

RENDERED: NOVEMBER 1, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-000371-MR

STEPHON FRANKLIN

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 18-CI-01088

BRAD ADAMS, WARDEN OF NORTHPOINT
TRAINING CENTER;
AND JAMES L. ERWIN,
COMMISSIONER OF THE KENTUCKY
DEPARTMENT OF CORRECTIONS

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: ACREE, COMBS, AND MAZE, JUDGES.

COMBS, JUDGE: Stephon Franklin, *pro se*, appeals from a Franklin Circuit Court order dismissing his petition for declaration of rights and denying his motion to

alter, amend, or vacate. After our review, we reverse the order of the circuit court of March 6, 2019, denying Franklin's motion to alter, amend, or vacate.

FACTUAL AND PROCEDURAL BACKGROUND

Franklin is an inmate incarcerated at Northpoint Training Center (NTC). He is serving a twenty-two-year sentence for: (1) attempted murder and assault, first degree;¹ (2) two counts of flagrant non-support;² (3) trafficking in a controlled substance, first degree;³ and (4) escape, second degree.⁴ Franklin filed a petition for declaration of rights against Brad Adams in his official capacity as the Warden of NTC and James Erwin in his official capacity as the Commissioner of the Kentucky Department of Corrections (KDOC). In his petition, Franklin argued that he has been wrongfully denied 542 days of credit toward his prison sentence.

¹ Franklin pled guilty to attempted murder (Kentucky Revised Statute (KRS) 507.020) and assault, first degree (KRS 508.010), in Jefferson Circuit Court case 03-CR-001853. Franklin was sentenced on November 3, 2004, to twelve years, to run consecutively with his collective ten-year sentence for charges in three other Jefferson Circuit Court cases: 03-CR-000908, 03-CR-001092, and 03-CR-001326.

² Franklin pled guilty to two counts of flagrant non-support (KRS 530.050) in case 03-CR-000908 and was sentenced on November 5, 2003, to two years for each count, but the two charges in this indictment ran concurrently with each other.

³ Franklin pled guilty to trafficking in a controlled substance, first degree, first offense, cocaine (KRS 218A.1412) and possession of drug paraphernalia, first offense (KRS 218A.500(2)), in case 03-CR-001092, and was sentenced on November 5, 2003, to five years and twelve months, respectively, but these two charges ran concurrently with each other.

⁴ Franklin pled guilty to escape, second degree (KRS 520.030), in case 03-CR-001326, and was sentenced on November 5, 2003, to three years.

Franklin contends that he was incarcerated from July 3, 2003,⁵ until he was paroled on January 4, 2016. Afterward, he was compliant with his parole from January 4, 2016, until June 29, 2017, when he admittedly absconded parole. He claims that KDOC will not give him 542 days of credit for his time on parole because he is a violent offender pursuant to KRS 439.344. However, Franklin argues that he had “served out” his sentence as a violent offender by the time that he was paroled on January 4, 2016; thus, he should no longer be considered a violent offender and should receive credit for the 542 days.

In response to Franklin’s petition, NTC and KDOC moved to dismiss, arguing that Franklin failed to attach proof that he exhausted his administrative remedies as required by KRS 454.415(3). In addition, NTC and KDOC argued that Franklin failed to state a claim because, as a violent offender, he is ineligible for parole supervision credit.

The circuit court agreed that Franklin failed to prove he exhausted his administrative remedies through the KDOC procedures. And, on February 8, 2019, the circuit court dismissed Franklin’s petition on that basis.

⁵ NTC and KDOC contend that Franklin did not begin serving his sentence for his violent offenses on this date as he did not enter a guilty plea on those charges until November 3, 2004. However, in NTC’s and KDOC’s response/motion to dismiss Franklin’s petition, they claim that Franklin’s sentence start-date was November 3, 2003, for his aggregate sentence.

Subsequently, Franklin filed a motion to alter, amend, or vacate the circuit court's order and attached: (1) Kentucky Department of Corrections Policies and Procedures (CPP) 17.4 Attachment I;⁶ (2) CPP 17.4 Attachment II;⁷ and (3) a July 19, 2018, letter from the Justice and Public Safety Cabinet stating that Franklin is ineligible to receive credit for his 542 days on parole because he is a violent offender but noting he had "exhausted all administrative remedies available to (him)." Concurrently with that motion, Franklin filed a notice of appeal.

The circuit court denied Franklin's motion to alter, amend, or vacate as untimely. The circuit court reasoned that CR⁸ 59.05 required Franklin's motion to be filed within ten days of its order of February 8, 2019, but that Franklin's motion was not stamped "filed" until February 25, 2019. The circuit court also noted that Franklin filed a notice of appeal with his motion to alter, amend, or vacate; thus, the circuit court reasoned that it no longer had jurisdiction.

In this appeal, Franklin argues that he timely placed his motion to alter, amend, or vacate in the prison mailbox within ten days of the February 8,

⁶ In this form, Franklin requested that the KDOC explain why he was not receiving credit for the 542 days.

⁷ In this form, Franklin appealed to the Central Office Offender Information Services Branch, requesting that credit for the 542 days be applied to his non-violent sentence.

⁸ Kentucky Rules of Civil Procedure.

2019, order. He also argues the circuit court erred in dismissing his petition because he attached documents proving that he exhausted his administrative remedies; and he further contends that he should receive credit for the 542 days of supervised parole because he “served out” his violent offense sentence.

In response, NTC and KDOC argue that Franklin should have attached documentation with his initial petition and that his untimely attempt to comply with KRS 454.415 in his motion to alter, amend, or vacate is inadequate. However, NTC and KDOC do not address the merits of Franklin’s sentence in their response brief.

ANALYSIS

We consider the timeliness of Franklin’s CR 59.05 motion to alter, amend, or vacate. As stated above, the circuit court denied Franklin’s petition for declaration of rights on February 8, 2019. Five days later, on February 13, 2019, according to the certificate of service, Franklin served his motion to alter, amend, or vacate. Franklin also provided the Court with the “History of Outgoing Mail by Inmate” document, which listed February 14, 2019, as the date when his motion was sent to the Franklin Circuit Court from prison. In denying Franklin’s motion to alter, amend, or vacate, the circuit court erroneously concluded that CR 59.05 required Franklin to *file* his motion no later than ten days after its February 8, 2019, order.

According to CR 59.05, “[a] motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be *served* not later than 10 days after entry of the final judgment.” (Emphasis added.) The circuit court erroneously interpreted CR 59.05 to require *filing* instead of *service* of the motion. *See Huddleston v. Murley*, 757 S.W.2d 216, 217 (Ky. App. 1988) (holding that CR 59.05 requires a motion be served instead of filed within the ten-day timeframe).

If Franklin served his motion to alter, amend, or vacate on either February 13, 2019, as indicated on the certificate of service, or on February 14, 2019, as indicated on the “History of Outgoing Mail by Inmate” document, his motion was timely made within ten days of the circuit court’s February 8, 2019, order. Therefore, the circuit court erred in denying Franklin’s motion to alter, amend, or vacate as untimely.⁹

In its March 6, 2019, order, the circuit court also held that it lacked jurisdiction to hear Franklin’s CR 59.05 motion because he filed a concurrent notice of appeal. That order is incorrect.

A circuit court retains jurisdiction to amend, alter, or vacate its own judgment when a timely CR 59.05 motion is filed. *Gullion v. Gullion*, 163 S.W.3d 888, 891 (Ky. 2005). Procedurally, a circuit court must rule on a pending CR

⁹ Because we conclude Franklin’s CR 59.05 motion was timely served, we need not address his argument that the prison mailbox rule should have rendered his motion filed when he placed it in the prison mailbox.

59.05 motion in order for a judgment to attain finality. *Id.* Thus, Franklin's concurrent notice of appeal was premature until he obtained a ruling on his CR 59.05 motion. Because Franklin's CR 59.05 motion to alter, amend, or vacate was timely, the circuit court retained jurisdiction to consider his motion.

Therefore, we reverse the Franklin Circuit Court's order of March 6, 2019, denying Franklin's CR 59.05 motion. Franklin's motion to alter, amend, or vacate shall be deemed timely, and the circuit court has jurisdiction to hear Franklin's CR 59.05 motion on remand. *See* CR 73.02(1)(e)(i).

ALL CONCUR.

BRIEFS FOR APPELLANT:

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