

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-000945-MR

TIMOTHY FANCHER

APPELLANT

v. APPEAL FROM METCALFE CIRCUIT COURT
HONORABLE PHIL PATTON, JUDGE
ACTION NO. 93-CR-00001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: MAZE, STUMBO, AND VANMETER, JUDGES.

VANMETER, JUDGE: Timothy Fancher, proceeding *pro se*, appeals from the Metcalfe Circuit Court's order denying his motion for post-conviction relief under CR¹ 60.02. For the following reasons, we affirm.

¹ Kentucky Rules of Civil Procedure.

In early 1993, Fancher was indicted by a Metcalfe Grand Jury for one count of murder. Following the indictment, the presiding judge assigned to the case retired. On August 23, 1993, Chief Regional Circuit Judge William S. Cooper appointed himself as special judge to try Fancher's case in the Metcalfe Circuit Court. Following a jury trial, Fancher was convicted of murder and sentenced to life in prison on January 7, 1994. He appealed the judgment to the Kentucky Supreme Court, which affirmed.²

Thereafter, Fancher filed a motion to obtain court records, which the circuit court denied. Fancher appealed to this court. While that appeal was pending, Fancher filed a motion to modify his sentence pursuant to CR 60.02(f), which the circuit court also denied. Fancher filed a notice of appeal from that order, as well as a motion to proceed *in forma pauperis* on appeal. The circuit court denied his motion to proceed *in forma pauperis*, and Fancher did not appeal from that order or file the requisite filing fee in accordance with CR 73.01(1)(b). On appeal of the denial of his motion to obtain the court records, Fancher also raised issues involving the circuit court's denial of his CR 60.02 motion. However, due to not paying the filing fee, we held Fancher did not properly appeal from the circuit court's denial of his motion for relief under CR 60.02(f), and affirmed the denial of his motion to obtain court records.³

² No. 94-SC-565-MR (April 25, 1996).

³ No. 2002-CA-000206-MR (Ky. App. Aug. 15, 2003).

Subsequently, Fancher filed a motion to vacate, set aside, or correct his sentence or, in the alternative, for a new trial, pursuant to RCr⁴ 11.42 and CR 60.02(e) and (f). In that motion, he raised sixteen claims, most of which alleged ineffective assistance of counsel. The circuit court denied his motion without a hearing. Fancher appealed to this court. This court affirmed the circuit court's order to the extent it denied Fancher's claims of relief under CR 60.02, and dismissed his claims under RCr 11.42 for lack of jurisdiction because the motion was filed more than three years after his conviction became final.⁵

On April 2, 2012, Fancher filed his third motion under CR 60.02, seeking to have his conviction vacated as a void judgment on the basis that Judge Cooper was without authority to appoint himself as a special judge to preside over the trial based on the holding in *Jacobs v. Commonwealth*, 947 S.W.2d 416 (Ky. App. 1997). The circuit court denied the motion on the following separate grounds: (1) the motion was not filed within a reasonable time; (2) Judge Cooper had authority to appoint himself as a special judge to preside over the case; and (3) Fancher did not object to Judge Cooper's appointment as special judge, and therefore waived his right to object. This appeal followed.

Our standard of review of of a circuit court's denial of a CR 60.02 motion "is whether the trial court abused its discretion." *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000) (citing *Brown v. Commonwealth*, 932 S.W.2d 359,

⁴ Kentucky Rules of Criminal Procedure.

⁵ No. 2009-CA-002174-MR (Ky. App. Sept. 3, 2010)

361 (Ky. 1996)). An abuse of discretion occurs if a decision reached by the circuit court was ““arbitrary, unreasonable, unfair or unsupported by sound legal principles.”” *Miller v. Eldridge*, 146 S.W.3d 909, 914 (Ky. 2004) (citation omitted).

As an initial matter, the Commonwealth raises an issue regarding the deficiency of the record on appeal. A quick review reveals that the record does not contain the judgment of conviction, or any previous orders detailing the procedural history of the underlying action, beyond the motion for CR 60.02 relief, response to, and denial thereof. Regardless, as the Commonwealth concedes, the procedural history and pertinent background information is contained in prior opinions of this court, of which we may take judicial notice. *See* KRE⁶ 201 (a court may take judicial notice of adjudicative facts not subject to reasonable dispute at any stage of the proceeding). By doing so, we are apprised of the procedural and factual history necessary to conduct a meaningful review.

On appeal, Fancher argues the circuit court abused its discretion by denying his motion for CR 60.02 relief. We disagree.

The basis for Fancher’s CR 60.02 motion for post-conviction relief is that Judge Cooper did not have jurisdiction to hear the action because he erroneously appointed himself as special judge over the matter. A special judge without proper authority lacks jurisdiction to make a determination in the action and any judgment rendered based on that authority is void. *Coleman v. Mullins*, 216 Ky. 761, 763-

⁶ Kentucky Rules of Evidence.

64, 288 S.W. 701, 702 (1926). A void judgment is not entitled to any respect or deference by the courts. *Mathews v. Mathews*, 731 S.W.2d 832, 833 (Ky. App. 1987). Instead, such a judgment is ““open to attack anytime and any place.”” *Id.* (quoting *Grubb v. Wurtland Water Dist.*, 384 S.W.2d 321, 323 (Ky. 1964).

Since Fancher raises a jurisdictional issue in his CR 60.02 motion, that if successful would nullify the judgment, we find the circuit court’s conclusions that the motion was not filed within a reasonable time and that Fancher waived his right to object to the jurisdictional authority of Judge Potter problematic. *See Rogers Group, Inc. v. Masterson*, 175 S.W.3d 630, 635 (Ky. App. 2005) (holding that the CR 60.02 requirement that a motion for relief sought from a void judgment be filed within a reasonable time is problematic since a void judgment does not acquire validity with the passage of time) (citations omitted). With that said, we need not decide this matter on those issues since we can affirm on any grounds supported by the record. *Kentucky Farm Bureau Mut. Ins. Co. v. Gray*, 814 S.W.2d 928, 930 (Ky. App. 1991) (citation omitted). Here, Fancher’s argument that the judgment was void is without merit.

A Chief Regional Circuit Judge has authority to appoint special judges pursuant to the Supreme Court’s Regional Administration Program Charter. Ky. Const. § 110(b)(5). Fancher argues that the October 8, 1992, amendment to the Regional Administration Program Charter precluded the then Chief Regional Judge Cooper from appointing a replacement judge. A clear reading of the amendment, however, reveals that it merely precluded the Chief Regional Judge from

appointing a retired judge or justice to a case. At the time of the appointment, Judge Cooper was an active circuit judge whose appointment to preside over the case was permitted. In spite of Fancher's argument to the contrary, the Court in *Jacobs* confirms this authority, specifically holding that while the Chief Regional Circuit Judge generally has authority to appoint special judges, only the Chief Justice has the authority to appoint retired judges. 947 S.W.2d at 418. Fancher's substantive argument therefore fails and the circuit court did not err by denying his CR 60.02 motion.

The order of the Metcalfe Circuit Court is affirmed.

ALL CONCUR.

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