

RENDERED: AUGUST 29, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001237-MR

JAMES ANTROBUS

APPELLANT

v. APPEAL FROM PENDLETON CIRCUIT COURT
HONORABLE JAY DELANEY, JUDGE
ACTION NO. 07-CR-00006

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, MAZE, AND TAYLOR, JUDGES.

MAZE, JUDGE: James A. Antrobus appeals from the order of the Pendleton Circuit Court denying his Kentucky Rules of Civil Procedure (CR) 60.02 motion to vacate an order of restitution. We hold that trial court did not abuse its discretion in denying the motion because it was not properly supported. Hence, we affirm.

On April 18, 2007, Antrobus was indicted for three counts of receiving stolen property (over \$300), and two counts of second-degree unlawful transaction with a minor. The indictment alleged that Antrobus received and disposed of stolen tobacco bales, and inducted a minor to engage in the theft.

Antrobus agreed to enter an *Alford*¹ plea of guilty in reliance on the Commonwealth's recommendation of pretrial diversion. The Order Granting Pretrial Diversion was entered on June 22, 2007. The Order, which was signed by both parties, imposed a five-year pretrial diversion period, with concurrent two-year sentences on each count if diversion was unsuccessful. As a condition of pretrial diversion, Antrobus was ordered to pay restitution in the amount of \$5,340.66 to Victim #1, \$1,836.00 to Victim #2, and \$1,394.40 to Victim #3. Antrobus paid restitution in full on June 25, 2007.

After successfully completing the five-year period of diversion, the trial court entered an Order on July 18, 2012, dismissing the case as diverted. On April 3, 2013, Antrobus filed a Motion to Amend Restitution under CR 60.02(b). Antrobus argued that restitution should be amended due to the presence of "newly discovered evidence" pertaining to the amount of bales claimed by the victims, the location of the bales, photographs, and other evidence used to determine restitution amounts. In his supporting memorandum, Antrobus alleged that the trial court abused its discretion in setting the restitution amount by relying on "mere allegations" and "false information" provided by the victims.

¹ *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

On June 24, 2013, the trial court entered an Order Denying the Motion to Amend Restitution. The trial court held that there was no merit to Antrobus's claim that it abused its discretion in setting the restitution amount. The trial court further held that Antrobus failed to support the allegations, as there was no indication as to why he did not have the newly discovered information at the time he agreed to the restitution amount, or why this information could not have been discovered at that time through the exercise of due diligence. As such, the trial court held that there was no basis to review this matter pursuant to CR 60.02.

We review a trial court's disposition of a CR 60.02 motion for an abuse of discretion. *White v. Commonwealth*, 32 S.W.3d 83 (Ky. App. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Miller v. Eldridge*, 146 S.W.3d 909, 914 (Ky. 2004) (*citation omitted*). For the following reasons, we hold that the trial court did not abuse its discretion when it denied Antrobus's motion for CR 60.02 relief.

"In order to be eligible for CR 60.02 relief, the movant must demonstrate why he is entitled to this special, extraordinary relief." *Sanders v. Commonwealth*, 339 S.W.3d 427, 437 (Ky. 2011), *quoting Barnett v. Commonwealth*, 979 S.W.2d 98, 101 (Ky. 1998). As the trial court noted, the allegations in Antrobus's motion were very general and lacked specificity.

Moreover, the motion was not accompanied by an affidavit which set out the facts demonstrating the alleged perjury or the newly discovered evidence. Generally, this omission is fatal to a motion for relief under CR 60.02. *Hampton v. Commonwealth*, 454 S.W.2d 672, 673 (Ky. 1970).

Finally, newly discovered evidence is evidence that could not have been obtained at the time of trial through the exercise of reasonable diligence. *Commonwealth v. Harris*, 250 S.W.3d 637, 642 (Ky. 2008). Antrobus's motion gives no indication how this information came to be recently discovered, or any reason that the information could not have been discovered earlier through the exercise of due diligence. The alleged misrepresentations concerning the value of the tobacco bales involve matters which should have been apparent when Antrobus agreed to the restitution amount. In the absence of any sufficient basis for granting relief, the trial court properly denied Antrobus's CR 60.02 motion.

For the above reasons, we affirm the judgment of the Pendleton Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Darrell A. Cox
Covington, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

John Paul Varo
Assistant Attorney General
Frankfort, Kentucky

