

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001159-MR

DAVID NELSON

APPELLANT

v. APPEAL FROM LYON CIRCUIT COURT
HONORABLE C.A. WOODALL, III, JUDGE
ACTION NO. 03-CR-00045

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: JOHNSON,¹ SMALLWOOD AND THOMPSON, JUDGES.

SMALLWOOD, JUDGE: Davis Nelson appeals from an order of the Lyon Circuit Court denying his motion for Kentucky Rules of Civil Procedure (CR) 60.02 relief. Nelson argues that his physical disability renders punitive and unconstitutional the

¹ Judge Robert G. Johnson dissented in this opinion prior to the expiration of his term of office. Release of the opinion was delayed by administrative handling.

ongoing requirement that he register as a sex offender because the status of sex offender limits the housing options available to him. For the reasons addressed below, we REVERSE the order on appeal and REMAND it for a hearing.

The facts are not in controversy. Since approximately 2014, Nelson has been a paraplegic confined to a wheelchair. In 2003, the Lyon County grand jury charged Nelson with one count of first-degree sexual abuse and with being a second-degree persistent felony offender. The charges arose from the claim that while incarcerated in the Kentucky State Penitentiary, Nelson twice placed his hand on the buttocks of a female nurse and once on her breast. Nelson entered a guilty plea on the sexual abuse charge the following year in exchange for the dismissal of the persistent felony offender charge. Nelson was sentenced to 18 months in prison and was required to register as a sex offender for 20 years.² The 18-month sentence was to be served consecutively to a prior ten-year sentence for robbery.

The Department of Corrections released Nelson from custody in 2010. Thereafter, Nelson was twice convicted for failure to register as a sex offender. After serving a one-year sentence on the latter offense, the Department of

² The first version of Kentucky Revised Statute (KRS) 17.520, was enacted on July 11, 2006, imposing a registration period of ten years and a lifetime period for serious and repeat offenders. The following day on July 12, 2006, another version was enacted increasing this period of registration from ten years to twenty years where it has remained.

Corrections could not find an assisted living facility willing to accept a registered sex offender. The maximum expiration of Nelson's latest sentence was September 8, 2016. However, since Nelson was subject to a one-year post-incarceration supervision, the Department of Corrections held him until June 9, 2017.

Nelson filed a CR 60.02 motion seeking to vacate his conviction so that he would no longer be required to be registered as a sex offender and could be released to a nursing home. On June 5, 2017, the court conducted a hearing on the motion and one week later rendered an order denying the motion as untimely and finding it failed to prove the type of extraordinary relief available under CR 60.02. Nelson was released from custody, and, as of December 2017, resided in a halfway house in Louisville.

Nelson, through appointed counsel, now argues that the Lyon Circuit Court committed reversible error in failing to vacate his conviction pursuant to CR 60.02(e) and (f). Although 13 years lapsed between Nelson's conviction and the filing of his CR 60.02 motion, he argues that the motion was timely given the totality of the circumstances and in particular the onset of his paraplegia in 2014. Specifically, Nelson asserts that at the time of his guilty plea he could not have anticipated his paraplegia nor the housing problems he would face on release from custody. He argues that requiring him to continue to register as a sex offender constitutes cruel and unusual punishment, is violative of the constitutions of the

United States and the Commonwealth of Kentucky, and justifies the type of extraordinary relief encompassed by CR 60.02. Further, Nelson argues that the nature of the underlying offense falls at the least offensive end of the spectrum of sexual offenses and is not substantially different than the groping that occurs on a dance floor full of intoxicated individuals. In summary, Nelson argues that forcing him to continue registering as a sex offender for another six years is excessive and cruel, and that the Lyon Circuit Court erred in failing to so rule.

Nelson moved for relief under CR 60.02(e) and (f). CR 60.02(e) states that a court may relieve a party from a final judgment when “the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application[.]” However, such a motion “shall be made within a reasonable time[.]” CR 60.02. What constitutes a reasonable time is left to the discretion of the trial court. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

CR 60.02(f) provides that the “court may, upon such terms as are just, relieve a party . . . from its final judgment . . . upon . . . any other reason of an extraordinary nature justifying relief.” In order to prevail upon a claim of newly discovered evidence pursuant to CR 60.02(f), a claimant must demonstrate that the “newly discovered evidence is evidence that could not have been obtained at the

time of trial through the exercise of reasonable diligence.” *Foley v. Commonwealth*, 425 S.W.3d 880, 887 (Ky. 2014) (quoting *Commonwealth v. Harris*, 250 S.W.3d 637, 642 (Ky. 2008)).

Herein, the Lyon Circuit Court concluded that Nelson’s claim for relief after the passage of 13 years did not constitute “a reasonable time” as mandated by CR 60.02. In support of this conclusion, the court noted that periods of five and twelve years were found on appeal in other cases not to be in conformity with CR 60.02. *See Gross, supra*, and *Ray v. Commonwealth*, 633 S.W.2d 71 (Ky. App. 1982). The instant facts are distinguishable from those of *Gross* and *Ray*, however, as it was asserted by Nelson’s counsel at oral argument that Nelson was not confined to a wheelchair until approximately 2014. This claim is significant because the denial of Nelson’s CR 60.02 motion was primarily grounded on the approximate 13-year passage of time between the conviction and the motion for relief. As Nelson’s confinement to a wheelchair apparently did not occur until approximately 2 years before the motion, it may constitute a substantive change in the facts affecting the trial court’s calculus. That is to say, Nelson could not have known at the time he entered his guilty plea approximately 13 years ago that he would find himself in circumstances requiring nursing care and assisted living. In Nelson’s view, the motion was timely as it was only necessitated in July 2016, when the Department of Corrections was unable to release him to an

adequate living placement. We agree that the clock did not begin to run as to the reasonable time requirement of CR 60.02 at least until Nelson was confined to a wheelchair and allegedly received inadequate placement at the time of his release. Therefore, we reverse the order of the Lyon Circuit Court.

However, we draw no conclusion as to whether Nelson is entitled to the relief sought. The Lyon Circuit Court should determine whether the delay in filing the motion after Nelson became a paraplegic in approximately 2014 was timely. It is also not clear from the record whether Nelson actually requires assisted living, as he asserts, or whether assisted living is available despite Nelson being a registered sex offender.

Further, “[t]wo of the factors to be considered by the trial court in exercising its discretion are whether the movant had a fair opportunity to present his claim at the trial on the merits and whether the granting of the relief sought would be inequitable to other parties.” *Fortney v. Mahan*, 302 S.W.2d 842, 843 (Ky. 1957). See also *Snodgrass v. Snodgrass*, 297 S.W.3d 878 (Ky. App. 2009). We conclude that under the circumstances this analysis extends to society at large since its safety is a primary consideration in requiring Nelson to register as a sex offender.

For these reasons, we REVERSE the order on appeal and remand the matter to the Lyon Circuit Court for a hearing and consideration of these issues.

THOMPSON, JUDGE, CONCURS.

JOHNSON, JUDGE, DISSENTS WITHOUT SEPARATE OPINION.

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