

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000341-MR

WILLIAM MCNEELY

APPELLANT

v. APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE STEPHEN N. FRAZIER, JUDGE
ACTION NO. 92-CR-00034

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: DYCHE, JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: William McNeely has appealed from an order entered by the Johnson Circuit Court which denied his motions pursuant to RCr¹ 10.26 and CR² 61.02. Having concluded that the circuit court did not err, we affirm.

This is McNeely's fourth appeal. McNeely was convicted of murdering two-year-old Sherman Newsome by

¹ Kentucky Rules of Criminal Procedure.

² Kentucky Rules of Civil Procedure.

inflicting blunt force trauma injuries to his back and stomach causing broken vertebra and liver damage, and compromising the mesentery membrane of the intestines. McNeely was sentenced to life imprisonment. The Supreme Court of Kentucky in an unpublished opinion affirmed McNeely's conviction.³ Approximately one year later, McNeely filed an RCr 11.42 motion alleging that he received ineffective assistance of counsel. The trial court denied the RCr 11.42 motion and this Court affirmed in an unpublished Opinion.⁴ In September 1998 McNeely filed a motion pursuant to CR 60.03 claiming that newly discovered evidence entitled him to a new trial. The trial court denied the CR 60.03 motion and this Court affirmed in an unpublished Opinion.⁵

On June 4, 2001, McNeely filed a motion to vacate judgment pursuant to RCr 10.26 and CR 61.02. In an order entered on December 20, 2001, the trial court denied the motion to vacate judgment and sentence. The trial court stated:

Kentucky Rules of Criminal Procedure 10.26 is not a procedural device that can provide, in and of itself, a new trial for a convicted defendant. It merely states that, in a motion for a new trial, a trial court or appellate court can consider substantial

³ McNeeley v. Commonwealth, 92-SC-000906-MR (March 24, 1994). We note that previous court documents, including unpublished Opinions, use the spelling "McNeeley" in reference to appellant.

⁴ 1995-CA-003128-MR.

⁵ 2001-CA-000073-MR.

errors in said motion. As such, the Defendant has provided inadequate grounds for such a motion.

The trial court also determined that since CR 61.02 is the civil equivalent of RCr 10.26, no relief was available under CR 61.02 either.

RCr 10.26 and CR 61.02 are identical and read as follows:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

We agree with the trial court that RCr 10.26 and CR 61.02 do not independently provide for the relief of vacating a judgment. The purpose of the rules is to allow a trial court to consider unpreserved palpable error on a motion for a new trial or an appellate court to consider such error on direct appeal.

More important to our determination however, is the fact that most of the issues raised by McNeely in his current motion were raised in his previous CR 60.03 motion. As to the issues regarding coerced testimony and jury influence, McNeely offers no reason why these claims were not or could not have

been raised on direct appeal or in his previous two post-conviction motions.⁶

McNeely also argues on appeal that the trial court denied his motion to vacate his sentence before ruling on his motion for judicial disqualification. McNeely filed a motion for judicial disqualification when he filed the motion to vacate his sentence. McNeely claimed that the trial judge was biased against him because he had ruled against him on previous motions. The trial court entered the order denying McNeely's post-conviction motions on December 20, 2001, without ruling on the motion for disqualification. However, on January 15, 2002, McNeely filed a complaint with the Judicial Conduct Commission against the trial judge, claiming a violation of the code of judicial conduct. It was only after the filing of the complaint that the trial court entered an order certifying the need for assignment of a special judge pursuant to KRS 26A.015 (2). McNeely seems to believe that the trial judge was admitting he was biased against McNeely by entering the order. However, it is clear from the record that the trial judge did not consider himself disqualified until after the filing of the complaint against him. Prior to the filing of the complaint, McNeely had no legal basis for requesting the trial judge's disqualification. His motion for disqualification raised no

⁶ Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983).

facts warranting recusal under KRS 26A.015, which requires more than a party's belief that the judge will not be fair and impartial.⁷

The order of the Johnson Circuit Court denying McNeely relief on his RCr 10.26 and CR 61.02 motions is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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⁷ Webb v. Commonwealth, Ky., 904 S.W.2d 226 (1995).