

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001828-MR

JAMES SINNETT

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE HENRY M. GRIFFIN, III, JUDGE
ACTION NO. 93-CR-00065

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BAKER, COMBS, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. This is an appeal from the Daviess Circuit Court denying appellant's pro se motion for relief pursuant to CR 60.02. Because the appellant's changed physical condition is not an extraordinary condition as contemplated by CR 60.02(f), and because no evidence exists warranting a new trial pursuant to CR 60.02(b), we affirm.

In 1995, James Sinnett stood trial and was found guilty of three counts of Sexual Abuse in the First Degree, five counts of

Sodomy in the First Degree, one count of Sodomy in the Second Degree, and one count of Rape in the First Degree. The jury fixed sentences for the various counts and recommended that they run consecutively for a total of 133 years. The trial court adopted the jury's recommendation and Mr. Sinnett was sentenced to a total of 133 years. Mr. Sinnett appealed directly to the Kentucky Supreme Court, citing improper admission of certain hearsay evidence; the Supreme Court affirmed the conviction. In 1997, Mr. Sinnett filed a motion pursuant to RCr 11.42 raising ten issues, along with a motion for an evidentiary hearing. The trial court overruled both motions. Mr. Sinnett appealed, and this Court affirmed in part, reversed in part, and remanded for an evidentiary hearing to address the issue of whether Mr. Sinnett's counsel was rendered ineffective where evidence of his impotency was not introduced at trial. Prior to the hearing, Mr. Sinnett entered a motion for leave of court to allow other arguments concerning ineffective assistance of counsel. The trial court denied the motion, and determined that Mr. Sinnett and his counsel had made a strategic decision to withhold evidence of his impotency. That ruling was appealed, and this Court affirmed the judgment of the trial court. Mr. Sinnett next filed a motion pursuant to CR 60.02, seeking leave to enter a guilty plea to lesser charges in return for a reduced sentence

of fifteen years. That motion was denied and Mr. Sinnett now appeals.

Taking into account that the record before this Court is incomplete, it seems that Mr. Sinnett is seeking relief, in part, under CR 60.02(f), which provides relief from a final judgment where the basis for relief is of an "extraordinary nature." Mr. Sinnett attempts to argue that the extraordinary circumstance is his terminal illness and generally poor prognosis. While Mr. Sinnett's illness is unfortunate, a change in physical condition may not be the basis for an amendment of a final judgment under CR 60.02(f). See Cawood v. Cawood, Ky., 329 S.W.2d 569 (1959) (denying motion for an amendment to a final order of dissolution of marriage where wife subsequently was diagnosed with cancer).

Mr. Sinnett also seeks to revive a plea bargain that was rejected by the lower court. At the time of the evidentiary hearing concerning ineffective assistance of counsel, Mr. Sinnett and the Commonwealth entered an agreed order amending the sentence and convictions in exchange for an Alford plea. This agreement came about in light of Mr. Sinnett's terminal medical condition, his advanced age, and the victim's willingness to consent to such an agreement. However, the trial court rejected the agreed order. In this appeal, Mr. Sinnett seems to be arguing that he was not properly advised of the

meaning of an Alford plea, and that his current understanding amounts to newly discovered evidence warranting relief under CR 60.02(b). Such relief is not available here. Facts not in existence at the time of trial do not constitute a ground for a new trial because of newly discovered evidence. Woods v. Kentucky Traction & Terminal Co., 252 Ky. 78, 65 S.W.2d 961 (1933). Furthermore, the newly discovered evidence must be conclusive and reasonably certain to render a different result upon retrial. Id. Even if this Court is willing to accept Mr. Sinnett's characterization of his current understanding of Alford pleas to be 'evidence', it cannot be stated that this 'evidence' existed at trial. Nor can it be concluded that Mr. Sinnett's understanding of an Alford plea would have changed the outcome of the trial. Therefore, Mr. Sinnett is not entitled to relief under CR 60.02(b)

For the foregoing reasons, the judgment of the Daviess Circuit Court is affirmed.

ALL CONCUR.

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