

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000285-MR

SAMUEL R. PRATHER II

APPELLANT

v. APPEAL FROM MASON CIRCUIT COURT
HONORABLE JAY DELANEY, SPECIAL JUDGE
ACTION NO. 05-CR-00047

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: J. LAMBERT, MAZE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Samuel R. Prather II, brings this appeal from a January 16, 2015, order of the Mason Circuit Court denying his Kentucky Rules of Civil Procedure (CR) 60.02 motion. We affirm.

The facts underlying this case were summarized in Prather's direct appeal as follows:

On April 11, 2005, agents with the Buffalo Trace Narcotics Task Force observed Prather operating an automobile. Agent [Tim] Fegan, who knew that Prather had a history of drug and firearms convictions, suspected that Prather's driver's license had been suspended which he confirmed with radio dispatch. After hearing the dispatch, Officer Hamm of the Maysville Police Department, who also knew Prather and his criminal history, saw Prather driving, pulled him over and asked for his license. Prather produced what appeared to be a driver's license so Officer Hamm again confirmed with dispatch that Prather's license had been suspended. Prather was removed from the automobile and arrested for driving on a suspended license. Officer Fegan and other officers who had arrived at the scene proceeded to conduct a search of the passenger compartment where they found pieces of wood which appeared to be from a "sawed-off" shotgun and several rounds of 40 caliber and 9mm live ammunition. Prather was asked for a key to the trunk but denied that he had it in his possession.

After transporting Prather to the detention center, he was searched and in his possession was a bag of cocaine as well as a key to the trunk of his automobile. Since Prather's automobile and officers were still at the place of Prather's arrest, the key was taken there and the trunk was searched. Inside the trunk, the officers found digital scales with a white residue and a handgun.

Prather v. Com., Appeal No. 2006-CA-000649-MR (February 23, 2007) (footnotes omitted).

Eventually, Prather entered a conditional guilty plea to possession of a controlled substance, possession of a handgun by a convicted felon, possession of drug paraphernalia, and driving on a suspended license. Prather preserved for appeal the circuit court's denial of his motion to suppress evidence seized from his

vehicle. By final judgment entered on February 27, 2006, Prather was sentenced to a total of ten-years' imprisonment.

Prather then pursued a direct appeal to the Court of Appeals. In *Prather v. Commonwealth*, Appeal No. 2006-CA-000649-MR (February 23, 2007), the Court held that the circuit court properly denied Prather's motion to suppress evidence seized from his vehicle. The Court concluded that the stop of Prather's vehicle and the subsequent search of Prather's vehicle were constitutionally valid.

Some seven years later, on September 19, 2014, Prather filed a CR 60.02 motion. Therein, Prather specifically sought relief under CR 60.02(e) and (f). Prather argued that Tim Fegan, a drug task force agent, was instrumental in having Prather's motor vehicle stopped and that Fegan searched his vehicle without reasonable suspicion or probable cause. Prather asserted that Fegan had engaged in a pattern of performing his official duties in bad faith, including the stop and search of Prather's vehicle. In support thereof, Prather pointed out that Fegan pleaded guilty to theft in Federal Court on February 28, 2014, and "acknowledged taking money seized during drug investigations and money kept on hand to use in undercover drug buys." CR 60.02 Motion at 7. Prather also claimed that the search of his vehicle was constitutionally improper per the United States Supreme Court decision in *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2008). Although *Gant* was rendered after Prather's direct appeal (Appeal No. 2006-CA-000649-MR) became final, Prather argues that *Gant* is controlling

because Fegan did not conduct the search of Prather's vehicle in reasonable reliance on case precedent established prior to the Supreme Court's ruling in *Gant*.

By order entered January 16, 2015, the circuit court denied Prather's CR 60.02 motion without a hearing. This appeal follows.

Prather argues that the circuit court erred by denying his CR 60.02 without a hearing. Prather maintains that he is entitled to relief under both CR 60.02(e) and (f). He contends that the search of his vehicle by Fegan was constitutionally impermissible as Fegan lacked probable cause or reasonable suspicion to initiate the search. And, Prather asserts that Fegan acted in bad faith as to the search of his motor vehicle and as to the performance of his official duties generally. Prather also argues that the holding in *Gant*, 556 U.S. 332, is controlling because Fegan did not reasonably rely on case precedent when searching his vehicle and further cites to *Davis v. United States*, 564 U.S. 229, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011), in support of his argument.

Having reviewed Prather's arguments, case law, and the record on appeal, we agree with the circuit court's erudite analysis addressing the arguments raised by Prather and adopt same herein. As stated by the circuit court:

STANDARD OF REVIEW

A motion pursuant to CR 60.02 is a means to correct errors in the trial process that could not be corrected by any other means, such as direct appeal or a motion pursuant to RCr

11.42. *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983). Remedies afforded by CR 60.02 are only available when a substantial miscarriage of justice will result from the effect of the final judgment. *Wilson v. Commonwealth*, 403 S.W.2d 710, 712 (Ky. 1966). The party seeking CR 60.02 relief bears the burden of proving his entitlement to relief. *City of St. Matthews v. Roberts*, 490 S.W.2d 758 (Ky. 1973).

CR 60.02(f) relief should not be granted unless the new evidence if presented originally would have, with reasonable certainty, changed the result. *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996).

IMPROPER CONDUCT BY AGENT FEGAN

It appears the entire basis for this motion surrounds the conduct of Agent Tim Fegan with the Buffalo Trace Narcotics Task Force. On November 7, 2012, Fegan resigned from the Maysville Police Department through which he served on the Buffalo Trace Task Force. On December 5, 2013, he was indicted in federal court on three (3) counts of embezzlement related to his position as Director of the Task Force. He ultimately pled guilty to one (1) count of theft of government money and was sentenced to twelve (12) months and one (1) day on June 19, 2014.

The defendant proposes that this conviction as well as other instances of improper conduct set forth in the defendant's motion establish the extraordinary circumstances necessary for CR 60.02 relief. One instance involves the intimidation of a potential witness and the other involves the forfeiture of a truck. Neither of these, however, is related to the defendant's case. Furthermore, the defendant has not pointed to any specific allegations of improper conduct by Agent Fegan regarding his case that would remotely approach the extraordinary nature required for CR 60.02 relief. The defendant has failed to meet the burden of proof required regarding this issue. *City of St. Matthews v. Roberts*, 490 S.W.2d 758 (Ky. 1973).

SEARCH OF THE VEHICLE

The defendant argues that the search of the vehicle was unlawful pursuant to *Gant v. Arizona* [*Arizona v. Gant*], 556 U.S. 332 (2008). However, the Mason Circuit Court conducted a suppression hearing on this issue and overruled the motion. The Court of Appeals affirmed that decision on February 23, 2007, in *Prather v. Commonwealth*, 2007 WL 543394 (Ky. App.). . . . This issue has been fully litigated and the defendant has failed to offer any new evidence specific to his case that would entitle him to CR 60.02 relief.

The defendant has failed to allege facts which, if true, would justify vacating the judgment nor has he alleged the special circumstances necessary to justify CR 60.02 relief and is therefore not entitled to a hearing. *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983).

Order Overruling Defendant's Motion for Relief Pursuant to CR 60.02(e)(f) at 2-4.

We concur totally with the circuit court's conclusion that Prather has failed to set forth a sufficient factual basis to support his CR 60.02 challenge.

Additionally, as to Prather's argument that *Davis*, 564 U.S. 229, is applicable herein, we disagree for two reasons. First, there are no facts indicating that Fegan's search of Prather's vehicle was not performed in "objectively reasonable reliance" upon precedent established by case law prior to *Gant*. In fact, the facts prove the opposite. Both the circuit court and the Court of Appeals viewed Fegan's search of Prather's vehicle as constitutionally permissible. Second, *Davis*, 564 U.S. 229, involved application of the holding in *Gant*, 556 U.S. 332, to a case pending on appeal and nonfinal. Conversely, Prather's direct appeal was final in 2007, more than two years before *Gant* was rendered by the United States Supreme Court on April 21, 2009. There is no legal basis for the retroactive application of

Gant to this case. *See Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987).

Upon the whole, we hold that the circuit court properly denied Prather's CR 60.02 motion without a hearing.

For the foregoing reasons, the order of the Mason Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Julia K. Pearson
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky