

RENDERED: AUGUST 21, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000407-MR

LINDSAY SWEATT

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
INDICTMENT NO. 155003

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: D. LAMBERT, MAZE AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Lindsay Sweatt appeals from the January 3, 2014, order of the Jefferson Circuit Court which denied Sweatt's petition for independent action.

We affirm.

Sweatt was convicted of armed robbery, malicious striking and wounding, and robbery in the Jefferson Circuit Court. These convictions were based on events that took place on December 23, 1974 and January 30, 1975. As a

result of his convictions, Sweatt received sentences of life imprisonment, twenty-one years' imprisonment, and twenty-one years' imprisonment, to run concurrently. Sweatt directly appealed his convictions to the Kentucky Supreme Court and on April 1, 1977, the Court rendered an opinion affirming the trial court's final judgment. *Sweatt v. Commonwealth*, 550 S.W.2d 520, 521 (Ky. 1977).

On May 24, 2013, Sweatt filed a petition for independent action, and cited to Kentucky Rules of Civil Procedure (CR) 60.03 as authority. Therein, Sweatt argued his convictions for armed robbery and malicious striking and wounding were unlawfully enforced because their governing statutes, Kentucky Revised Statutes (KRS) 433.140 and 435.170, were repealed during the 1974 Kentucky General Assembly and, therefore, no longer effective during his 1975 trial. He further argued he should have been afforded the opportunity to consent to charges under the Kentucky Penal Code, which became effective on January 1, 1975. The trial court denied Sweatt's petition in an order entered on January 3, 2014. The trial court indicated the petition was procedurally improper, the court lacked jurisdiction, and the request for relief was untimely. This appeal followed.

Sweatt's first arguments to this Court are that the trial court erred when it failed to find it had jurisdiction to grant relief to Sweatt and the request for relief was timely made. In the alternative, Sweatt argues that if the request was not timely made, it was subject to equitable tolling. We disagree on all accounts.

It is well established that a circuit court loses jurisdiction over the case ten days after entry of the final judgment. CR 59.05; *Silverburg v. Commonwealth*, 587 S.W.2d. 241, 244 (Ky. 1979). However, jurisdiction can be renewed or extended through statute or rule. *Rollins v. Commonwealth*, 294 S.W.3d 463, 466 (Ky.App. 2009). Sweatt's pleading sought relief under CR 60.03. CR 60.03, which relates to independent actions, reads in its entirety:

Rule 60.02 shall not limit the power of any court to entertain an independent action to relieve a person from a judgment, order or proceeding on appropriate equitable grounds. Relief shall not be granted in an independent action if the ground of relief sought has been denied in a proceeding by motion under Rule 60.02, or would be barred because not brought in time under the provisions of that rule.

CR 60.02 serves as a means to relieve a party of a final judgment based upon several factors, including mistake, fraud, neglect, newly discovered evidence, or "any other reason of an extraordinary nature justifying relief." Motions for relief brought under 60.02 should be made within one year or within a reasonable time, depending on the nature of the claim.

We first note that Sweatt's petition was not, in fact, an independent action, but was actually a pleading within the original action. Despite its printed title, the pleading was in fact a motion for CR 60.02 post-conviction relief disguised as a petition for independent action. Secondly, we note that Sweatt's petition was filed more than thirty-six years after the Kentucky Supreme Court affirmed his conviction. It has previously been held that eighteen, sixteen, and

even fourteen year post-conviction delays do not comply with the time requirements of CR 60.02. *Stoker v. Commonwealth*, 289 S.W.3d 592, 597 (Ky.App. 2009); *Oller v. Commonwealth*, 292 S.W.3d 332, 334 (Ky.App. 2009); *Baze v. Commonwealth*, 276 S.W.3d 761, 768 (Ky. 2008). Sweatt has offered no reason why a delay of thirty-six years would be acceptable. Accordingly, it is our holding that the trial court did not err when it concluded that Sweatt's pleading was procedurally improper, untimely, and failed to confer jurisdiction on the court.

Sweatt argues his petition is subject to equitable tolling. Historically, the doctrine of equitable tolling has been "a measure applicable to prisoners who attempt to get documents timely filed, yet fail." *Hallum v. Commonwealth*, 347 S.W.3d 55, 58 (Ky. 2011). The "critical inquiry remains whether the circumstances preventing a petitioner from making a timely filing were both beyond the petitioner's control and unavoidable despite due diligence." *Commonwealth v. Carneal*, 274 S.W.3d 420, 429 (Ky. 2008) (quoting *Commonwealth v. Stacey*, 177 S.W.3d 813, 817 (Ky. 2005)). Sweatt has failed to show, much less argue, the presence of any such due diligence. Although Sweatt argues the application of equitable tolling by way of manifest injustice, that is simply not the standard. Sweatt's argument of equitable tolling fails.

Sweatt's final two arguments on appeal are not properly before this Court. Those arguments are that the trial court erred when it failed to find Sweatt had been deprived of effective assistance of trial counsel and fundamental fairness during his trial. The trial court declined to address the merits of Sweatt's petition

when it concluded that it lacked jurisdiction. Therefore, neither issue was addressed nor adjudicated within the January 3, 2014, order and there is nothing for this Court to review.

For the foregoing reasons, the January 3, 2014, order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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