

EUBANK, APPELLANT, v. ANDERSON, WARDEN, ET AL., APPELLEES.

[Cite as *Eubank v. Anderson*, 119 Ohio St.3d 349, 2008-Ohio-4477.]

Appeal from denial of motion for relief from judgment — Court of appeals did not abuse its discretion — Judgment affirmed.

(No. 2008-0933 — Submitted August 26, 2008 — Decided September 10, 2008.)

APPEAL from the Court of Appeals for Lorain County, No. 07CA009136.

Per Curiam.

{¶ 1} This is an appeal from a judgment denying a motion for relief from a judgment dismissing a petition for a writ of habeas corpus. Because the court of appeals did not abuse its discretion in denying the motion, we affirm.

{¶ 2} In 1985, appellant, James R. Eubank, was convicted of two counts of involuntary manslaughter and two counts of aggravated arson and was sentenced to prison. In 2007, Eubank filed a petition in the Court of Appeals for Lorain County for a writ of habeas corpus to compel his release from prison. The court of appeals dismissed the petition.

{¶ 3} Nearly a year after the dismissal of his petition, Eubank filed a motion pursuant to Civ.R. 60(B)(1) for relief from the judgment dismissing his petition. Eubank claimed that the court had made a “mistake” in its decision. The court of appeals denied the motion.

{¶ 4} In his appeal as of right from the court of appeals’ determination, we must determine whether the court of appeals abused its discretion in denying Eubank’s motion for relief from judgment. *State ex rel. Russo v. Deters* (1997), 80 Ohio St.3d 152, 153, 684 N.E.2d 1237 (“In an appeal from a Civ.R. 60(B) determination, a reviewing court must determine whether the trial court abused its discretion”).

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{¶ 5} The court of appeals did not abuse its discretion in denying Eubank’s motion for relief from judgment because in a timely appeal from the judgment dismissing the petition, Eubank could have raised his claim that the court of appeals erred in dismissing his habeas corpus petition. *Harris v. Anderson*, 109 Ohio St.3d 101, 2006-Ohio-1934, 846 N.E.2d 43, ¶ 9. “A Civ.R. 60(B) motion for relief from judgment cannot be used as a substitute for a timely appeal * * * .” *Key v. Mitchell* (1998), 81 Ohio St.3d 89, 90-91, 689 N.E.2d 548.

{¶ 6} Based on the foregoing, we affirm the judgment of the court of appeals.

Judgment affirmed.

MOYER, C.J., and PFEIFER, LUNDBERG STRATTON, O’CONNOR, O’DONNELL, LANZINGER, and CUPP, JJ., concur.

James R. Eubank, pro se.

Nancy Hardin Rogers, Attorney General, and Diane Mallory, Assistant Attorney General, for appellee.
