No. 89983-5

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

DAWN BAUER,

Respondent,

vs.

NYLES BAUER,

Petitioner

APPEAL FROM DIVISION II
OF THE COURT OF APPEALS
#43530-6-II

PETITION FOR REVIEW

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TABLE OF AUTHORITIES

Cases

Rules

I. IDENTITY OF PETITIONER

Nyles Bauer, petitioner, respectfully requests that this Court accept review of the Court of Appeal's decision in case number 43530-6-II terminating review designated in Part II of this petition.

II. COURT OF APPEALS DECISION

Petitioner respectfully requests that this Court review the Court of Appeal's decision, affirming the trial court's decision in this case. The Court of Appeals erroneously determined that the trial court's entry of an order without notice was unreviewable because Mr. Bauer did not provide the entire record of the trial court, even though it was not relevant to the issues.

A copy of the decision from the Court of Appeals, Division II, terminating review which was filed on February 4, 2014 is attached as Exhibit "A".

III. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in affirming the trial court's decision refusing to vacate an order impacting Mr. Bauer's parental rights that was entered without notice to him?

IV. STATEMENT OF THE CASE

A. *Procedural History*

In August 2010, an order in a child custody case was entered against the petitioner herein, which limited his parental rights. RP 10 at 3-19; CP 29-62. The order was entered after his prior attorney withdrew from the case. CP 8. However, even then, the attorney represented that Mr. Bauer wanted a hearing on the matter. RP 5:16-25. In addition to naming his ex-wife as primary guardian, the oral order allowed professionally supervised visits upon certain conditions. RP 13. See Attachment "A".

Upon learning of the entry of the order, Mr. Bauer filed a motion to vacate on May 3, 2012. CP 2-3. The basis for the motion was that the attorney had withdrawn, and was not representing him at the hearing. CP 4-9; 25-27. As stated in his motion, the reason for it not being made within one year was because he was incarcerated for approximately 200 days and then placed in a psychiatric unit. CP 26. The trial court indicated it would hear the motion without oral argument. CP 65-66. The court then summarily denied the motion, finding it was without merit. See Attachment "A". Mr. Bauer now submits this petition for review.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Petitioner respectfully requests that this Court accept review of this case as it involves a decision of the Court of Appeals that conflicts with an earlier decision from this Court in Bresoloin v. Morris, 86 Wn.2d 241, 543 P.2d 325 (1975) and the Court of Appeals in State ex rel. Campbell v. Cook, 86 Wn.App. 761, 938 P.2d 345 (1997). Thus, review is appropriate under RAP 13.4(b)(1) & (2).

A. THE COURT SHOULD ACCEPT REVIEW OF THE DECISION DENYING THE APPEAL BECAUSE THE ORDER WAS ENTERED WITHOUT PROPER NOTICE.

A decision on a motion to vacate a judgment is within the Court's discretion and will not be disturbed on appeal unless the trial court abused its discretion. In re Dependency of A.G., 93 Wn.App. 268, 276, 968 P. 2d 424 (1998). A court abuses it discretion when its decision is based on untenable grounds, for untenable reasons, or its decision is manifestly unreasonable. Lindgren v. Lindgren, 58 Wn.App. 588, 595, 794 P.2d 526 (1990). In this instance, all of these factors are present.

1. The Order Was Void.

CR 5(a) provides as follows:

> Service--When Required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper

> relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties....

And a violation of CR 5(b)(2):

> Service by Mail. (A) How made. If service is made by mail, the papers shall be deposited in the post office addressed to the person on whom they are being served, with the postage prepaid. The service shall be deemed complete upon the third day following the day upon which they are placed in the mail, unless the third day falls on a Saturday, Sunday or legal holiday, in which event service shall be deemed complete on the first day other than a Saturday, Sunday or legal holiday, following the third day. (B) Proof of service by mail. Proof of service of all papers permitted to be mailed may be by written acknowledgment of service, by affidavit of the person who mailed the papers, or by certificate of an attorney.

In this case, Mr. Bauer was never given notice of the hearing because his attorney had withdrawn from the case, and he was not present for the hearing, not having been given notice. As the Court is aware, before a court may issue an order against an individual, it must have jurisdiction over the parties. If it does not, then a judgment is void. See Bresoloin v. Morris, 86 Wn.2d 241, 245, 543. P.2d 325 (1975). Under this scenario, a judgment is void, and pursuant to CR 60(b)(5), it should be vacated regardless of the time between the original order and the motion to vacate. State ex rel. Campbell v. Cook, 86 Wn.App. 761, 767, 938 P.2d 345 (1997). Additionally, there is no need to even demonstrate a

meritorious defense under this scenario. Mid-City Materials, Inc. v. Heater Beaters Custom Fireplaces, 36 Wn.App. 480, 486, 674 P.2d 1271 (1984).

The trial court, having denied the motion without hearing or articulated reasons, committed obvious and probable error. As such, based on the authorities set forth above, the Court should reverse the trial court and remand for a new hearing.

2. The Order Is Voidable and Mr. Bauer Filed His Motion to Vacate Within a Reasonable Time.

If the Court determines that the order is not void, but merely voidable, the trial court, nevertheless, abused its discretion in denying the motion without any analysis. Pursuant to CR 60(b)(1),(2), or (3) a motion to vacate must be made within a reasonable time. It provides:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
>
> (2) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;
>
> (3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b).

In this instance, the order was entered by surprise, excusable neglect and irregularity in the proceedings. Mr. Bauer's former attorney had withdrawn, only to reappear, unbeknownst to Mr. Bauer. Additionally, he was out of the country and unavailable to be at the hearing. The order was entered without his knowledge or consent. In State ex rel. Turner v. Briggs, 94 Wn.App. 299, 305, 971 P.2d 581(1999), the court acknowledged that orders entered without client authority are voidable and may be vacated.

The only issue is whether Mr. Bauer brought his motion within a reasonable time. As he noted in his pleadings he was incarcerated and then later placed in a psychiatric unit and unavailable. Thus, he has demonstrated that he acted within a reasonable time.

The Court of Appeals affirmed the trial court, "...because Mr. Bauer failed to provide meaningful argument on the notice he should have received, and because he failed to provide a sufficient record for review..." Court's decision at 4. First, as it relates to the record, there was no other part of the record that is even relevant to the narrow issue on this appeal. RAP 9.6 only requires that the designation of clerk's papers include any written order appealed from. All pertinent orders and supporting documents were provided. Additionally, there was no transcript of the trial court's decision denying the motion to vacate, since no argument was presented. Thus, the Court of Appeals had the entire record at its disposal.

Secondly, it is simply without merit to suggest that it is unclear as to what notice Mr. Bauer is entitled to receive. As stated in the opening brief, he never was served with any pleading giving him notice of the proceeding pursuant to CR 5(a).

VI. CONCLUSION

Based on the arguments, records and files contained herein, petitioner respectfully requests that this Court accept review of this matter.

Respectfully submitted this 5 day of March, 2014.

HESTER LAW GROUP, INC., P.S.
Attorneys for Petitioner

By: _____
WAYNE C. FRICKE
WSB #16550

CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the petition for review to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

Dawn Bauer
PMB 5360
P. O. Box 257
Olympia, WA 98507-0257

Nyles Bauer
1242-B Willow Street NE
Lacey, WA 98503

Signed at Tacoma, Washington, this 5th day of March, 2014.

LEE ANN MATHEWS

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

No. 43530-6-II

In re the Marriage of:

DAWN BAUER,

Respondent,

v.

NYLES BAUER,

Appellant.

UNPUBLISHED OPINION

PENOYAR, J. — Nyles Bauer appeals the trial court's denial of his motion to vacate the parenting plan and child support orders. He contends he did not receive notice of the custody hearing and thus the trial court's orders are void under CR 60(b)(5). Because Mr. Bauer failed to provide meaningful legal argument and citation to the record as RAP 10.3(a)(6) requires and because he failed to provide a sufficient record for review, we affirm.

FACTS

The trial court orally ruled on Mr. Bauer's and Dawn Bauer's parenting plan issues for their son, E.B., on August 25, 2010. Mr. Bauer's attorney had withdrawn from the case on August 6, 2010, and reappeared on August 25, 2010, the day of the hearing. Mr. Bauer did not attend the hearing.[1]

The trial court entered the findings of facts and conclusions of law, the parenting plan, and the child support order on October 1, 2010. The parenting plan awarded full residential time of E.B. to Ms. Bauer. As a condition of having any contact with E.B., the trial court ordered Mr.

[1] It appears from the record that Mr. Bauer was out of the country on the hearing date. *See* CP at 20-23 (e-mails between Mr. Bauer and a friend indicating Mr. Bauer was in either South Korea or Hong Kong until at least August 15); RP at 5-6 (trial court stated Mr. Bauer would have had the opportunity to be present at the hearing if he had been in the court's jurisdiction).

Bauer to have a full forensic psychological evaluation, to enroll in and complete the Parent Protection Group course, and to enroll in and complete a parenting class with a focus on the impact of domestic violence on children. The trial court stated Mr. Bauer could seek professionally supervised contact with E.B after meeting the ordered conditions.

Mr. Bauer filed a motion to vacate the findings of fact and conclusions of law, the parenting plan, and the child support order on May 3, 2012. Mr. Bauer stated it took him one and a half years to file the motion to vacate because he was arrested and spent over 160 days in prison upon his return to the United States and then was admitted to a psychiatric unit for mental health issues.

The trial court denied Mr. Bauer's motion to vacate without oral argument, stating, "I have reviewed the materials filed by the parties and find no reason justifying vacation of the Order entered in this matter." Clerk's Papers at 107. Mr. Bauer appeals.

ANALYSIS

Mr. Bauer argues the trial court erred when it denied his motion to vacate the findings of fact and conclusions of law, the parenting plan, and the child support order. Specifically, he contends that he did not receive notice of the custody hearing and thus the orders are void under CR 60(b)(5).[2] Because Mr. Bauer failed to provide meaningful legal argument or citations to the record as RAP 10.3(a)(6) requires, and because Mr. Bauer failed to provide a sufficient record to review this issue, we affirm the trial court.

[2] Mr. Bauer also argues the findings of fact and conclusions of law, the parenting plan, and the child support order are voidable under CR 60(b)(1)-(3). Motions to vacate under CR 60(b)(1)-(3) must be made "not more than 1 year after the judgment, order, or proceeding." CR 60(b). The trial court entered the orders on October 1, 2010, but Mr. Bauer did not file his motion to vacate until May 3, 2012, more than a year later. Thus, Mr. Bauer's CR 60(b)(1)-(3) argument fails.

Under CR 60(b), a trial court "may relieve a party . . . from a final judgment, order, or proceeding." Generally, a decision to grant or deny a motion to vacate a judgment under CR 60(b) is within the trial court's sound discretion and will not be disturbed unless the trial court exercised its discretion on untenable grounds or for untenable reasons. *In re Marriage of Hughes*, 128 Wn. App. 650, 657, 116 P.3d 1042 (2005). However, courts have a mandatory, nondiscretionary duty to grant relief from void judgments. *Ahten v. Barnes*, 158 Wn. App. 343, 350, 242 P.3d 35 (2010). Therefore, we review de novo a trial court's decision to grant or deny a CR 60(b)(5) motion to vacate a void judgment. *Ahten*, 158 Wn. App. at 350.

Here, Mr. Bauer cites CR 5(a) and (b)(2), which discuss the requirement of and process for service, and argues he was never given notice of the custody hearing. Mr. Bauer, however, provided no argument or law on what type of notice he should have received for the hearing. Mr. Bauer also did not provide an adequate record of his custody case, in which the trial court asserted jurisdiction in February 2009.[3] The trial court indicated during its oral ruling on the parenting plan that the "court date has been scheduled for a long time," yet Mr. Bauer did not attend the hearing. Report of Proceedings at 5. The trial court also noted that it had ordered Mr. Bauer to attend parenting classes in April 2010, but he failed to so.

[3] The record he provided consists only of the trial court's oral ruling on the parenting plan and child support orders; the trial court's written orders; his motion to vacate and its corresponding declaration and exhibits, which include pictures that he states portray Ms. Bauer physically assaulting him at the airport, his exchange of e-mails with a friend while he was in either South Korea or Hong Kong during the time leading up to the parenting plan hearing, notices of his trial attorney's withdrawal and reappearance for the parenting plan hearing, an e-mail from his mother regarding why his attorney reappeared at the parenting plan hearing, and his discharge summary from Providence St. Peter Hospital.

Based on the trial court's statements at the parenting plan hearing and in its written order, it is clear that the custody case had been active for at least one and a half years; yet, Mr. Bauer failed to provide any information about any prior hearings, court orders, motions, etc. during the custody case that could have provided us with information regarding any notice he may or may not have received regarding the hearing date in August 2010. Accordingly, because Mr. Bauer failed to provide meaningful argument on the notice he should have received, and because he failed to provide a sufficient record for review, we affirm the trial court.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

Maxa, J.

Lee, J.