

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001648-MR
AND
NO. 2002-CA-000776-MR

RICKEY BERNARD JONES

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
ACTION NO. 89-CR-001476

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: HUDDLESTON, PAISLEY AND TACKETT, JUDGES.

PAISLEY, JUDGE. These are pro se appeals from two postjudgment orders entered by the Jefferson Circuit Court. In Appeal No. 2001-CA-001648, appellant claims that the circuit court erred by denying his CR 60.02 motion in which he requested either an evidentiary hearing or a new trial based on additional evidence that allegedly was concealed from him at trial by the

Commonwealth. In Appeal No. 2002-CA-000776, he argues that the circuit court erroneously denied his motion for a copy of his presentence investigation report (PSI). Finding no error in either of the circuit court's orders, we affirm.

On July 22, 1989, appellant shot Gregory Chatham and Jefferey Daugherty while attempting to sell them cocaine. Chatham died almost immediately from various gunshot wounds. Daugherty suffered one gunshot wound to the head and was taken to a hospital where he was placed on life support. He died shortly thereafter when he was pronounced brain dead and life support was removed.

On September 21, 1990, following a jury verdict, the Jefferson Circuit Court entered a judgment convicting appellant of two counts of murder and sentencing him to two concurrent terms of life in prison without the possibility of parole for twenty-five years. On direct appeal, the Kentucky Supreme Court affirmed appellant's convictions. He then motioned the trial court to vacate the judgment pursuant to RCr 11.42. Upon denial of this motion, he unsuccessfully appealed to this court. In addition, appellant filed a federal habeas corpus petition which is still pending. Then, on December 4, 2000, appellant filed a motion requesting the trial court to vacate the judgment pursuant to CR 60.02, based on his alleged discovery of evidence that he claims was concealed from him at trial. Appellant later

filed another motion with the trial court in which he requested a copy of his PSI. The trial court denied both motions, and these appeals followed.

Appellant contends in Appeal No. 2001-CA-001648 that the circuit court erred by denying his request for relief pursuant to CR 60.02. He asserts he is entitled to either an evidentiary hearing or a new trial because the Commonwealth allegedly withheld material evidence during his trial that could have changed the outcome of the case. More specifically, appellant claims that the Commonwealth wrongfully failed to disclose information that Daugherty died after being removed from life support rather than as an immediate consequence of the gunshot wound inflicted by appellant. Appellant asserts that he therefore should have been charged with the assault of Daugherty rather than with his murder. We disagree.

Clearly, the evidence to which appellant refers is neither new nor recently discovered information, as appellant admits that he learned that Daugherty's death was preceded by his removal from life support when Daugherty's girlfriend gave a victim impact statement prior to appellant's sentencing. Any issues of prosecutorial misconduct were waived by appellant's failure to raise them on direct appeal to the Kentucky Supreme Court.

Moreover, the raising of any issue relating to newly discovered evidence is barred by RCr 10.06, which states in pertinent part that "[a] motion for a new trial based upon the ground of newly discovered evidence shall be made within one (1) year after the entry of the judgment or at a later time if the court for good cause so permits." Similarly, CR 60.02 requires that any request for relief based on newly discovered evidence must be brought within one year, rather than ten years after the trial, as here. Further, "CR 60.02 is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings." McQueen v. Commonwealth, Ky., 948 S.W.2d 415, 416 (1997).

In any event, there is no merit to any contention that because the victim died only after being removed from life support, appellant should have been charged with assault rather than murder. According to KRS 501.060(1), "[c]onduct is the cause of a result when it is an antecedent without which the result in question would not have occurred," and as noted in 40 Am. Jur. 2d Homicide §16 (1999) at 467 (citations omitted), "[t]he act of disconnecting life support systems of a person who is brain dead with little chance of recovery is medically reasonable and is not a death-producing cause or sufficient intervening cause of death to negate the defendant's

responsibility for murder." Clearly, the fact that Daugherty's heart and lungs were able to function for a period of time with the assistance of external devices does nothing to change the fact that the evidence showed that he had already lost all brain function as a result of the head wound inflicted by appellant. We conclude, therefore, that the trial court did not abuse its discretion by denying appellant's motion for CR 60.02 relief. Barnett v. Commonwealth, Ky., 979 S.W.2d 98, 102 (1998).

Next, in Appeal No. 2002-CA-000776 appellant contends that the trial court erred by denying his request for a copy of his PSI. Appellant is clearly not entitled to that document. Although KRS 532.050 provides that defense counsel may have presentence access to a PSI report, it does not in any way permit a defendant to have access to it some ten years after the judgment. As the record reflects that appellant and his defense counsel were advised of the contents of the PSI prior to appellant's sentencing, given the opportunity to object to any inaccuracies, and both of them signed a document acknowledging that the information contained in the PSI was correct, we cannot say that the trial court denied appellant his statutory right to a fair opportunity to controvert any of the information contained in the PSI within a reasonable period of time.

The orders of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

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