney advised the Court that he was not aware that the credit was given to [Stephens] for the time that he was hospitalized pursuant to KRS 202(A), until only recently when the family of the murder victims . . . brought it to his attention that [Stephens] was to serve out on February 1, 2010. The Commonwealth advised that upon notification by the victims’ families he became aware that the Department of Corrections was giving [Stephens] credit for the time period that he was hospitalized under the 202(A) Orders. As such, he moved to correct this mistake in jail credit.

In granting the Commonwealth’s CR 60.02 motion, the circuit court found that Stephens was not permitted to receive credit for the time he was involuntarily hospitalized, pursuant to *Todd*. The court found that the circumstances of the case were extraordinary in nature, and they warranted granting the Commonwealth’s motion. Thus, the circuit court held that “the original judgment should have awarded only 1054 days toward [Stephens’s] service of his sentence and as such [the court] amended [it] to reflect the proper days [of] credit in this matter of 1054 days [of] service as of November 22, 2002.” The circuit court further reasoned that “[i]t appeared that the presiding judge simply placed a jail time credit in an order without any type of discussion or opportunity for parties to object or to review the matter.”

Stephens now appeals, contending that: (a) the circuit court erred to his substantial prejudice by granting the Commonwealth’s CR 60.02 motion to correct jail time credit based upon *Todd* and thereby reducing his jail time credit

from 2134 days to 1054 days; and (b) the circuit court erred to his substantial prejudice by granting the Commonwealth's CR 60.02 motion even though the motion was untimely filed.

II. STANDARD OF REVIEW

We review a circuit court's decision granting a CR 60.02 motion for an abuse of discretion. *See Kurtsinger v. Board of Trustees of Ky. Retirement Systems*, 90 S.W.3d 454, 456 (Ky. 2002). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

We note that CR 60.02(f), upon which the circuit court based its decision granting the Commonwealth's motion, provides: "On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding [for] any . . . reason of an extraordinary nature justifying relief. . . ." Moreover, CR 60.02 motions are required to be brought within a reasonable time. *See* CR 60.02.

III. ANALYSIS

A. CORRECTION OF JAIL TIME CREDIT BASED UPON *TODD*

Stephens first contends that the circuit court erred to his substantial prejudice by granting the Commonwealth's CR 60.02 motion to correct jail time credit based upon *Todd* and thereby reducing his jail time credit from 2134 days to 1054 days. In the *Todd* case, the Appellant was indicted and subsequently

determined by KCPC to be incompetent to stand trial. Todd was then involuntarily hospitalized by court order pursuant to KRS 504.110(2) and KRS Chapter 202A, and the indictment was dismissed without prejudice. Months later, Todd was reindicted, again determined to be incompetent to stand trial, and again he was involuntarily hospitalized and the indictment was dismissed without prejudice. Approximately one year later, Todd consented to be charged by information, he did not challenge his competency to stand trial, and he entered guilty pleas to the charges against him. Todd sought jail time credit for the time he spent involuntarily hospitalized. The trial court granted his motion, and the Commonwealth appealed. *See Todd*, 12 S.W.3d at 696.

On appeal, this Court held that the time Todd spent involuntarily hospitalized did not qualify as jail time credit because Todd's indictment was not pending during the time he was involuntarily hospitalized. Specifically, the Court noted that Todd's indictment was dismissed each time he was ordered to be involuntarily hospitalized. *See Todd*, 12 S.W.3d at 696-98. In fact, this Court reasoned that "had the indictment been pending during [Todd's hospitalization], and had Todd not otherwise been released from criminal custody, he would have been entitled to credit for his [hospital] time." *Id.* at 698.

In the present case, Stephens was involuntarily hospitalized pursuant to KRS Chapter 202A, and his indictment was pending the entire time he remained hospitalized. Thus, pursuant to the reasoning in *Todd*, Stephens was entitled to jail

time credit for this time, and the circuit court abused its discretion by granting the Commonwealth's CR 60.02 motion.

B. TIMELINESS OF CR 60.02 MOTION

However, even if we were to assume for the sake of argument that the circuit court had not erred pursuant to *Todd* in granting the Commonwealth's motion, it nevertheless erred in granting the motion because it was not brought within a reasonable time and because the Commonwealth's claim could have been presented on direct appeal. As previously explained, CR 60.02 requires motions brought pursuant to that rule to be brought within a reasonable time. The Commonwealth did not file its CR 60.02 motion until more than seven years after the trial court's judgment was entered. There was no reason why the Commonwealth could not have known before that time that Stephens was being credited for the time he spent involuntarily hospitalized, as the trial court specified in its judgment how many days of each year since his indictment Stephens was being credited. Further, the Commonwealth was aware that Stephens was involuntarily hospitalized during many of those years. Thus, the Commonwealth failed to challenge the trial court's judgment within a reasonable time, as required by CR 60.02.

Furthermore, we note that the Commonwealth should have challenged the award of jail time credit on direct appeal but failed to do so. *See Winstead v. Commonwealth*, 327 S.W.3d 479, 485 (Ky. 2010). Because the Commonwealth could have and should have raised this claim on direct appeal, it is not entitled to

CR 60.02 relief based on the claim. *See McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997) (“Civil Rule 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could reasonably have been presented by direct appeal” (internal quotation marks omitted)); *see also Winstead*, 327 S.W.3d at 488.

Accordingly, the order of the Harlan Circuit Court is reversed and the case is remanded with the instruction that the trial court’s original judgment shall be reinstated.

ALL CONCUR.

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