

RENDERED: DECEMBER 20, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002036-MR

STEVEN A. DODSON

APPELLANT

v. APPEAL FROM CUMBERLAND CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NOS. 81-CR-00018 AND 81-CR-00019

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CAPERTON, DIXON, AND VANMETER, JUDGES.

CAPERTON, JUDGE: The Appellant, Steven A. Dodson, appeals the April 5, 2012, order denying him Kentucky Rules of Civil Procedure (CR) 60.02 relief from judgment entered by the Cumberland Circuit Court against him in 1981 for

two counts of theft by deception¹ based upon his contention that fraud affected the previous proceedings, thereby entitling him to relief. Upon review of the record, the arguments of the parties and the applicable law, we affirm.

In 1981, Dodson was indicted for two counts of theft by deception. He pled guilty to both charges in November of 1981, at which time he was represented by Hon. Steve Hurt. Dodson's sentencing was deferred for six months. Thereafter, in June of 1982, Dodson was sentenced to a total of five years for the two theft convictions. The judgment of conviction indicated that Hurt was present in court with Dodson at the time of sentencing and that a copy was mailed to Hurt.

Subsequently, on December 5, 2011, almost thirty years later, Dodson filed a CR 60.02 motion attacking the 1982 convictions. Relying on the "fraud affecting the proceedings" portion of CR 60.02(d), Dodson asserted that he did not "recall having the assistance of counsel at any time," and was certain "that he did not have the assistance of counsel when he was found guilty" in those two cases. Dodson also alleged that he had contacted Attorney Hurt regarding the discrepancy between Dodson's memory and the court record, and Attorney Hurt claimed that he did not recall ever representing Dodson, that Hurt was employed as a trial commissioner in 1982 and, therefore, could not have represented Dodson because it would have been a conflict of interest. Accordingly, Dodson argued that there was "considerable and persuasive evidence" that he was not represented by counsel in the 1982 cases, and that there had not been a determination that he had

¹ We note that this case involved Cumberland Circuit Court Case Nos. 81-CR-00018 and 81-CR-00019, which cases were prosecuted and handled together.

“sufficient capacity to act as his own counsel during those proceedings.” Dodson argued that he had been denied his right to counsel and that the “jurist presiding over the Court” had committed a “fraud” and engaged in “fraudulent behavior.”

After filing his CR 60.02 motion, Dodson filed additional documents in the circuit court record, which included documents from the Administrative Office of the Courts showing that the Chief District Judge for the 29th Judicial Circuit appointed Attorney Hurt as a district court trial commissioner on December 5, 1981, which appointment began on January 4, 1982. Dodson also submitted an affidavit from Attorney Hurt that contained the following key statements:

I have no knowledge of ever representing Steve Dodson in any criminal matter. I served as Trial Commissioner in Cumberland County from 1982 to 1985. My position as Trial Commissioner would have disqualified me from representing Steve Dodson at his final sentencing on June 29, 1982.

On April 5, 2012, Dodson’s CR 60.02 motion was denied. At the outset, the court noted that the origin of this collateral attack was Dodson’s recent felony convictions in Monroe Circuit Court² and the use of the two 1982 felony convictions in that proceeding wherein he was convicted of possession of a handgun by a convicted felon. Ultimately, the court concluded that Dodson “did not use due diligence to investigate the supposed fraud he now claims impacted the proceedings against him,” and that this should have been presented “as a threshold issue to the admissibility of the two (2) previous convictions” in his recent trial.

Further, the court stated that it was unable to ascertain evidence of a conclusive,

² These convictions were affirmed on appeal. *Dodson v. Commonwealth*, 2010-CA-370-MR.

clear, or convincing character to evince fraud in the proceedings, and that the “passage of thirty (30) years is far too long to grant the relief requested herein.”

Dodson did not appeal the denial of the CR 60.02 motion. He did, with the assistance of new counsel, file a Kentucky Rules of Criminal Procedure (RCr) 11.42 motion on May 29, 2012, alleging that the attorney who filed and prosecuted his CR 60.02 motion was ineffective for failing to appeal the denial of the CR 60.02 motion. In the first paragraph of that motion, Dodson requested a “new trial,” but in the final paragraph asked the circuit court “to take the procedural steps such that [he] may pursue his appeal.” The court denied Dodson’s RCr 11.42 motion on July 26, 2012. Thereafter, on August 15, 2012, Dodson filed a notice of appeal stating his intention to appeal “the Court’s Order Overruling Motion for Rule 60.02 Relief entered on April 5, 2012.” He attached the order denying his CR 60.02 motion to the notice of appeal.

As his first basis for appeal, Dodson now argues that the circuit court erred in denying his RCr 11.42 motion. Specifically, he contends that his CR 60.02 counsel rendered ineffective assistance by failing to appeal the order denying the CR 60.02 motion. Dodson argues that *sub judice* the failure to pursue an appeal of the April 5, 2012, order denying CR 60.02 relief was a failure to present a defense to the felon in possession of a handgun charge. Dodson asserts that his counsel had knowledge of Dodson’s defense of being an unlawfully convicted felon prior to trial.

The Commonwealth argues that Dodson's claim must be rejected because he did not appeal from the July 26, 2012, order denying the RCr 11.42 motion but, instead, appealed from the CR 60.02 order entered on April 5, 2012. Thus, the Commonwealth argues that the appeal of the RCr 11.42 order is not properly before this Court. Moreover, the Commonwealth argues that Dodson was not entitled to seek relief under RCr 11.42 in connection with the representation of his CR 60.02 counsel. Finally, the Commonwealth argues that even in spite of the procedural bars to his appeal, an appeal of the CR 60.02 motion would have stood no chance of success on appeal and that an attorney cannot be faulted for failing to take action with no chance of success.

Upon review of the record, we find no evidence that Dodson ever appealed from the July 26, 2012, order denying his motion for RCr 11.42 relief. Pursuant to RCr 12.04(2), it is clear that a party wishing to appeal shall file a notice of appeal, shall name all of the appellants and appellees, and designate the judgment from which the appeal is being taken. Dodson did not do so in this instance. Accordingly, we decline to further address this matter herein.

As his second basis for appeal, Dodson argues that the court erred in denying his CR 60.02 motion. He argues that the affidavit of Attorney Hurt is the type of evidence which clearly shows a miscarriage of justice and which warrants relief pursuant to CR 60.02(d). Dodson argues that though he was aware of his alleged lack of representation in 1981 and 1982, he did not understand his

constitutional right to counsel at that time and, accordingly, took no action to correct the error.

In response, the Commonwealth argues that Dodson did not timely appeal the denial of his CR 60.02 motion. The Commonwealth notes that the order denying the motion was entered on April 5, 2012, but that Dodson did not file a notice of appeal with respect thereto until August 15, 2012, clearly beyond the 30-day time period permitted for filing such a notice set forth in CR 73.02.

Upon review of the record, we are in agreement with the Commonwealth that Dodson failed to timely file his appeal of the denial of his CR 60.02 motion. That motion was entered on April 5, 2012, and it is undisputed that Dodson did not file an appeal until August of 2012. Clearly, he was beyond the 30-day time limit set forth in CR 73.02. As this Court recently held in *Stinson v. Stinson*, 381 S.W.3d 333 (Ky. App. 2012):

Our rules of procedure specifically and clearly provide that a notice of appeal must be filed within thirty days after notation of service of the judgment or order. CR 73.02(1)(a). “Compliance with the time requirements of [CR 73.02](#) is mandatory[.]” *United Tobacco Warehouse, Inc. v. Southern States Frankfort Co-op., Inc.*, 737 S.W.2d 708, 710 (Ky.App.1987).

The timely filing of a notice of appeal is not jurisdictional, but rather is a matter of procedure. *Johnson v. Smith*, Ky., 885 S.W.2d 944 (1994). Nevertheless, the supreme court squarely held in [Johnson](#) that the timely filing of a notice of appeal in compliance with CR 73.02 is the method by which the jurisdiction of the appellate court is invoked and that automatic dismissal of an appeal is the penalty for late filing of such a notice. 885 S.W.2d at 950.

Stewart v. Kentucky Lottery Corp., 986 S.W.2d 918, 921 (Ky.App.1998). Here, Stephen did not attempt to contest the propriety of the original DVO until he filed the present appeal in July 2011, close to two years after the entry of the DVO in October 2009. Because he did not timely appeal from the original DVO, Stephen is precluded from contesting the propriety of the original DVO in the present appeal.

Stinson at 336. In keeping with our holding in *Stinson*, and in light of the clear and unambiguous language of CR 73.02, we believe that Dodson's appeal was untimely and, therefore, decline to address this issue further herein.

As his final basis for appeal, Dodson argues that public policy supports a comprehensive review of cases where irrefutable evidence indicates that a defendant has been unlawfully convicted, particularly as the conviction was entered against Dodson at a time when signed plea agreements were not required, and proceedings were not recorded on audio or video.

Having found that neither the denial of the CR 60.02 motion nor the denial of the RCr 11.42 motion are properly before this Court, we find no basis for addressing the public policy arguments made by Dodson. Accordingly, we affirm.

Wherefore, for the foregoing reasons, we hereby affirm the April 5, 2012, order of the Cumberland Circuit Court denying Dodson's CR 60.02 motion, the Honorable Eddie C. Lovelace, presiding.

ALL CONCUR.

BRIEF FOR APPELLANT:

David Broderick
Jason C. Hays
Bowling Green, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Jeffrey A. Cross
Assistant Attorney General
Frankfort, Kentucky