

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000195-MR

DARRELL F. PERRY

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 90-CR-00276

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, McANULTY AND MINTON, JUDGES.

GUIDUGLI, JUDGE. Darrell F. Perry (hereinafter "Perry")
appeals from the denial of his CR 60.02 motion alleging
prosecutorial misconduct. We affirm.

In his prior CR 60.02 appeal, which this Court
affirmed in a not-to-be-published opinion rendered June 1, 2001
(No. 2000-CA-001659-MR), the Court set forth the procedural
history as follows:

Pursuant to a jury verdict, appellant
was found guilty of criminal attempt to

commit murder,¹ first-degree burglary, and theft by unlawful taking. The Warren Circuit Court sentenced appellant to a total of thirty years' imprisonment.

Appellant pursued a direct appeal of his sentence and the Commonwealth cross-appealed same. In Perry v. Commonwealth, Ky., 839 S.W.2d 268 (1992), the Kentucky Supreme Court affirmed upon direct appeal and reversed upon cross-appeal. On February 10, 1994, appellant filed a motion for new trial pursuant to Ky. R. Crim. P. (RCr) 10.02, RCr 10.06, RCr 13.04, Ky. R. Civ. P. (CR) 59.02, and CR 60.02. The circuit court subsequently denied same. He next filed a second CR 60.02 motion on December 14, 1995, which was also denied. From the denial of these motions, appellant pursued appeals to this Court in Appeal No. 1994-CA-001221-MR, Appeal No. 1994-CA0002006-MR, and Appeal No. 1995-CA-003289-MR. These appeals were subsequently affirmed. Appellant also filed an RCr 11.42 motion to vacate sentence. Same was denied by the circuit court; the Court of Appeals affirmed the denial in Appeal No. 1997-CA-001426-MR and Appeal No. 1997-CA-001871-MR. On June 10, 1999, appellant filed the instant CR 60.02 motion. The circuit court summarily denied same. This appeal follows.

In that appeal, Perry raised five issues. This Court summarily affirmed that appeal stating that the arguments had been previously adjudicated in prior motions or appeals. This Court went on to hold that pursuant to McQueen v. Commonwealth, Ky., 948 S.W.2d 415 (1997), Perry's CR 60.02 motion was not the proper mechanism to raise such arguments.

¹ Although this opinion refers to only one criminal attempt to commit murder charge, there were in fact two counts. One involved Deputy Sheriff Osborne and the other involved Marty Hayden.

In this appeal (Perry's ninth) he alleges that the prosecutor "committed prosecutorial misconduct by electing, accepting, and using perjured testimony from his material state witness, Marty Hayden, to obtain a conviction against movant on a First Degree Burglary Charge." According to Perry, Hayden, who was the victim as to one of the attempted murder charges and as to the burglary charge, changed his statements concerning the alleged offenses on several occasions. Specifically, Perry complains about statements made by Hayden regarding Perry's level of intoxication at the time of the shooting and a statement made by Perry prior to the crime that Hayden had thirty seconds to live.

As an initial matter, we note that review of Perry's claim is procedurally barred. In Gross v. Commonwealth, Ky., 648 SW.2d 853 (1983), the Supreme Court of Kentucky set out the procedure for post-judgment review in criminal cases. The Court stated that the structure for appellate review is not haphazard or overlapping. Id. at 856. It held that a criminal defendant must first bring a direct appeal when available, then utilize RCr 11.42 by raising every error of which he should be aware, and only utilize CR 60.02 for extraordinary situations not otherwise subject to relief by direct appeal or by way of RCr 11.42. More recently in McQueen, supra, at 416, the Supreme

Court reaffirmed the procedural requirements set out in Gross, when it stated:

A defendant who is in custody under sentence or on probation, parole or conditional discharge is required to avail himself of RCr 11.42 as to any ground of which he is aware, or should be aware, during the period when the remedy is available to him. Civil Rule 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could "reasonably have been presented" by direct appeal or RCr 11.42 proceedings. RCr 11.42; Gross, supra at 855. The obvious purpose of this principle is to prevent the relitigation of issues which either were or could have been litigated in a similar proceeding. See also, Land v. Commonwealth, Ky., 986 S.W.2d 440 (1999); Barnett v. Commonwealth, Ky., 979 S.W.2d 98 (1998).

Perry has raised or should have raised the issue presented herein in his direct appeal or his prior RCr 11.42 and CR 60.02 motions. Consequently, Perry is precluded from raising this issue under a successive CR 60.02 motion. In addition to the procedural default, Perry's motion lacks substantive merit. A review of the record indicates the contradictions in Hayden's testimony were explored by both the prosecutor and Perry's defense counsel. In closing arguments, each attorney had the opportunity to argue the significance of the various statements given by Hayden and it was within the jury's province to give each its proper weight. Finally, as to the issue of Perry's level of intoxication, Deputy Sheriff Osborne, the first victim,

testified he believed Perry to be sober at the time of the shooting. Thus, even if Perry had raised the issue of prosecutorial misconduct properly, he would still not be entitled to a reversal of his conviction since the issue has no merit.

For the foregoing reasons, the order of the Warren Circuit Court denying Perry's successive CR 60.02 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Darrell F. Perry, Pro Se
Central City, KY

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Gregory C. Fuchs
Assistant Attorney General
Frankfort, KY