RENDERED: July 16, 2004, 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000610-MR

DONNIE HILLYARD — APPELLANT

v.

APPEAL FROM UNION CIRCUIT COURT
HONORABLE WILLIAM LEWIS SHADOAN, JUDGE
INDICTMENT NO. 78-CR-00037

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DYCHE, JUDGE; AND EMBERTON,[1] SENIOR JUDGE.

DYCHE, JUDGE. Donnie Hillyard appeals from an order of the Union Circuit Court, entered on April 24, 2002, denying his CR 60.02 motion. We affirm.

Hillyard was indicted in 1978 at the age of seventeen for murder, kidnapping, and first-degree rape. He made a full

[1] Senior Status Judge Thomas D. Emberton, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution.

confession to police shortly after the commission of the crimes. At trial, Hillyard's primary defense was insanity. His chief witness was Elya Bresler, who was presented to the court as an expert in the field of clinical psychology. Bresler testified that he was a clinical psychologist with numerous graduate degrees, who was licensed to practice in many states including Kentucky. He stated that he was employed at the Chester Mental Health Hospital in Illinois, and also had a private practice.

In response to questions regarding Hillyard's mental condition, Bresler testified that Hillyard had simple schizophrenia, which could result in the sufferer not knowing right from wrong. He also testified that Hillyard was delusional.

A jury found Hillyard guilty of all the charges, and he was sentenced to serve consecutive sentences of life in prison and twenty years. Hillyard's conviction was affirmed by the Kentucky Supreme Court in 1980, with the exception that the Court ordered the sentences to be served concurrently rather than consecutively.

Officials at the Department of Public Advocacy thereafter discovered that Bresler was an imposter who did not even have a college degree. Accordingly, on August 13, 1984, Hillyard filed a motion for a new trial on the grounds of newly-discovered evidence, pursuant to RCr 10.02 and 10.06. The

motion was denied by the trial court, and this Court affirmed that decision in an opinion rendered on May 9, 1986 ("1986 Opinion").

Then, on May 14, 1996, Hillyard filed a pro se motion to vacate or set aside his sentence pursuant to RCr 11.42, raising several claims including ineffective assistance of counsel for engaging an unqualified expert. The motion was denied. The record indicates that Hillyard did not appeal the denial of this motion.

On October 16, 2001, Hillyard filed a pro se motion to vacate sentence pursuant to CR 60.02(e) and (f), raising a claim concerning a jury instruction. He also filed a motion for appointment of counsel, which was granted. His counsel filed a supplement to the pro se 60.02 motion, raising again the issue of Bresler's perjured testimony regarding his qualifications. The CR 60.02 motion was denied by the circuit court in an order entered on April 24, 2002, on the grounds that the jury instruction claim could and should have been raised on direct appeal and that the claims regarding Bresler's perjury and fraud had not been raised within a reasonable time. Hillyard appeals from this order.

Hillyard's first argument concerns Bresler's perjured testimony regarding his qualifications as a clinical psychologist, and his failure to testify expressly that Hillyard

was criminally insane. Although Hillyard discovered that Bresler was an imposter seventeen years before filing the motion, he contends that it was timely because he could not have availed himself of the extraordinary remedy available under CR 60.02 until after the decision in Commonwealth v. Spaulding, Ky., 991 S.W.2d 651 (1999), in which it was held that perjury now constitutes a sufficient due process violation to sustain a claim pursuant to CR 60.02(f).

Our review of the record indicates that the issue of Bresler's testimony was fully resolved by this Court in its 1986 Opinion affirming the trial court's denial of Hillyard's motion for a new trial pursuant to RCr 10.02 and 10.06. Our reconsideration of this claim is therefore barred by the doctrine of res judicata. See Richardson v. Brunner, Ky., 328 S.W.2d 530 (1959).

In the 1986 Opinion, this Court assessed Bresler's testimony under the claim that Hillyard was denied his right to a competent psychiatrist. See Ake v. Oklahoma, 470 U.S. 68 (1985). However, the analysis was virtually identical to that which would be performed if we considered Bresler's perjury as a violation of due process meriting extraordinary relief pursuant to CR 60.02(f). The 1986 Opinion stated, in relevant part, as follows:

> The expert witness, Bresler, was qualified to the trial court as an expert clinical psychologist, and accepted as such by the jury. Bresler testified that he had administered appropriate psychological tests to Hillyard, and that in his opinion the appellant was a "schizophrenic, simple type." Bresler further described schizophrenia as a severe mental illness, characterized by gross disturbances in thinking, which would block out the appellant's normal sense of right or wrong and cause him to have irresponsible impulses. The state forensic psychiatrist examined Hillyard and found no evidence of mental illness.
>
> Assuming that the appellant could have found a bona fide expert who would testify that Hillyard was mentally ill, **there is no indication that the jury would have been or would be more receptive to virtually the same testimony from a different expert**. The only competent physician to examine Hillyard, although admittedly not chosen by the appellant, found Hillyard not to be mentally ill. This testimony was accepted by the jury in light of the brutal nature of the crimes with which the appellant was charged. Hillyard was able to have his case presented in its best light to the jury. We find no error in the trial court's determination that **the newly discovered evidence did not merit a new trial, especially since the newly discovered evidence would serve only to impeach the appellant's own witness**.

Hillyard v. Commonwealth, No. 85-CA-1373-MR (1986)(emphasis added).

Hillyard contends that a fresh review is nonetheless justified because the standard of review under CR 60.02(f) is different from that employed in reviewing the denial of motions

made pursuant to RCr 10.02 and 10.06. The standards of review, however, are identical, and require (1) a showing of abuse of discretion and (2) a showing that the new evidence would with reasonable certainty have changed the outcome of the trial.

> Whether to grant a new trial on the basis of newly discovered evidence is largely within the discretion of the trial judge, and the standard of review is whether there has been an abuse of that discretion. Foley v. Commonwealth, Ky., 55 S.W.3d 809 (2000). The evidence must be of such decisive value or force that it would, with reasonable certainty, change the verdict or probably change the result if a new trial was granted. Foley, supra.

Caldwell v. Commonwealth, Ky., 133 S.W.3d 445, 454 (2004).

> [A]ctions under CR 60.02 are addressed to the "sound discretion of the court and the exercise of that discretion will not be disturbed on appeal except for abuse." Richardson v. Brunner, [Ky.,] 327 S.W.2d 572, 574 (1959). Rule 60.02(f) "may be invoked only under the most unusual circumstances...." Howard v. Commonwealth, [Ky.,] 364 S.W.2d 809, 810 (1963); see also, Cawood v. Cawood, [Ky.,] 329 S.W.2d 569 (1959) and relief should not be granted, pursuant to Rule 60.02(f), unless the new evidence, if presented originally, would have, with reasonable certainty, changed the result. See, Wallace v. Commonwealth, [Ky.,] 327 S.W.2d 17 (1959).

Brown v. Commonwealth, Ky., 932 S.W.2d 359, 362 (1996).

> Th[e] use of perjured testimony is treated like newly discovered evidence for the purposes of CR 60.02. Cf. Mullins v. Commonwealth, Ky., 375 S.W.2d 832, 834 (1964); see also North Dakota v. Thiel, 515 N.W.2d 186, 188 (N.D. 1994). "[I]n order

> for newly discovered evidence to support a motion for new trial it must be 'of such decisive value or force that it would, with reasonable certainty, have changed the verdict or that it would probably change the result if a new trial should be granted.'" Jennings v. Commonwealth, Ky., 380 S.W.2d 284, 285-86 (1964), quoting Ferguson v. Commonwealth, Ky., 373 S.W.2d 729, 730 (1963).

Commonwealth v. Spaulding, supra at 654.

Therefore, the analysis performed by this Court in the 1986 Opinion fully met the standard of review required under CR 60.02(f).

As to the contention that Bresler never stated the "magic words," that Hillyard met the test for lack of criminal responsibility, we note that in a recent case examining whether an expert medical witness must utter the magic words "reasonable probability," the Kentucky Supreme Court reiterated that they were not necessary if the testimony "satisfie[d] the requirement that an issue requiring medical expertise be proven by 'the positive and satisfactory type of evidence required to take the case to the jury on that question.'" Turner v. Commonwealth, Ky., 5 S.W.3d 119, 122 (1999) (citation omitted). In the view of this Court in 1986, Bresler's testimony clearly fulfilled this function.

Hillyard next argues that his counsel was ineffective for allowing Bresler to testify at trial, and for presenting an

insanity defense with only one witness, Bresler, to support it. Hillyard relies on a recent Sixth Circuit case, Skaggs v. Parker, 235 F.3d 261 (6th Cir. 2000), in which the appellant was granted a new penalty trial on the grounds that his counsel was ineffective for permitting Bresler to serve as his primary mitigation witness.

We are barred from considering this claim of ineffective assistance of counsel, however, because it was raised in Hillyard's RCr 11.42 motion in 1996. The structure for appellate review is not haphazard or overlapping. Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856 (1983). 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. Id. CR 60.02 should be utilized only for extraordinary situations not subject to relief by direct appeal or by way of RCr 11.42. Id. 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. McQueen v. Commonwealth, Ky., 948 S.W.2d 415, 416 (1997). Obviously, Hillyard believed in 1996 that his counsel was ineffective for using Bresler as the primary defense witness, and stated as much in his RCr 11.42 motion. Successive motions raising claims that either have or should have been presented earlier cannot be

reviewed on appeal. Hampton v. Commonwealth, Ky., 454 S.W.2d 672 (1970).

We note also that in Skaggs v. Parker, the Sixth Circuit Court of Appeals granted relief in part because Bresler had behaved in a bizarre manner at trial. "Bresler's testimony was rambling, confusing, and, at times, incoherent to the point of being comical." Id. at 264. This was not the situation in Hillyard's case. As the 1986 Opinion noted, Hillyard's case was presented to the jury in its best light.

Hillyard's final argument concerns allegedly defective jury instructions. This is a claim that could have been raised on direct appeal. Accordingly, the trial court correctly held that CR 60.02 may not be invoked as an alternate method of review.

The order of the Union Circuit Court is affirmed.

ALL CONCUR.

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