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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001557-MR

ERIN WELLS — APPELLANT

v.

APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 16-CR-00149

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: JONES, MAZE, AND TAYLOR, JUDGES.

MAZE, JUDGE: Erin Wells appeals the order of Boyle Circuit Court denying his motion to vacate his sentence pursuant to RCr[1] 11.42 and CR[2] 60.02. Wells argues the addition of post-incarceration supervision to his sentence and his subsequent parole revocation breached the terms of his plea agreement and violated multiple

[1] Kentucky Rules of Criminal Procedure.

[2] Kentucky Rules of Civil Procedure.

provisions of the Kentucky Constitution. After careful review, we dismiss Wells's appeal of the denial of his RCr 11.42 motion as moot. We also hold that the trial court did not abuse its discretion in denying Wells relief pursuant to CR 60.02.

I. Background and Procedural History

On September 8, 2016, Wells pleaded guilty to second-degree escape and fourth-degree assault. He was sentenced to twelve months' imprisonment for the assault, to run consecutive to a one-year sentence for the escape charge. Neither Wells's guilty plea agreement nor the trial court's judgment and sentence referenced the possibility that Wells could be subject to post-incarceration supervision.

One day before being released from prison, the Kentucky Department of Corrections (DOC) informed Wells he had been given a "close" security classification. This implicated KRS[3] 532.400, which provides that any person with a close security classification, as defined by the DOC's administrative regulations, shall be subject to a one-year period of post-incarceration supervision upon release. Wells did not appeal this administrative determination, and he was released from prison and sent to a halfway house.

Complying with the conditions of his supervision would prove difficult for Wells, and in December 2017 he was arrested on a post-incarceration

[3] Kentucky Revised Statutes.

warrant for, amongst other things, absconding parole supervision. Wells subsequently pleaded guilty to the alleged violations at a final revocation hearing before the Kentucky Parole Board (the Board). The Board revoked Wells's parole and denied his motion to reconsider. The record does not indicate that Wells administratively appealed this decision.

Wells then moved under RCr 11.42 and CR 60.02 to vacate or amend his sentence. Wells argued his plea was not knowing and voluntary because he did not agree to any post-incarceration supervision. He also argued the DOC violated the separation of powers doctrine by giving him a close security classification and effectively sentencing him to a period of post-incarceration supervision. Finally, Wells contended that KRS 532.400 was unconstitutional as applied to him. The trial court denied the motion. Wells appealed this order but was released from custody before his appeal could be assigned to a panel of this Court.

II. The RCr 11.42 Motion is Moot

"Appellate courts lack subject matter jurisdiction to decide cases that have become moot." *Commonwealth, Kentucky Bd. of Nursing v. Sullivan Univ. Sys., Inc.*, 433 S.W.3d 341, 343 (Ky. 2014). In *Parrish v. Commonwealth*, 283 S.W.3d 675, 677 (Ky. 2009), the Kentucky Supreme Court held that a RCr 11.42 motion is moot if the petitioner completes his sentence while his appeal is pending. The Court reasoned that its holding was axiomatic because the relief provided by

RCr 11.42 is release from sentence. *Id.* However, Wells claims two exceptions to the mootness doctrine are applicable his case. First, he contends his appeal is one "capable of repetition, yet evading review." *Philpot v. Patton*, 837 S.W.2d 491, 493 (Ky. 1992). Second, he requests we review his case under the public interest exception set out by the Kentucky Supreme Court in *Morgan v. Getter*, 441 S.W.3d 94, 103 (Ky. 2014). We hold that neither exception is suited to this case.

A case is capable of repetition, yet evading review, when "there is a reasonable expectation that the same complaining party would be subject to the same action again." *Philpot*, 837 S.W.2d at 493. Wells contends he satisfies this test because his criminal history makes it reasonable to expect he will be charged with another crime in the future and be subject to another sentence by the DOC. This novel argument is unsupported by any legal authority. Regardless, the errors alleged by Wells do not evade appellate review so long as the proper procedure is followed. Wells could have challenged his close security classification by exhausting his administrative remedies and filing a petition for declaratory judgment against the DOC. *See* KRS 418.040; *Smith v. O'Dea*, 939 S.W.2d 353, 355 (Ky. App. 1997). This Court has already held that a civil action, not an RCr 11.42 motion, is the appropriate method for challenging revocation of post-incarceration supervision. *Skaggs v. Commonwealth*, 488 S.W.3d 10, 16 (Ky. App. 2016).

We also hold that the public interest exception to the mootness doctrine is not applicable to this case. As the Kentucky Supreme Court explained, a court may review an otherwise moot case when "(1) the question presented is of a public nature; (2) there is a need for an authoritative determination for the future guidance of public officers; and (3) there is a likelihood of future recurrence of the question." *Morgan*, 441 S.W.3d at 102. However, we cannot provide guidance in this case because a necessary party is missing, and several arguments were not preserved for appellate review.

Wells argues the DOC's actions violated the separations of powers doctrine and his constitutional rights but did not add the DOC as a party to this case. A party is indispensable to an appeal when it has "an interest that would be *affected* by the decision of the Court of Appeals, regardless of whether that interest is affected adversely or favorably." *Browning v. Preece*, 392 S.W.3d 388, 391 (Ky. 2013) (emphasis original). Failure to name an indispensable party requires dismissal of an appeal. *Watkins v. Fannin*, 278 S.W.3d 637, 640 (Ky. App. 2009). Wells also argues KRS 532.400 is unconstitutional as applied to him. We are unable to find any indication in the record that Wells provided notice to the Attorney General, as required under KRS 418.075(1).[4] Accordingly, these issues

[4] Wells's brief did not contain a statement, with reference to the record, showing whether each issue was properly preserved for appellate review. *See* CR 76.12(4)(c)(v). It is the appellant's responsibility to cite where in the record an issue is preserved for review, and an appellate court

are not preserved for appellate review. *Benet v. Commonwealth*, 253 S.W.3d 528, 533 (Ky. 2008).

III. The Trial Court Did Not Abuse Its Discretion by Denying Wells's CR 60.02 Motion.

Wells made a brief reference to CR 60.02 in his original motion to alter, amend, or vacate. However, he has not articulated how the rule is applicable to his case. "CR 60.02 is an extraordinary remedy and is available only 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). A denial of a CR 60.02 motion is reviewed for an abuse of discretion. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000). Given Wells's procedural errors and his failure to allege specific grounds for relief under CR 60.02, the trial court did not abuse its discretion.

IV. Conclusion

For the reasons stated above, the order of the Boyle Circuit Court is affirmed.

ALL CONCUR.

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will not search the record on appeal to make that determination. *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 53 (Ky. 2003).

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