

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001297-MR

SHANNON D. DAVIS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 94-CR-01051

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BAKER, COMBS, and SCHRODER, Judges.

COMBS, JUDGE. Shannon Davis appeals from an order of the Fayette Circuit Court entered on June 7, 2002, denying his CR¹ 60.02/60.03 motion to vacate his 1995 judgment of conviction for first-degree rape. Davis argues that his guilty plea upon which his conviction was based was involuntary because it was induced by prosecutorial misconduct. After reviewing the record, we conclude that the trial court did not abuse its discretion in ruling on Davis's post-conviction motion. Therefore, we affirm.

¹ Kentucky Rules of Civil Procedure.

On December 21, 1994, Davis was indicted on charges of first-degree rape and first-degree robbery arising from events that occurred on October 15, 1994. Armed with a knife, Davis had entered the workplace of his victim and forced her to open her employer's safe and then to perform multiple acts of sex. After engaging Davis in a lengthy and detailed colloquy, the trial court accepted Davis's plea of guilty to the charges on January 27, 1995. Davis acknowledged using force to accomplish the sex crime. On February 1, 1995, he was sentenced in accordance with the plea agreement to serve fifteen years on each charge -- to run consecutively for a total of thirty years.

In February 1998, Davis filed a motion pursuant to RCr² 11.42 to set aside his judgment of conviction. The crux of his motion concerned the imposition of consecutive sentences. However, he also set forth several grounds for relief relating to the quality of his trial counsel's representation. Relevant to the current appeal, Davis alleged that his counsel rendered ineffective assistance by failing to obtain discovery from the Commonwealth and by accepting the Commonwealth's word that it had DNA evidence implicating him as the perpetrator of the rape. Davis claimed that he later learned that the DNA evidence allegedly available to the Commonwealth was inconclusive, arguing, therefore, that it would not have been admissible if he

² Kentucky Rules of Criminal Procedure.

had gone to trial. The motion was denied in an order entered on March 24, 1998. This Court dismissed Davis's appeal at his request on March 31, 1999.

On January 9, 2002, Davis filed his first motion to vacate his conviction and sentence pursuant to CR 60.02. He alleged that he was confused about the law in relation to the facts. Specifically, he argued that he did not understand the term "forcible compulsion" and that neither his attorney nor the court properly explained that particular element of the crime of first-degree rape in order to render his plea knowing and intelligent. The motion was denied in an order entered February 28, 2002. Davis's appeal to this Court was dismissed for failure to file a brief.

On April 17, 2002, Davis filed his second CR 60.02 motion for relief from his conviction and sentence of imprisonment. Davis alleged that he had pled guilty to the rape charge only because he believed the claim of the prosecutor that there was DNA evidence identifying him as the perpetrator of the crime. Davis alleged that the prosecutor lied about the evidence and that a DNA test had never been performed on his victim. He maintained that his plea was rendered involuntary by the prosecutor's misconduct and that if the Commonwealth had been truthful, he would not have pled guilty. The motion was denied without a hearing on June 7, 2002. This appeal followed.

In this appeal, Davis raises the same arguments addressed in his CR 60.02/60.03 motion. Davis argues that his plea of guilty to the charge of first-degree rape was in effect coerced by the misrepresentation of the prosecutor concerning the existence of DNA evidence to establish his guilt. Additionally, Davis contends that without such evidence, the Commonwealth did not have a strong case against him and that he would not have pled guilty but for the alleged misrepresentation. He submits that the prosecutor's misconduct was sufficiently egregious to warrant the vacating of his conviction for rape.

The Commonwealth argues that the claim of prosecutorial misconduct is barred by the procedural default provision of RCr 11.42 and Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983). We agree. Subsection (3) of the criminal rule provides:

The motion shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding.

Gross, supra, holds:

The structure provided in Kentucky for attaching the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete. . . [CR 60.02] is for relief that

is not available by direct appeal and not available under RCr 11.42.

Id. at 856.

The Commonwealth argues that Davis's attempt to litigate the issue of prosecutorial misconduct is precluded by the denial of his RCr 11.42 motion. It contends that Davis's claim with respect to the DNA evidence involves the same argument presented in his RCr 11.42 motion - although it is now expressed in terms of prosecutorial misconduct.

Davis denies that the issue of prosecutorial misconduct was raised in any of his previous post-conviction motions. Indeed, he contends that he could not have raised the issue earlier because he only "recently found out that the prosecution lied to him." (Appellant's brief, p. 9).

Nevertheless, the record reveals that at the time Davis filed his RCr 11.42 motion in 1998, he was aware that the Commonwealth did not have DNA evidence that could have been used against him at trial. In that RCr 11.42 motion, he argued that his trial counsel had rendered ineffective assistance by failing to seek discovery of the contested DNA evidence and by taking the Commonwealth's word that it had ever possessed such evidence in the first place. The Commonwealth correctly observes that Davis's current claim is duplicative of the grounds stated in his former motion and that it is, therefore, barred from re-

litigation. Land v. Commonwealth, Ky., 986 S.W.2d 440, 442 (1998).

In addition to being procedurally precluded, Davis's claim is barred by the reasoning of Tollett v. Henderson, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973), in which the Supreme Court stated as follows with respect to a guilty plea:

[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.

See also, Centers v. Commonwealth, Ky.App., 799 S.W.2d 51, 55 (1990). Davis's plea essentially neutralized his ability to claim that his constitutional rights were violated by the prosecutor's alleged misrepresentation as to the state of the evidence that would have been available at trial. Davis had ample opportunity to seek discovery of the evidence in possession of the Commonwealth before entry of his plea. He elected not to pursue discovery prior to pleading guilty. Even if his claim of prosecutorial misconduct were true, the misconduct does not indicate circumstances so unjust as to merit the extraordinary relief contemplated by CR 60.02 or 60.03 --

especially in light of his own waiver of the right to conduct adequate discovery.

The order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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