

RENDERED: FEBRUARY 10, 2006; 2:00 P.M.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-002683-MR  
AND  
NO. 2004-CA-001746-MR

LARRY EDWARD WILLIAMSON

APPELLANT

v. APPEALS FROM MARION CIRCUIT COURT  
HONORABLE DOUGHLAS M. GEORGE, JUDGE  
ACTION NO. 92-CR-00080

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION AFFIRMING

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BEFORE: BUCKINGHAM AND McANULTY, JUDGES; PAISLEY, SENIOR JUDGE.<sup>1</sup>

McANULTY, JUDGE: In these two appeals, Larry Edward Williamson (Larry) challenges the Marion Circuit Court's denials of his motions to (1) vacate his murder conviction under either CR 60.02 or RCr 10.26 due to alleged errors in the jury selection process and prosecutorial misconduct and (2) correct his pre-sentence investigation (PSI) report. Finding no error in the trial court's rulings on either motion, we affirm.

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<sup>1</sup> Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

A Marion County jury found Larry guilty of murder for the August 27, 1992 shooting death of Johnny Stiles. Larry's defense at trial was that Stiles pulled a gun on him outside a bar. According to Larry, he struggled briefly with Stiles to get the gun away from him, and the gun went off in the struggle. Stiles later died from a single gunshot wound to his abdomen. There were no witnesses to the shooting.

Larry was sentenced to 30 years' imprisonment. The final judgment of conviction was entered on November 11, 1994.

Presently, Larry has two appeals pending before this Court. The first appeal is appeal number 2003-CA-002683-MR. In that appeal, Larry challenges the trial court's denial of relief under CR 60.02(f) and RCr 10.26 based on (1) his claim that a close business friend of Johnny Stiles was seated on the jury and (2) his claim that the prosecutor committed prosecutorial misconduct in making certain statements in voir dire and closing arguments.

The second appeal is appeal number 2004-CA-001746-MR. In that appeal, Larry challenges the trial court's denial of his motion to correct his PSI report to reflect an order of expungement issued by the Nelson Circuit Court.

**Appeal Number 2003-CA-002683-MR**

Since his conviction, Larry has filed a number of motions in an attempt to overturn his conviction, however, all relief requested by Larry has been denied by the courts.

At this point, we will summarize the substance of Larry's post-conviction motions, as it is relevant to our decision in this appeal. Larry filed a direct appeal in which he raised three issues. First, he asserted that the trial court erred in denying his request to question unsequestered jurors concerning television and newspaper stories. Second, Larry argued that the trial court erred in refusing to grant his motion for a new trial based on the prosecution's failure to turn over exculpatory evidence concerning a prior felony conviction of a key government witness. Third, Larry claimed that the trial court erred when it failed to give a limited admonition restricting the jury's consideration during the guilt/innocence phase of the fact that Larry was a convicted felon. Ultimately, the Supreme Court of Kentucky affirmed the judgment of conviction in an unpublished opinion (94-SC-1002-MR).

While his direct appeal was pending, Larry filed a pro se motion to vacate under RCr 11.42 in which he alleged that his trial counsel was ineffective. In support, Larry outlined 11 different instances of ineffective assistance. Upon Larry's motion, the trial court appointed an attorney with the

Department of Public Advocacy to represent him in the RCr 11.42 proceedings, but before that attorney had filed a brief, a private attorney retained by Larry filed a motion to allow him to represent Larry on his motion. The trial court granted the motion, and that attorney proceeded to supplement Larry's original motion.

Through his attorney, Larry argued that he had learned that one of the jurors was related by marriage to a member of Johnny Stiles's family. In addition, Larry focused on eight alleged ways in which his trial counsel rendered ineffective assistance of counsel. The instances of deficient performance pertained to his trial court's failure to capitalize on evidence -- in the form of inconsistent witness statements and the post-mortem examination -- that was favorable to Larry's account of what happened that night. In addition, Larry alleged that his trial counsel failed to adequately investigate and prepare Larry's defense at trial.

The trial court granted Larry an evidentiary hearing on his claims, but ultimately denied relief under RCr 11.42. Larry appealed the trial court's order denying relief, and a panel of this Court affirmed the trial court's judgment in an unpublished opinion (1997-CA-002207-MR). And the Kentucky Supreme Court denied discretionary review (99-SC-0373-D).

That brings us to Larry's current pro se motion for relief under CR 60.02(f) and RCr 10.26. The trial court denied Larry relief under either rule, and Larry filed a motion for reconsideration, which the trial court also denied.

Consistent with his arguments in support of his motions, in this appeal Larry argues that the trial court denied him a fair trial when it allowed the prosecutor to (1) bolster the credibility of a witness in voir dire by expressing his personal opinions and (2) argue facts not in evidence during his closing argument. Moreover, Larry argues that the trial court committed palpable error in failing to excuse for cause a juror that was a close business friend of Johnny Stiles and in not allowing Larry an extra peremptory challenge as mandated by RCr 9.40(2). Woven through his arguments on these issues is the assertion that his trial counsel was ineffective in failing to preserve the issues for appeal.

The rules upon which Larry relies are CR 60.02(f) and RCr 10.26. CR 60.02(f) is as follows:

On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds . . . (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time . . .

And RCr 10.26 is as follows:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

In denying Larry's motion, the trial court concluded that Larry had not alleged any unusual or extraordinary circumstances that would justify relief under CR 60.02. Further, citing McQueen v. Commonwealth, 948 S.W.2d 415, 416 (Ky. 1997), the trial court noted that CR 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, and all issues raised by Larry could have been raised on direct appeal.

We agree with the trial court's reasoning and affirm the trial court's judgment. Moreover, to the extent that Larry continues to argue that his trial counsel was ineffective, he has already raised or could have raised these issues in the RCr 11.42 proceedings. See RCr 11.42(3); Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983).

Because the trial court concluded that Larry did not make any claims in his motion pertaining to RCr 10.26, it did not consider Larry's arguments under this rule. But Larry argues that his pro se motion is entitled to liberal

interpretation, and he has alleged palpable error resulting in manifest injustice. Although not considered by the trial court, we consider his argument because the rule states that this Court may consider palpable error claims even though insufficiently raised or preserved for review. See RCr 10.26.

Considering Larry's claims and the trial transcript in this case, we find no error. Thus, there can be no palpable error. The juror about whom Larry complains stated that he was "with the tobacco warehouse and Johnny sold his tobacco there," and the juror stated when questioned further that he could render an impartial verdict. Under these facts, we cannot conclude that there existed a close relationship -- either financial or situational -- between Johnny Stiles and the juror for which the juror should have been excused for cause. Moreover, Larry was not entitled to an extra peremptory challenge under RCr 9.40(2) because no additional jurors were called. Finally, we have reviewed the statements made by the prosecutor in voir dire and closing arguments that Larry alleges were improper, and we do not conclude that the prosecutor expressed his personal opinions before the jury or argued facts not in evidence.

The judgment of the Marion Circuit Court denying relief under CR 60.02 is affirmed, and there was no palpable error under the facts alleged.

**Appeal Number 2004-CA-001746-MR**

In this appeal, Larry argues that he has a right to have a correct and accurate PSI report that if not corrected will most certainly have an adverse effect on his parole eligibility as well as an adverse effect on programming and access to rehabilitative programs.

In the underlying proceedings, Larry filed a motion for the issuance of a corrected PSI report that deleted any reference to previous charges of which he had been acquitted. In his motion, he asserted that his PSI report contained a previous charge of capital murder and capital kidnapping in Nelson County of which he was acquitted and for which the Nelson Circuit Court issued an expungement order on December 17, 2003. Moreover, he alleged that the Kentucky Department of Corrections had not carried out this order of expungement as evidenced by the fact that two separate officers with the department made comments to him concerning the offenses that should have been expunged. In addition, he contends that he attempted to request a copy of his PSI report, which request was denied by the Department of Corrections under KRS 61.878. Finally, Larry argues that he found numerous mistakes on the PSI report at final sentencing in November of 1994.

The Marion Circuit Court denied Larry's motion and his motion for reconsideration.

An order of expungement operates to seal criminal records of an offense for which a person has been charged and found not guilty. See KRS 431.076. Larry believes that a new PSI report should be issued because the charges of capital murder and capital kidnapping were expunged in 2003. Considering the facts, however, that (1) the charges were expunged over 9 years after Larry was sentenced and (2) the parole board has broad discretion in hearing evidence including criminal activity for which a prisoner has not been charged and records that are sealed, we conclude that Larry's argument provides no basis for removing this information from his PSI report. See Aaron v. Commonwealth, 810 S.W.2d 60, 62 (Ky. App. 1991) ("[I]n Kentucky, the Parole Board is to consider *all pertinent information*"). The order of the Marion Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Larry Williamson, pro se  
Burgin, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky

Samuel J. Floyd, Jr.  
Assistant Attorney General  
Frankfort, Kentucky