

RENDERED: JANUARY 11, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001551-MR

ROBERT WILLIS MCKINNEY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 16-CI-03148

TIFFANY RATLIFF, WARDEN;
JASON LOTTLER, ADJUSTMENT OFFICER;
AND KENTUCKY DEPARTMENT
OF CORRECTIONS

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES.

CLAYTON, CHIEF JUDGE: Robert Willis McKinney appeals, *pro se*, from an order of the Fayette Circuit Court denying his Kentucky Rules of Civil Procedure (CR) 60.02 motion for relief. We affirm.

BACKGROUND

McKinney was an inmate in the custody of the Kentucky Department of Corrections (“Corrections”) and incarcerated at the Blackburn Correctional Complex. After a hearing held on July 6, 2016, Adjustment Officer Jason Lottler found McKinney guilty of the offense of lying to an employee, and McKinney forfeited 30 days of good time credit as a result. McKinney filed an appeal of Officer Lottler’s decision on July 11, 2016 to the warden, Tiffany Ratliff, who subsequently concurred with Officer Lottler.

On August 26, 2016, McKinney filed a *pro se* petition for a declaration of rights pursuant to Kentucky Revised Statute (KRS) 418.040 (“Petition”) in the Fayette Circuit Court, appealing the foregoing prison disciplinary action against him and requesting that the circuit court restore his forfeited good time credit. McKinney failed to include with the Petition a copy of his July 11, 2016 appeal to the warden, and the circuit court dismissed the Petition on September 13, 2016, finding that McKinney had failed to attach filed documents verifying the exhaustion of his administrative remedies as required by KRS 454.415(3).

On October 14, 2016, McKinney filed a “Motion to Reinstate Complaint” with the Fayette Circuit Court, arguing that he had in fact exhausted his administrative remedies by appealing the decision to the warden and including

such documentation with his motion. McKinney also tendered a notice of appeal on October 18, 2016 from the circuit court's September 13, 2016 order dismissing the Petition. The Court of Appeals entered an order on November 30, 2016 giving McKinney 30 days to show cause why his appeal should not be dismissed for being untimely filed, as McKinney filed it 30 days after the entry of the circuit court's order. The Court of Appeals subsequently stated, in a February 23, 2017 order, that McKinney had demonstrated insufficient cause and dismissed his appeal.

On April 20, 2017, McKinney filed with the Fayette Circuit Court a motion for relief pursuant to CR 60.02, claiming "mistake, inadvertence, surprise, or excusable neglect." McKinney argued, among other things, that he was denied the right to submit an answer to the response filed by Corrections to McKinney's Petition, as the court dismissed the Petition on the same day as Corrections filed its response. McKinney further argued that the circuit court incorrectly dismissed the Petition because he was indigent and could not pay the fees associated with providing a copy of his appeal to the warden along with the Petition.

McKinney filed the same motion again on June 2, 2017, as well as a "Motion to Compel Court to Take Action on Motion for RCr 60.02(A)." By order entered on August 2, 2017, the Fayette Circuit Court denied McKinney's CR 60.02 motion, stating:

The Petitioner's motion raises grounds that were known to him before the dismissal of his petition and which could have been raised by motion to this Court or appeal to the Kentucky Court of Appeals. The Petitioner has failed to show "mistake, inadvertence, surprise or excusable neglect" that would entitle him to relief under CR 60.02.

Thereafter, McKinney served a "Motion for a CR 59.05 Findings of Fact and Conclusion of Law" on August 4, 2017, which was mailed on August 8, 2017 and filed on August 14, 2017. The Fayette Circuit Court entered an order on August 28, 2017 denying McKinney's CR 59.05 motion, finding that its August 2, 2017 order dismissing McKinney's CR 60.02 motion already stated the applicable factual and legal basis for the court's decision. Thereafter, McKinney filed a notice of appeal on September 27, 2017 from the trial court's order dismissing his CR 60.02 motion.

ANALYSIS

CR 60.02 states in applicable part:

[o]n motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect[.]

Relief under CR 60.02:

is an extraordinary and residual remedy to correct or vacate a judgment upon facts or grounds, not appearing on the face of the record and not available by appeal or

otherwise, which were discovered after the rendition of the judgment without fault of the party seeking relief.

Harris v. Commonwealth, 296 S.W.2d 700, 701 (Ky. 1956). The Kentucky

Supreme Court has further stated that:

The purpose of CR 60.02 is to bring before a court errors which (1) had not been put into issue or passed on, and (2) were unknown and could not have been known to the moving party by the exercise of reasonable diligence and in time to have been otherwise presented to the court.

Young v. Edward Technology Group, Inc., 918 S.W.2d 229, 231 (Ky. App. 1995).

If the party pursuing relief under CR 60.02 could have raised the issue prior to judgment or could have followed the appropriate channels for a direct appeal but neglected to do so, relief from judgment under CR 60.02 is not available. *Board of Trustees of Policemen's and Firemen's Retirement Fund of City of Lexington v. Nuckolls*, 507 S.W.2d 183, 186 (Ky. 1974).

An appellate court reviews the trial court's denial of a CR 60.02 motion for an abuse of discretion. *Partin v. Commonwealth*, 337 S.W.3d 639, 640 (Ky. App. 2010). The test for an abuse of discretion is whether the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky.1999).

In this case, McKinney only addresses one argument in his brief that he made in his original CR 60.02 motion – the argument that he had valid reasons

for failing to attach copies of the documents proving that he had exhausted all administrative remedies before filing his petition as required by KRS 454.415(3). The trial court correctly determined that this was an issue that could have been and should have been addressed on direct appeal. Further, McKinney makes two other arguments in his brief regarding claimed errors during the hearing held before the adjustment officer – that the adjustment officer had refused to allow McKinney to use evidence of recorded phone calls and that the adjustment officer did not allow certain witnesses to provide statements. Not only were these arguments not addressed in McKinney’s CR 60.02 motion, but, again, pertain to issues that he knew about or that he could have known about through the exercise of reasonable diligence in time to present on direct appeal. As previously discussed, CR 60.02 “is for relief that is not available by direct appeal” *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). Where the method required for obtaining relief was an appeal, and where McKinney failed to exercise the option of appeal in a timely manner, he cannot now challenge such issues in a CR 60.02 motion. As a result, McKinney has stated no grounds for extraordinary relief. We find no abuse of discretion by the circuit court and, therefore, affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert Willis McKinney, *pro se*
Central City, Kentucky

BRIEF FOR APPELLEE:

Brenn O. Combs
Department of Corrections
Office of Legal Services