

RENDERED: December 31, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-002248-MR

IRVIN EDGE

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN D. MINTON JR., JUDGE
ACTION NO. 92-CR-00610

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: EMBERTON, CHIEF JUDGE; BUCKINGHAM AND KNOPF, JUDGES.
KNOPF, JUDGE: Following a jury trial in 1993, Irvin Edge was convicted of murder. By order entered June 14, 1993, he was sentenced to life in prison. Our Supreme Court affirmed the conviction and sentence.¹ In September 2001, Edge moved for a new trial on the ground of newly discovered evidence. By order

¹ Edge v. Commonwealth, Ky., 93-SC-0440-MR (rendered May 26, 1994).

entered October 21, 2002, the Warren Circuit Court denied Edge's motion. It is from that denial that Edge now appeals. We affirm.

The Commonwealth accused Edge of having contracted for the murder of Charles Westerfield, Edge's partner in a sideline business. There was evidence that Edge had been embezzling funds from the business, that the business was on the verge of bankruptcy, and that the business had insured Westerfield's life not long before the murder. Most damning, however, was the testimony of Barry McManaway, an employee of the Southwire Rod and Cable Company where Edge and Westerfield were also employed.

According to McManaway, in December of 1990, Edge approached him at work for help in locating someone who would kill Westerfield for money. Eventually McManaway found Randall Murphy. McManaway testified that he passed money and a twenty-two caliber handgun from Edge to Murphy. On March 12, 1991, Murphy shot and killed Westerfield. There was evidence that on the night of McManaway's arrest he had contacted Edge at the behest of the police and that, in the meeting with Edge that ensued, Edge had possibly betrayed a consciousness of wrongdoing. In exchange for his testimony, McManaway was permitted to plead guilty to reduced charges and was eventually sentenced to ten years' imprisonment.

Edge denied any involvement in the murder and accused McManaway of fabricating his allegations to shield himself from more serious charges. He tried to show that bad blood had existed between McManaway and Westerfield, that McManaway could have acquired Edge's gun following a fire at Edge's residence prior to the killing, and that McManaway had repeatedly lied to the police and had a poor reputation for honesty.

Joe Blake testified on behalf of Edge. In the fall of 1991, he said, he had been incarcerated in the Owensboro jail and had served as a trustee. McManaway was an inmate at the jail at that time, Blake said, and one day had confided in Blake that Edge was innocent, that McManaway had implicated Edge solely to protect himself. Blake admitted, however, that he was acquainted with Edge's sister and that he had not come forward until he had talked to her about Edge's plight.

Notwithstanding Blake's testimony and Edge's other evidence, the jury found Edge guilty. McManaway's testimony and the evidence of Edge's financial motive convinced the jury beyond a reasonable doubt that Edge had instigated the killing. Edge now claims to have additional evidence that McManaway fabricated his testimony. Two other inmates, John Roach and Walter Buckner, who also had contact with McManaway in the Owensboro jail in late 1991 and early 1992, have come forward with statements to the effect that McManaway admitted to them

his responsibility for the killing and his falsely accusing Edge.

Roach and Buckner testified at an evidentiary hearing on Edge's motion on June 14, 2002. Both had limited but unusually similar recollections of McManaway's alleged statements, and both admitted that they had not come forward until years later when they had gotten to know Edge in prison. McManaway also testified at the hearing. He reaffirmed his former allegations and denied the statements attributed to him by Roach and Buckner. The trial court ruled that Roach and Buckner's evidence was not sufficiently compelling to warrant a new trial. We agree.

Our Supreme Court has explained that continued punishment for a conviction shown to have been based on perjured testimony constitutes a denial of due process and that relief from such a conviction may thus be available under CR 60.02(f).² Before this extraordinary relief is appropriate, however, the movant must show with reasonable certainty both that the perjury occurred and that it prejudiced the outcome of the movant's

² Commonwealth v. Spaulding, Ky., 991 S.W.2d 651 (1999).

trial.³ The new evidence must be compelling enough to make the original trial appear to have been no trial at all.⁴

As Edge insists, if McManaway's testimony was false it was prejudicial. The trial court ruled, however, that Roach and Buckner's statements did not render it reasonably certain that McManaway's testimony was false. Generally, new evidence that is merely cumulative or impeaching of prior evidence, such as these statements by Roach and Buckner, is not sufficient to warrant a new trial.⁵ Edge has suggested no reason for an exception in this case. Edge's jury considered and rejected Blake's testimony that in the Owensboro jail McManaway admitted responsibility for Westerfield's murder. Roach and Buckner's similar statements, seemingly rehearsed and coming as they have so long after the fact, when Roach and Buckner might be thought to be performing a favor for a fellow inmate, add little to what the jury heard. They do not add enough to make a different outcome at all likely, much less a reasonable certainty. The trial court did not abuse its discretion by so ruling.

³ *Id.*

⁴ Brown v. Commonwealth, Ky., 932 S.W.2d 359 (1996).

⁵ Commonwealth v. Tamm, Ky., 83 S.W.3d 465 (2002); Foley v. Commonwealth, Ky., 55 S.W.3d 809, 815 (2000); Epperson v. Commonwealth, Ky., 809 S.W.2d 835 (1990).

Accordingly we affirm the October 21, 2002, order of the Warren Circuit Court.

ALL CONCUR.

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