

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-000287-MR

KENNETH RAY NEELEY

APPELLANT

v. APPEAL FROM OWSLEY CIRCUIT COURT  
HONORABLE WILLIAM W. TRUDE, JUDGE  
ACTION NO. 95-CR-00001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, KNOPF, and McANULTY, Judges.

COMBS, JUDGE. Kenneth Ray Neeley appeals *pro se* from an order of the Owsley Circuit Court of December 26, 2002, denying his motion to vacate his sentence pursuant to CR<sup>1</sup> 60.02. We affirm.

On May 9, 1995, Neeley was indicted for murder in the shooting death of Philip Raunck. At trial, he claimed that he had acted in self defense. The jury convicted him of murder, and he moved for a new trial based on his allegation that two of the jurors had been coerced into agreeing to the verdict of

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<sup>1</sup> Kentucky Rules of Civil Procedure.

guilty. On October 15, 1996, the motion for a new trial was denied and Neeley was sentenced to twenty years in prison. After Neeley's conviction was affirmed by the Kentucky Supreme Court<sup>2</sup>, he moved to vacate his sentence pursuant to RCr<sup>3</sup> 11.42 based on his claim of ineffective assistance of trial counsel. The order denying post-conviction relief pursuant to RCr 11.42 was affirmed by this Court on March 3, 2000.<sup>4</sup>

On October 4, 2002, Neeley filed a motion in the trial court to vacate his sentenced pursuant to CR 60.02. The court summarily denied the motion, finding that Neeley "failed to set forth any legitimate reason for relief." This appeal followed.

We are bound by a highly deferential standard of review of a court's denial of post-conviction relief when an appellant has invoked CR 60.02 to allege the existence of extraordinary cause. We cannot disturb a ruling unless it is apparent that the trial court has abused its discretion.

Bethlehem Minerals Co. v. Church & Mullins Corp., Ky., 887 S.W.2d 327, 329 (1994). In this case, we find no abuse of that discretion because the grounds supporting the motion either consisted of issues raised and addressed in Neeley's previous appeals or were matters that he should have raised in those

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<sup>2</sup> 1996-SC-000968-MR.

<sup>3</sup> Kentucky Rules of Criminal Procedure.

<sup>4</sup> 1999-CA-001212-MR.

earlier proceedings. See, Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856 (1983).

Neeley argues that he was denied a fair and impartial trial because two members of the jury, April Stepp Bennett and Phyllis Gabbard Stepp, concealed their relationship to the victim. However, this very issue had been raised in his RCr 11.42 motion as follows:

April (Stepp) Bennett is the daughter of Phyllis (Gabbard) Stepp, both of which deliberated movant's guilt or innocence. Phyllis (Gabbard) Stepp is directly related to Nedra Gabbard, who is the mother of the victim, Phillip Raunck.

. . .

None of the Stepps raised their [sic] hand during jury selection when the question was asked if any of the potential jurors were related to the victim, etc. However, counsel feared a problem of this nature could arise, but failed to investigate further in order to ensure movant of an impartial jury, thus denying him of a fair trial.

(Motion pursuant to RCr 11.42, filed March 16, 1999, pp. 13-14; emphasis in original.) In affirming the denial of the RCr 11.42 motion, this Court concluded that Neeley had failed to provide any evidence to support his claim of a familial relationship of the jurors to the victim or that counsel had acted ineffectively on this issue.

In the CR 60.02 motion now before us, Neeley again seeks relief from his conviction based on the alleged relationship of the same two jurors to the victim. In support of his motion, he submitted the affidavit of Lowell Morris, a life-long resident of Owsley County, who stated that "all Gabbards" in Owsley County could trace their lineage to "Henry Gabbard and Barbara Hunsacker who settled in Pennsylvania in the 1700's."

Procedurally, Neeley is not entitled to re-litigate his claim of ineffective assistance of counsel on the same ground previously asserted and adjudicated. Gross, supra. Additionally, when examined on the merits, the claim does not present a basis for granting for CR 60.02 relief. At the most, the documentary evidence (assumed, *arguendo*, to be reliable) establishes that the two jurors were distantly related to the victim. Phyllis Stepp was Raunck's fourth cousin by marriage; April Stepp was Raunck's fourth cousin, once removed. Neeley presented no evidence to support his allegation that the two jurors had been aware of their remote relationship to the victim or that they were untruthful in their answers on *voir dire*. Thus, we conclude that Neeley has failed to establish entitlement to the extraordinary relief he seeks based on this contention.

Next, Neeley argues that he was denied a fair trial because two jurors were coerced into voting in favor of his conviction. However, this very issue was directly addressed by the Kentucky Supreme Court in affirming Neeley's conviction on direct appeal:

The affidavit of a juror claiming that she was coerced into agreeing with the verdict is not the basis for reversal. RCr 10.04 makes it clear that such a claim cannot be the grounds for a new trial. A juror may not be examined to establish a basis for a new trial because she alleges that she was coerced into agreeing to the verdict.

Slip op., p. 5. We are barred from re-visiting this issue by the doctrine of issue preclusion. Yeoman v. Commonwealth Health Policy Board, Ky., 983 S.W.2d 459, 465 (1998).

Neeley's final argument is that he is entitled to relief because the jury was not given the opportunity to determine whether he was acting pursuant to an extreme emotional disturbance (EED) when he shot Raunck. He blames both his trial counsel for failing to request such an instruction and the trial court for failing to give an EED instruction.

The record confirms that the instruction for murder contained no definition of extreme emotional distress. Neeley argues that counsel was ineffective for failure to tender an EED instruction. However, that issue procedurally was proper subject matter for the RCr 11.42 proceeding rather than an

appropriate basis for invoking relief pursuant to CR 60.02.

McQueen v. Commonwealth, Ky., 948 S.W.2d 415, 416 (1997).

The judgment of the Owsley Circuit Court is affirmed.

ALL CONCUR.

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