RENDERED: JUNE 18, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000759-MR

SHAMIL MUQUIT — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE STEVEN R. JAEGER, JUDGE
ACTION NO. 99-CR-00490

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, Chief Judge; TACKETT, Judge; and EMBERTON, Senior Judge[1].

COMBS, CHIEF JUDGE. Shamil Muquit, *pro se*, appeals from two orders of the Kenton Circuit Court, entered on December 11, 2002, and March 10, 2003. Muquit challenged his conviction for first-degree rape, claiming that the victim had committed perjury. The first order denied Muquit's motions and

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

supplemental pleadings for extraordinary relief pursuant to CR[2] 60.02. The subsequent order denied his motions for more specific findings of fact and conclusions of law and for reconsideration. Finding no error, we affirm.

On March 9, 2001, a jury found Muquit guilty of first-degree rape, first-degree burglary, receiving property more than $300 in value, and second-degree persistent felony offender. He was sentenced to serve a total of twenty years in the final judgment entered on April 16, 2001. The Kentucky Supreme Court affirmed the judgment on August 22, 2002, in an unpublished memorandum opinion (2001-SC-0397-MR).

Muquit filed the CR 60.02 motion to vacate or set aside judgment that is the subject of the present appeal on September 18, 2002. His basis for relief is his claim that the rape victim, J.K., committed perjury when testifying before the jury about the details of the attack.

A motion pursuant to CR 60.02(c) alleging perjury as grounds for relief must be filed within one year of the entry of the final judgment. Thus, Muquit's motion was not timely under that section of the Rule. The Kentucky Supreme Court has held, however, that a criminal conviction based on perjured testimony may also qualify as a reason of an "extraordinary nature" pursuant to CR 60.02(f), making it subject to the "reasonable

[2] Kentucky Rules of Civil Procedure.

time" limitation of that portion of the rule. See Spaulding v. Commonwealth, Ky., 991 S.W.2d 651 (1999), as amended on June 28, 1999. In such a case, the defendant bears a dual burden: first, to show "that a reasonable certainty exists as to the falsity of the testimony;" and second, to demonstrate "that the conviction probably would not have resulted had the truth been known." Id. at 657.

As proof of J.K.'s perjury, Muquit relies on inconsistencies between her statements to police prior to trial and her testimony at trial primarily as to whether vaginal penetration had occurred. Muquit argues that J.K.'s initial accounts of the incident to police were sufficient to support a charge of attempted sodomy. He claims that she later changed her story to indicate that vaginal penetration had taken place in order to sustain a charge of first-degree rape pursuant to KRS 510.040 and KRS 510.010(8).

Muquit points to three different statements made by J.K. First, the initial police citation recounted that the victim told police that her assailant forced his way into her apartment and "attempted to have deviate [*sic*] sexual intercourse." Second, the testimony of Detective Mike McGuffey at a preliminary hearing indicated that J.K. had told him that Muquit had attempted to insert his penis in her rectum but that there had been no penetration. Finally, Muquit alludes to

another statement made by J.K. to the police in August. This statement is not in the record before us, but according to the opinion of the Kentucky Supreme Court, the August statement indicated that there had been penetration. At trial, J.K. testified that vaginal penetration had occurred.

Muquit claims that the inconsistencies among J.K.'s prior statements and her testimony at trial prove that she committed perjury and that, therefore, the trial court abused its discretion in denying his motions. We disagree.

The writ of *coram nobis* preceded the present use of CR 60.02 in criminal cases. The purpose of the writ was to allow

> a trial court to reopen and correct its judgment in light of the discovery of a substantial factual error not appearing in the record which, if known at the time of judgment, would have been grounds to prevent judgment from being pronounced.

John S. Gillig, Kentucky Post-Conviction Remedies and the Judicial Development of Kentucky Rule of Criminal Procedure 11.42, 83 Ky. L. J. 265, 320 (1994-95). Similarly, CR 60.02 allows defendants to raise issues that "were unknown and could not have been known to the moving party by exercise of reasonable diligence and in time to have been otherwise presented to the court." Barnett v. Commonwealth, Ky., 979 S.W.2d 98, 101 (1998) quoting Young v. Edward Technology Group, Inc., Ky.App., 918 S.W.2d 229, 231 (1995).

The inconsistencies among J.K.'s statements relied upon by Muquit to sustain his CR 60.02 motion were all known to him prior to or during the course of the trial. His defense counsel had received copies of J.K.'s first statement to the police and a summary of McGuffy's testimony prior to trial. Admittedly, he was not made aware of the August report during the discovery period and received it only at the time of the trial. This issue, however, was raised and resolved on appeal. The Supreme Court also pointed out that because the August statement was inculpatory rather than exculpatory, it was useful for impeachment purposes only.

Furthermore, the record shows that Muquit's defense counsel did attempt to impeach J.K. She testified under cross-examination as follows:

> Defense counsel: Did you ever tell Detective McGuffey that there was no penetration?
>
> J.K.: I told him that [Appellant] was never going in and out, like sex.
>
> Defense counsel: In the statement that you gave him, you indicated that [Appellant] was always attempting to do something, that he was attempting to put it in?
>
> J.K.: Uh-huh.
>
> Defense counsel: Do you remember at what point in time it changed from attempt to he actually penetrated you?

> J.K.: My point is I never felt it all the way in, just the tip pushing in but not getting to go in.

The sufficiency of the evidence supporting the rape conviction was raised by Muquit on direct appeal, and the Supreme Court held that J.K.'s testimony of penetration, regardless of however slight, was sufficient to substantiate the rape charge.

Therefore, Muquit's motion for relief pursuant to CR 60.02 is barred because the content of the allegedly perjured testimony was known to him either before or during the course of the trial. His counsel was made fully aware of the inconsistencies in J.K.'s statements and was given sufficient opportunity to impeach her. Because Muquit has provided no new evidence to meet his threshold burden of demonstrating with "reasonable certainty" that J.K. committed perjury, we need not proceed to the second step of the CR 60.02(f) analysis under Spaulding.

Muquit has also argued that he should have been granted an evidentiary hearing on his motion. However, Muquit has provided no facts that would justify vacating the judgment.

> Before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.

Gross v. Commonwealth, 648 S.W.2d 853, 856 (1983). Since the issues could be decided based solely on the record, no evidentiary hearing was required.

In its second order denying Muquit's motions, the trial court refused to make additional findings of fact or conclusions of law. We find no error. CR 52.01 specifically provides that "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41.02." The denial of CR 60.02 relief does not fall within the category of those decisions which require the entry of written findings and conclusions. Therefore, the trial court did not err by declining to make the additional entry sought by Muquit.

The order of Kenton Circuit Court is affirmed.

ALL CONCUR.

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