IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: FEBRUARY 15, 2018
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2017-SC-000210-MR

STEVEN ROBINSON — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2017-CA-000028-MR
JEFFERSON CIRCUIT COURT NO. 11-CR-001279

HONORABLE FRED COWAN (RETIRED JUDGE, JEFFERSON CIRCUIT COURT) — APPELLEE

AND

COMMONWEALTH OF KENTUCKY — REAL PARTY IN INTEREST

MEMORANDUM OPINION OF THE COURT

AFFIRMING
AND
ORDER DENYING MOTION TO STRIKE

Steven Robinson appeals the Court of Appeals' decision to deny his petition for a writ of prohibition. Robinson has also moved this Court to strike as untimely filed the Commonwealth's brief in this appeal. We deny the motion to strike, and we affirm the denial of the writ.

I. BACKGROUND.

A grand jury indicted Robinson on one count of kidnapping, one count of first-degree sexual abuse, and indecent exposure. Robinson entered into a plea agreement with the Commonwealth in which he pleaded guilty to first-degree

sexual abuse and indecent exposure. In exchange for these guilty pleas, the Commonwealth moved to dismiss the kidnapping charge and recommended a total sentence of three years' imprisonment, registration as a sex offender for 20 years, and completion of the sex-offender treatment program. The trial court accepted this agreement and entered judgment accordingly.

Robinson served his three-year sentence and was released from custody. During the process of his release, Robinson alleges the Department of Corrections informed him that he was conditionally discharged from custody for an additional five years of post-incarceration supervision by the Department of Corrections under KRS 532.043 and 532.060(3). Robinson now contends that this post-incarceration supervision was never mentioned in any proceedings regarding the plea agreement, the plea agreement itself, or the trial court's final judgment.

Four months after his release, Robinson was returned to prison as a technical violator of the conditional discharge for having missed a sex-offender treatment class. Robinson filed a motion in the trial court to set aside his guilty plea, arguing that he was not advised at the time of his guilty plea that his failure to complete a post-incarceration sex-offender training program could result in his re-incarceration under KRS 534.043. Robinson eventually withdrew this motion, however.

Robinson later filed another motion in the trial court, requesting the trial court to enter a *nunc pro tunc* order[1] to enforce the specific terms of the plea agreement under which he was originally sentenced and to prohibit the Commonwealth from enforcing the five-year post-incarceration supervision requirement. Robinson argued that he should not be subject to post-incarceration sex-offender conditional discharge because neither his plea agreement nor the trial court's final judgment included this requirement.

On July 11, 2016, after review of Robinson's motion, the trial court issued an order presenting Robinson with two options he could choose from at a hearing scheduled for August 18, 2016: (1) consent to the amendment of the final judgment to reflect the requirement that he complete sexual offender post incarceration supervision; or (2) withdraw his guilty plea and subject himself to re-prosecution on the original charges. That hearing apparently was never held because before the scheduled date, the Commonwealth filed an interlocutory appeal from this order, which was dismissed by the Court of Appeals[2]. On December 9, 2016, before the Court of Appeals ruled on the Commonwealth's interlocutory appeal, the trial court, of its own accord, entered an order vacating the July 11, 2016 order, correcting the original judgment to include the requirement of post-incarceration supervision.

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[1] "'*Nunc pro tunc*,' a Latin phrase meaning 'now for then,' denotes an order having retroactive legal effect through a court's inherent power." 60 C.J.S. Motions and Orders § 52; *see Powell v. Blevins*, 365 S.W.2d 104 (Ky. 1963).

[2] *Commonwealth v. Robinson*, No. 2016-CA-001176-MR, 2017 WL 4862404, at *4 (Ky. App. Oct. 27, 2017).

Robinson then filed a *pro se* petition for a writ of prohibition, requesting the Court of Appeals to enforce the terms of the original plea agreement and to order his immediate release from prison. The Court of Appeals denied the petition, finding that Robinson had alternative avenues for relief from the judgment, including the filing of a Kentucky Rules of Criminal Procedure ("RCr") 11.42 motion and a Kenuckty Civil Rule ("CR") 60.02 motion. Robinson then appealed to this Court raising two issues for review: (1) whether the Court of Appeals erred when it denied Robinson's petition for writ of prohibition; and (2) whether this Court should grant Robinson's motion to strike the Commonwealth's brief, which he alleged was untimely filed. We shall analyze first the motion to strike the Commonwealth's brief.

II. ROBINSON'S MOTION TO STRIKE COMMONWEALTH'S BRIEF AS UNTIMELY.

Robinson's brief regarding his appeal of the denial of his petition for writ of prohibition was filed with this Court on June 15, 2017. The Commonwealth transmitted its brief to the Clerk of this Court by express mail on August 14, 2017. The Commonwealth's brief was not logged as received by the Clerk of this Court until August 16, 2017.

Kentucky Civil Rule (CR) 76.12(2)(a) requires an appellee's brief to be "filed within 60 days after the date on which the appellant's brief was filed." CR 76.40(2) additionally provides:

> To be timely filed, a document must be received by the Clerk of the Supreme Court...within the time specified for filing, *except that any document shall be deemed timely filed if it has been transmitted by...express mail...with the date the transmitting agency received said document from the sender noted by the transmitting agency on*

the outside of the container used for transmitting, within the time allowed for filing.[3]

The Commonwealth used express mail to transmit its brief on August 14, 2017, the date noted on the mailer, one day before the time allowed for filing. The Commonwealth complied with CR 76.40(2), and therefore complied with CR 76.12(2)(a). Robinson's motion to strike the Commonwealth's brief as untimely is denied.

III. ROBINSON'S APPEAL OF THE DENIAL OF HIS PETITION FOR WRIT OF PROHIBITION.

Robinson argues that the Court of Appeals erred when it denied his writ of prohibition seeking enforcement of his original plea agreement and immediate release from custody. Robinson's argument essentially boils down to the following: Because KRS 532.043's five-year post-incarceration supervision requirement was not included in the plea agreement, this requirement cannot be imposed upon Robinson, the plea agreement should be imposed exactly as it appears on its face, and Robinson should be released from incarceration. This is the only basis upon which Robinson bases his writ petition.

We review the Court of Appeals' decision for abuse of discretion.[4] "However, if the basis for the grant or denial involves a question of law, the appellate court reviews this conclusion *de novo*."[5] "If the court with which the

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[3] (emphasis added).

[4] *Commonwealth v. Peters*, 353 S.W.3d 592, 595 (Ky. 2011) (quoting *Bender v. Eaton*, 343 S.W.2d 799, 800 (Ky. 1961)).

[5] *Id.*

petition is filed bases its ruling on a factual determination, this finding of fact is reviewed for clear error."[6]

This Court in *Commonwealth v. Peters* explained the use of writs of prohibition and the legal rules accompanying them:

> Relief by way of a writ of prohibition is an "extraordinary remedy and we have always been cautious and conservative both in entertaining petitions for and in granting such relief."[7] Writ cases are divided into two classes, which are distinguished by "whether the inferior court allegedly is (1) acting without jurisdiction (which includes 'beyond its jurisdiction'), or (2) acting erroneously within its jurisdiction."[8] When...the petitioner alleges that the trial court is acting erroneously, though within its jurisdiction, a writ will only be granted when two threshold requirements are satisfied: there exists no adequate remedy by appeal or otherwise; and the petitioner will suffer great and irreparable harm.[9] Under a narrow exception to the harm requirement, the "certain special cases" exception, the writ can be granted "in the absence of a showing of specific great and irreparable injury...provided a substantial miscarriage of justice will result if the lower court is proceeding erroneously, *and* correction of the error is necessary and appropriate in the interest of orderly judicial administration"[10].[11]

"No adequate remedy by appeal or otherwise means that the injury to be suffered...'could not therefore be rectified by subsequent proceedings in the

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[6] *Id.*

[7] *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 808 (Ky. 2004).

[8] *Id.*

[9] *Hoskins v. Maricle*, 150 S.W.3d 1, 18 (Ky. 2004).

[10] *Bender*, 343 S.W.2d at 801 (emphasis in original). This Court in *Independent Order of Foresters v. Chauvin* acknowledged that invoking the "certain special cases" exception is still subject to the requirement of showing a lack of an adequate remedy by appeal when the alleged error is that of the court erroneously acting within its jurisdiction. 175 S.W.3d 610, 617 (Ky. 2005) (citing *Bender*, 343 S.W.2d at 801).

[11] *Peters*, 353 S.W.3d at 595.

case.'"[12] Under these rules, we agree with the Court of Appeals' denial of the writ of prohibition.

Robinson's writ petition falls under the second class of writ petitions—an allegation that the trial court is acting erroneously within its jurisdiction for failing to enforce Robinson's plea agreement on its face[13]. But the Court of Appeals correctly identified that Robinson has available to him "adequate remedies," the filing of a RCr 11.42 or CR 60.02 motion, that could "rectify" the purported injury in this case.[14] The filing of either motion would adequately address Robinson's writ-petition claim in the form of a collateral attack upon the original judgment.[15]

Because of these other adequate alternative remedies, Robinson's petition for a writ of prohibition must fail, because Robinson's petition fails to meet the threshold requirements needed for the filing of such a writ.[16] But this

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[12] *Ridgeway Nursing & Rehabilitation Facility, LLC v. Lane*, 415 S.W.3d 635, 640 (Ky. 2013) (quoting *Bender*, 343 S.W.2d at 802).

[13] *See Akers v. Stephenson*, 469 S.W.2d 704, 706 (Ky. 1970) (holding that a court has "the authority...to enforce its own judgments and remove any obstructions to such enforcement"). Even if it was determined that Robinson's writ petition fell under the "certain special cases" class, Robinson's writ petition would nonetheless fail for failing to show "no adequate remedy by appeal or otherwise." *See Chauvin, supra* fn. 10.

[14] *See Hawks v. Saunders*, No. 2009-SC-000405-MR, 2009 WL 4251326, *1 (Ky. Nov. 25, 2009) ("...[Defendant] cannot show that he lacks an adequate remedy for his allegations that the final judgment is invalid because RCr 11.42 or CR 60.02 motions to challenge the validity of the judgment to the trial court were available. So [Defendant] clearly has not shown that he was entitled to a writ under our standard.").

[15] Although it would appear that Robinson would subsequently make the same arguments in either of these motions as he did in this writ petition, we note Kentucky law's general reluctance to allow courts to recharacterize motions into what a court thinks a Defendant is attempting to do. *See McDaniel v. Commonwealth*, 495 S.W.3d 115 (Ky. 2016).

[16] The Commonwealth argues that Robinson failed to name the correct party in his writ petition, an additional reason why his writ petition should fail. However, we need

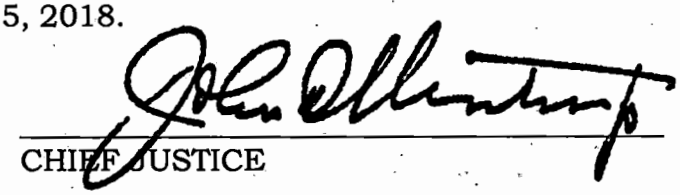
does not preclude Robinson from seeking alternative forms of relief, namely, the filing of a RCr 11.42 or CR 60.02 motion in the trial court.

IV. CONCLUSION.

We affirm the Court of Appeals and hold that Robinson's petition for writ of prohibition fails, in addition to concluding that the Commonwealth's brief in this case was filed in a timely manner.

All sitting. All concur.

ENTERED: February 15, 2018.



CHIEF JUSTICE

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not address this issue at this time, because we have denied Robinson's writ petition for different reasons.