

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000376-MR

LORENZO TUNSTALL

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS MCDONALD, JUDGE
ACTION NO. 96-CR-000468 & 96-CR-001322

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; BARBER, AND DYCHE, JUDGES.

BARBER, JUDGE: Appellant Lorenzo Tunstall appeals from the trial court's denial of his post-conviction request for relief under CR 60.02. The trial court denied the motion, stating that it found no merit to Tunstall's claims of error.

Tunstall was convicted of carjacking and robbery. The conviction was affirmed by the Kentucky Supreme Court on direct appeal. One of the witnesses against Tunstall was a co-defendant, Larry Pearson. Tunstall asserts that Pearson

committed perjury at trial, and therefore, his conviction should be set aside. The Supreme Court's opinion affirming his conviction relies in part on Pearson's testimony in finding that Tunstall was properly convicted.

Tunstall filed a motion to vacate his conviction pursuant to CR 60.02. Tunstall attached an affidavit from Pearson as an exhibit to his motion requesting relief. This affidavit was signed by Pearson after Pearson's sentence had been satisfied and had expired.

The record shows that the affidavit was typed out and signed by Pearson at a local police station, where the affidavit was witnessed in accordance with law. The affidavit was then provided to Tunstall. Pearson's affidavit, in its entirety, states:

Comes now the affiant, Larry D. Pearson, and after having been duly sworn, and states as follows:

Regarding the day of November 7, 1996, I Larry D. Pearson testified falsely during the trial of Lorenzo Tunstall and Antonio Hill because of duress and/or coercion.

Further the affiant sayeth naught.

Affidavit of Larry Pearson. The affidavit does not state what portion of Pearson's testimony was false, or give particulars as to why perjured testimony was offered. Tunstall's memorandum of law in support of his motion for relief asserts that Pearson

lied about various facts relevant to the charged offenses and with regard to Tunstall's participation in the offense. These assertions are unsupported by the affidavit, which does not identify the alleged untruthful testimony. Tunstall asserts that if Pearson's testimony was untruthful with regard to any of the facts below, then the entire conviction must be overturned.

A trial court's ruling on a motion for post-conviction relief shall not be disturbed unless an abuse of discretion is shown. Fortney v. Mahan, Ky., 302 S.W.2d 842, 843 (1957). A CR 60.02 claim for relief must present new evidence that the trial court finds would change the final result of the trial under a standard of "reasonable certainty." Brown v. Commonwealth, Ky., 932 S.W.2d 359, 362 (1966). The record shows that Tunstall's conviction was not based solely upon Pearson's evidence, but was also supported by the testimony of a victim of the robbery, and by evidence connected to the robbery. In the absence of any showing in the affidavit or otherwise that Pearson's testimony regarding Tunstall's participation in the offense was false, the affidavit cannot support the requested relief.

A defendant has the burden of proof in showing within a reasonable certainty that perjured testimony was introduced against him at trial. Commonwealth v. Spaulding, Ky., 991 S.W.2d 651, 654 (1999), citing Anderson v. Buchanan, 292 Ky. 810, 168 S.W.2d 48, 54 (1943). The defendant must show that the

testimony in question is of "such decisive value or force that it would, with reasonable certainty, have changed the verdict or that it would probably change the result if a new trial should be granted." Jennings v. Commonwealth, Ky., 373 S.W.2d 729, 730 (1963).

Tunstall has failed to show that the perjured testimony, if any, given by Pearson at trial was of such decisive nature that it would have changed the outcome of the trial. In the absence of such a showing, the trial court's denial of the motion cannot be held to have been in error. For this reason, the trial court's denial of the motion for post-conviction relief is affirmed.

ALL CONCUR.

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