

IN THE COURT OF APPEALS OF TENNESSEE  
AT JACKSON  
April 24, 2003 Session

**CITY OF MEMPHIS**  
**v.**  
**CIVIL SERVICE COMMISSION OF THE CITY OF MEMPHIS**  
**AND STANLEY SHOTWELL**

**An Appeal from the Chancery Court for Shelby County**  
**No. 105517-3 D. J. Alissandratos, Chancellor**

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**No. W2002-01556-COA-R3-CV - Filed September 15, 2003**

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This case involves a Rule 60.02 motion for relief from a final judgment. The plaintiff police officer was terminated from his position at the police department. The officer appealed his termination to the civil service commission, which reversed the officer's termination and ordered his reinstatement. The city appealed to the court below. In 1995, the trial court reversed the commission's decision and upheld the officer's termination. The officer appealed to this court, which affirmed the termination decision in 1997. In 1998, after the appeal had been adjudicated, the officer filed a motion in the trial court for relief from its 1995 judgment, pursuant to Rule 60.02 of the Tennessee Rules of Civil Procedure. The trial court rejected the motion, determining that it was filed outside the one-year time limitation provided in Rule 60.02. The officer now appeals that decision. We affirm the decision of the trial court, finding that the one-year time limitation provided in Rule 60.02 begins to run on the date of entry of the order from which the movant seeks relief.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court is Affirmed**

HOLLY M. KIRBY, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and ALAN E. HIGHERS, J., joined.

William E. Frulla, Memphis, Tennessee, for the appellant, Stanley Shotwell.

Robert L. J. Spence, Jr., Memphis City Attorney, Ronald G. Wyatt, Assistant City Attorney, and Elbert Jefferson, Assistant City Attorney, Memphis, Tennessee for the appellee, City of Memphis.

**OPINION**

Defendant/Appellant Stanley Shotwell ("Shotwell") was employed by the police department for the Plaintiff/Appellee City of Memphis ("the City") for twenty-one years. On January 21, 1993, Shotwell voluntarily entered into the City's Employee Assistance Program ("EAP"), which provides

assistance and counseling to City employees with substance abuse problems. On September 19, 1994, a urine sample submitted by officer Shotwell tested positive for cocaine. This was a violation of the terms of Shotwell's EAP agreement with the City. After an administrative hearing, Shotwell's employment with the police department was terminated.

In March 1995, Shotwell appealed his termination to the City of Memphis Civil Service Commission ("the Commission"). The Commission found that the termination of Shotwell's employment was unreasonable in light of the fact that it was his first offense and he had voluntarily participated in the EAP. Accordingly, the Commission ordered his reinstatement. The City appealed to the trial court below. The trial court reversed the decision of the Commission and upheld Shotwell's termination, finding that the Commission had acted in excess of its statutory authority and that its decision was not supported by substantial and material evidence. On September 18, 1995, the trial court entered its final order.

Shotwell appealed the September 1995 order to this Court. In an order dated November 4, 1997, this Court upheld the trial court's decision on the merits. On January 12, 1998, this Court issued a mandate remanding to the chancery court for final determination.

On October 16, 1998, after the appeal this Court had been adjudicated, Shotwell filed a motion in the trial court for relief from the September 1995 judgment. The motion was filed pursuant to Rule 60.02(1) of the Tennessee Rules of Civil Procedure based on mistake, inadvertence, surprise, or excusable neglect, as well as Rule 60.02(2) based on fraud, misrepresentation, or other conduct of an adverse party. Shotwell argued that the City did not in fact have a "zero-tolerance" policy for drug use in the police department, as was represented by counsel for the City in the hearing before the trial court, and that the representation by the attorney for the City resulted from mistake, inadvertence, or fraud. On October 12, 2001, Shotwell filed a supplemental motion for relief from the September 1995 judgment, seeking permission to submit a newspaper article indicating that the City did not have a zero-tolerance drug policy. On May 8, 2002, the trial court held a hearing on the timeliness of Shotwell's Rule 60.02 motion and determined that it was untimely under the one-year limitation set out in Rule 60.02. Shotwell now appeals that decision.

The sole issue on appeal is whether Shotwell's Rule 60.02 motion for relief from the September 1995 judgment was timely. The facts are undisputed, and the issue for our determination is a question of law, which we review *de novo*. *State v. Levandowski*, 955 S.W.2d 603, 604 (Tenn. 1997).

Rule 60.02 provides:

The motion [under Rule 60.02] shall be made within a reasonable time, and for reasons (1) and (2) not more than one year after the judgment, order or proceeding was entered or taken.

Tenn. R. Civ. P. 60.02. Shotwell acknowledges that his motion was brought pursuant to subsections (1) and (2) of Rule 60.02 and therefore falls under the requirement that such motions be filed within

one year after the entry of the final judgment. He also concedes that his motions were filed well after one year from the entry of the trial court's September 1995 judgment. He argues, however, that the one-year time limitation set out in Rule 60.02 should be tolled during the pendency of the appeal from the judgment. Shotwell argues that the trial court no longer has jurisdiction over the case once an appeal is filed and, therefore, cannot adjudicate a Rule 60.02 motion filed after the notice of appeal is filed. Shotwell contends that only after the matter is adjudicated on appeal can a litigant seek relief from a judgment that has been made "final" by the decision of the appellate court. He maintains that, "[s]ince the trial court cannot hear nor decide on a 60.02 motion until the appellate court remands it, the statute should be tolled during the pendency of an appeal," citing *Spence v. Allstate Insurance Co.*, 883 S.W.2d 586 (Tenn. 1994).

In *Spence*, the Supreme Court of Tennessee stated that "[i]f a party wishes to seek relief from the judgment during the pendency of an appeal, he should apply to the appellate court for an order of remand." *Spence*, 883 S.W.2d at 596. Thus, the appellate court, which has jurisdiction over the case after the notice of appeal is filed, may remand the cause to permit the trial court to consider the factors enumerated in Rule 60.02, possibly obviating the need for further legal proceedings on appeal. The pendency of an appeal does not affect the requirement that a Rule 60.02 motion be filed within one year after the judgment from which relief is sought, since the party seeking relief can apply to the appellate court for an order of remand. See *Bradfield v. City of Memphis*, No. 02A01-9808-CV-00220, 1999 WL 643389, at \*4 (Tenn. Ct. App. Aug. 24, 1999) (citing *Ellison v. Alley*, 902 S.W.2d 415, 418 (Tenn. Ct. App. 1995)). Under the circumstances, we must affirm the decision of the trial court denying Shotwell's Rule 60.02 motion as untimely.

The decision of the trial court is affirmed. Costs are to be taxed to the appellant, Stanley Shotwell, and his surety, for which execution may issue, if necessary.

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HOLLY M. KIRBY, JUDGE