IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-439

No. COA20-599

Filed 17 August 2021

North Carolina Industrial Commission, I.C. No. TA-24836

DANIEL ROSS, Plaintiff,

v.

N.C. STATE BUREAU OF INVESTIGATION, Defendant.

Appeal by plaintiff from order entered 1 April 2020 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 May 2021.

Law Office of Barry Nakell, by Barry Nakell, for plaintiff-appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Alexander G. Walton, for defendant-appellee.

DIETZ, Judge.

¶ 1 Plaintiff Daniel Ross appeals the Industrial Commission's denial of a Rule 60(b) motion seeking relief from the Commission's judgment against him. Ross brought the underlying claim against the State Bureau of Investigation for failure to properly maintain certain criminal records. Ross argues that the Commission erred because its earlier judgment was based on fraud and misrepresentations by the SBI. Ross also argues that a federal court order entered after the Commission's judgment

changes the key underlying facts on which the Commission relied.

¶ 2 We are constrained by our limited standard of review to reject Ross's arguments. Ross's motion under Rule 60(b)(3), concerning fraud or misrepresentations by the SBI, was untimely. Ross's motion under Rule 60(b)(6) is subject to abuse of discretion review and the Commission's decision not to reopen the case was not so arbitrary that it could not have been the result of a reasoned decision. We therefore affirm the Commission's order.

Facts and Procedural History

¶ 3 In 1969, Plaintiff Daniel Ross was convicted of first degree murder in Wake County Superior Court. In 1983, the U.S. Court of Appeals for the Fourth Circuit held that the conviction was obtained in violation of the U.S. Constitution and the U.S. Supreme Court affirmed that decision. *Ross v. Reed*, 704 F.2d 705, 709 (4th Cir. 1983), *aff'd*, 468 U.S. 1 (1984). The Fourth Circuit ordered the lower federal court to issue a writ of habeas corpus. *Id.* The U.S. District Court for the Eastern District of North Carolina carried out the Fourth Circuit's mandate by issuing a writ of habeas corpus setting aside Ross's conviction and declaring it "null and void and of no legal effect." *Ross v. Reed*, No. 78–62–HC, order at 2 (E.D.N.C. June 1, 1983).

¶ 4 In 2013, Ross was employed as a security guard in Maryland and, as a condition of his employment, he was required to obtain a license. The licensing process required a criminal background check. The agency conducting that

background check contacted the FBI to obtain a copy of Ross's criminal history. The document the FBI produced included a record of Ross's 1969 murder conviction but no indication that the conviction had been set aside in a federal habeas proceeding and declared null and void by a federal court. As a result of the background check, Ross was unable to obtain a license and lost his job as a security guard.

¶ 5 In March 2015, Ross filed a *pro se* complaint in the Industrial Commission under the State Tort Claims Act, alleging that the State Bureau of Investigation negligently failed to accurately maintain his criminal record. Ross alleged that the SBI breached its duty to update his criminal record to reflect the outcome of the habeas proceeding in federal court and to transfer the updated, accurate criminal history to the FBI.

¶ 6 In February 2016, a deputy commissioner heard Ross's tort claim. The SBI presented a computer printout of its record of Ross's criminal history, dated 2015, showing that Ross's record had been updated to include the following notation on the murder conviction: "060183 CONVICTION SET ASIDE-NULL & VOID-OF NO LEGAL EFF." Along with the 2015 printout, the SBI presented an accompanying affidavit and testimony from an SBI agent who stated under oath that the annotation of the murder conviction was entered on Ross's record in the SBI's system "on or before August 19, 2011." In May 2016, the deputy commissioner entered a decision and order denying Ross's claim, concluding that the SBI fulfilled its duty to maintain

Ross's criminal record. Ross appealed to the Full Commission.

¶ 7 In February 2017, the Full Commission filed a decision and order affirming the denial of Ross's claim. The Commission concluded that Ross failed to satisfy his burden of proof to show that the SBI was negligent because the SBI fulfilled its statutory duty to maintain Ross's criminal record when it added the annotation to his conviction in 2011 and that any error in a database search and dissemination of the resulting information on the part of the FBI was not attributable to the SBI.

¶ 8 Ross appealed to this Court. Later in 2017, Ross also filed a federal civil action seeking an injunction requiring the SBI to remove his murder conviction from his criminal history records. *Ross v. Hooks & Schurmeier*, No. 5:17-CV-510-H (E.D.N.C.).

¶ 9 In Ross's first appeal to this Court, we affirmed the Full Commission's decision, holding that the SBI "presented competent evidence showing [it] accurately updated and maintained [Ross]'s criminal record," and that this was competent evidence supporting the Commission's findings of fact and resulting conclusions of law. *Ross v. N.C. State Bureau of Investigation*, 259 N.C. App. 424, 812 S.E.2d 858, 2018 WL 2016405, at *4 (2018) (unpublished).

¶ 10 On 26 November 2019, the federal district court entered an order stating that, to "carry out the intent of its prior order [from 1983 declaring Ross's murder conviction null and void], the court hereby orders that [Ross's] conviction of first degree murder . . . be expunged from his criminal record . . . ." *Ross v. Hooks &*

Schurmeier, No. 5:17-CV-510-H (E.D.N.C. 2019). The federal court order noted that "The Industrial Commission found that the SBI was not negligent in the maintenance of its records." *Id.*

¶ 11 On 25 February 2020, Ross, now represented by counsel, filed a "Motion for Reconsideration and Relief from Decision and Order" under "Rule 60(b)(1), (3), and (6)," requesting that the Commission "relieve him" from its 2016 and 2017 decisions and "reopen the case and reinstate it to active docket status."

¶ 12 On 1 April 2020, the Full Commission entered an order denying Ross's Rule 60(b) motion, finding that Ross "fail[ed] to argue specific factual or legal grounds under Rule 60, aside from challenging the competence of certain record evidence." The Commission concluded that "good grounds do not exist to grant plaintiff's motion or grant plaintiff relief under Rule 60" and that Ross did not "cite any other grounds on which he [was] entitled to relief." Ross appealed.

Analysis

¶ 13 Ross argues that the Industrial Commission erred in denying his motion for relief from the Commission's judgment under Rule 60(b). A Rule 60(b) motion "is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975). This Court may find an abuse of discretion only "when the court's decision is manifestly unsupported by reason or is so arbitrary that

it could not have been the result of a reasoned decision." *Brown v. Foremost Affiliated Ins. Servs., Inc.*, 158 N.C. App. 727, 732, 582 S.E.2d 335, 339 (2003).

I. Rule 60(b)(3) – fraud, misrepresentation, or misconduct

¶ 14 Ross first argues that the Commission erred by denying his Rule 60(b) motion because the SBI concealed material facts and presented deceptive or misleading evidence before the Industrial Commission and before this Court in his prior appeal, which "constituted fraud on both tribunals." Specifically, Ross asserts that the SBI used the 2015 printout of his criminal record, and the accompanying affidavit and testimony, to create a "deception" or "false impression" that the SBI had annotated his criminal record in 2011. Ross asserts that the printout itself contained no support for the 2011 date and there was no basis for the SBI's sworn testimony that the annotation occurred in 2011 or earlier.

¶ 15 The Industrial Commission properly rejected this argument because it was untimely under Rule 60(b). A motion seeking relief from a final judgment under Rule 60(b)(3) must be made "not more than one year after the judgment." N.C. R. Civ. P. 60(b). "One of the conditions precedent that must be proven before a court will consider a Rule 60(b) motion is timeliness." *Bruton v. Sea Captain Properties, Inc.*, 96 N.C. App. 485, 488, 386 S.E.2d 58, 59 (1989). Where appellants "did not bring their motions within one year of entry of judgment, their motions were not timely filed and denial was proper." *Id.* at 489, 386 S.E.2d at 60.

¶ 16 Here, Ross's motion alleging fraud or misrepresentations in the evidence presented by the SBI was filed in February 2020, nearly three years after the Full Commission's final 2017 decision. Moreover, the argument he raises is one that could have been made to the Commission during the proceeding in 2016 and does not involve any evidence not available to Ross at that time. In essence, Ross contends that no one during the proceedings in the Industrial Commission adequately questioned the SBI agent whose sworn testimony was the foundation of both the Commission's ruling and this Court's decision on appeal. Although we sympathize with the fact that Ross was *pro se* in these earlier stages of this case, "our courts have emphasized that the Rules of Civil Procedure must be applied equally to all parties to a lawsuit, without regard to whether they are represented by counsel." *Cohen v. McLawhorn*, 208 N.C. App. 492, 500, 704 S.E.2d 519, 525 (2010). Under Rule 60(b)(3), this argument is not timely.

¶ 17 In any event, even if the motion were timely, we still could not hold that the Commission's decision to deny the motion amounted to an abuse of discretion. It is well-settled that the "Commission is the sole judge of the credibility of the witnesses and the [evidentiary] weight to be given their testimony." *Holt v. N.C. Dep't of Transp.*, 245 N.C. App. 167, 175, 781 S.E.2d 697, 703, *aff'd*, 369 N.C. 57, 791 S.E.2d 458 (2016). The Commission heard the SBI agent's sworn testimony about the date when Ross's criminal history was last updated. The Commission found that testimony

to be credible. This Court, in turn, held that there was competent evidence to support the Commission's decision. In light of these determinations, we cannot say that the Commission abused its discretion by declining to reconsider that credibility determination on a Rule 60 motion. *Brown*, 158 N.C. App. at 732, 582 S.E.2d at 339.

II. Rule 60(b)(6) – relief from judgment in the interests of justice

¶ 18 Ross next contends that the Commission erred by denying his Rule 60(b) motion in the interests of justice. Ross contends that, in light of the federal district court order in 2019 concluding that the SBI must expunge his criminal record (rather than merely annotate it), the Commission's earlier decision is either erroneous or unjust because it turned largely on the notion that the annotation was sufficient to satisfy the SBI's responsibility to maintain accurate records.

¶ 19 "Rule 60(b)(6) is equitable in nature" and is a core discretionary decision. *Piedmont Rebar, Inc. v. Sun Constr., Inc.*, 150 N.C. App 573, 575, 564 S.E.2d 281, 283 (2002). Thus, in addition to the already high standard of review, this Court has held that a Rule 60(b)(6) motion "may be reversed on appeal only upon a showing that the decision results in a substantial miscarriage of justice." *Id.*

¶ 20 Rule 60(b)(6) "has been described as a grand reservoir of equitable power to do justice in a particular case. In order to be entitled to relief under Rule 60(b)(6) the movant must show that (1) extraordinary circumstances exist and that (2) justice demands such relief." *Goodwin v. Cashwell*, 102 N.C. App. 275, 278, 401 S.E.2d 840,

842 (1991) (citation omitted). "This test is two-pronged, and relief should be forthcoming only where both requisites exist." *Chandak v. Elec. Interconnect Corp.*, 144 N.C. App. 258, 265, 550 S.E.2d 25, 30 (2001). Factors relevant to whether relief should be granted under 60(b)(6) include "(1) the general desirability that a final judgment not be lightly disturbed, (2) where relief is sought from a judgment of dismissal or default, the relative interest of deciding cases on the merits and the interest in orderly procedure, (3) the opportunity the movant had to present his claim or defense, and (4) any intervening equities." *Standard Equip. Co. v. Albertson*, 35 N.C. App. 144, 147, 240 S.E.2d 499, 501–02 (1978).

¶ 21 Applying this standard, the Commission's denial of the Rule 60(b)(6) motion was not an abuse of discretion that results in a substantial miscarriage of justice. Ross had his day in court. He had the opportunity to challenge the credibility of the SBI agent whose sworn testimony was the foundation of the Industrial Commission's decision. Moreover, the federal district court's 2019 order did *not* hold that the court's original 1983 habeas ruling required Ross's conviction to be expunged. Instead, the court expressly declined to address that issue and instead entered an order that "clarifies its prior order declaring plaintiff's 1969 conviction null and void" by ordering that to "carry out the intent of its prior order," Ross's conviction must be expunged. *Ross v. Hooks & Schurmeier*, No. 5:17-CV-510-H (E.D.N.C. 2019). Given the narrow standard of review applicable to motions under Rule 60(b)(6), we cannot

conclude that the Commission's decision not to reopen the proceeding in light of these facts was an abuse of the Commission's broad discretion under Rule 60(b)(6).

Conclusion

¶ 22 We affirm the Industrial Commission's order.

AFFIRMED.

Judges INMAN and WOOD concur.

Report per Rule 30(e).