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NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2004-CA-001988-MR

KEVIN ANTWAN HENDERSON

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT  
v. HONORABLE DENISE CLAYTON, JUDGE  
ACTION NO. 97-CR-002403

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: McANULTY, SCHRODER, AND VANMETER, JUDGES.

VANMETER, JUDGE: Following a criminal conviction, a defendant who seeks a new trial based on allegedly perjured testimony must prove both a reasonable certainty as to the falsity of the testimony, and that the conviction probably would not have resulted had the truth been known. In this pro se appeal, Kevin Henderson claims that the recanted testimony of his codefendant entitles him to reversal of his conviction. The issue we must decide is whether the Jefferson Circuit Court erred in holding

that Henderson failed to meet his burden of proof. We hold that the trial court did not err, and therefore affirm.

In 1997, Kevin Henderson and Cedric O'Neal were charged with the murder and robbery of Quinton Hammond. Both were convicted, and Henderson was sentenced to life on the murder charge and twenty years for the robbery. In affirming the conviction on direct appeal,<sup>1</sup> the Kentucky Supreme Court summarized the evidence against Henderson as follows:

At trial, the two (2) codefendants were tried jointly over [Henderson's] objection. The Commonwealth's theory of the case was that O'Neal fired the shot that killed Hammond, but that [Henderson] was liable as an accomplice because of his active participation in the planning, preparation, and commission of both offenses. During its case-in-chief, the Commonwealth connected [Henderson] to the crimes through the testimony of: (1) Odessa Booker, who heard the shots from her home and observed two (2) black males running eastward from the scene; (2) Officer Anne Duncan, who was dispatched to the residence where both [Henderson] and O'Neal lived on the morning of the shooting in reference to another alleged shooting and found O'Neal with a gunshot wound to the elbow area of his left arm. According to Officer Duncan, she found suspicious O'Neal's explanation that he had been shot approximately two (2) hours earlier by an unknown person who had attempted to rob him; (3) Billy McAtee, a friend of O'Neal's, who testified that he observed [Henderson] and O'Neal together on the morning of the shooting, later saw them run inside the O'Neal house, and, after following them inside noticed O'Neal had been shot. McAtee

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<sup>1</sup> Henderson v. Commonwealth, 1998-SC-0624-MR, slip op. at 3-7 (Ky., Dec. 20, 2001), rehearing den'd (Mar. 21, 2002).

testified that O'Neal stated that, "He was trying to rob a boy for his shoes, boy wouldn't give it up, shot the boy and himself in the arm." McAtee also testified that he had been present on an earlier occasion when Henderson had given O'Neal a handgun with the instruction, "Take it, do your business, but be careful," and that he had also been present at O'Neal's residence the day before the shooting and witnessed O'Neal loading a handgun and making efforts to disguise the identity of the ammunition by "chopping" bullets. The Commonwealth also introduced a transcript of a telephone call McAtee had made to a relative incarcerated in state prison in which McAtee verified many of the above-described facts and stated that [Henderson] had given the handgun to O'Neal and that O'Neal returned it to Henderson following the shooting; (5) Kathy O'Neal, Cedric O'Neal's younger sister, who testified that, on the morning of the shooting, she observed [Henderson] and O'Neal whispering together in the living room. Kathy O'Neal also admitted that she had previously told the investigating officers that she observed [Henderson] and O'Neal donning masks as they left the house; (6) Joquita Sanders, O'Neal's first cousin who also lived in the house, who admitted telling the investigating officers that she also saw [Henderson] and O'Neal run inside the house, but testified at trial that the statement was a lie; (7) Angela Bailey, O'Neal's sister, who testified that she observed [Henderson] hurriedly placing guns and a rifle in a duffle bag that morning; and (8) Victoria O'Neal, [Henderson's] girlfriend, who testified at trial that [Henderson] was in bed asleep with her when O'Neal knocked on her door and asked for a rag to stop his arm from bleeding. Victoria O'Neal acknowledged, however, that in a previous statement to the investigating officers, she had stated that [Henderson] was not in bed when she was awakened by O'Neal.

The Commonwealth also introduced O'Neal's tape-recorded statement in which O'Neal told numerous contradictory statements attempting to substantiate his claim of being a robbery victim before stating that: (1) while attempting to "jack" Hammond, he killed Hammond and shot himself accidentally, (2) no one else was present during the shooting; (3) he disposed of the .38 handgun by throwing it into the sewer;<sup>2</sup> and (4) he then ran home, got a cloth from his sister and laid in his bed until later reporting his shooting as a "robbery." One of the detectives present during O'Neal's confession testified that, after giving his tape-recorded "confession," O'Neal admitted his involvement in the crimes to his mother and her live-in boyfriend.

At trial, however, O'Neal testified in his own defense and, notwithstanding his tape-recorded statements, denied involvement in the shooting and testified that [Henderson] had killed Hammond. During his testimony, O'Neal: (1) admitted that he had been with [Henderson] on the morning of the shooting, but claimed ignorance of any planned robbery; (2) testified at length concerning a pattern of criminal conduct in which [Henderson] played the role of O'Neal's instructor and superior while O'Neal himself reluctantly "played along" under duress and, once out of [Henderson's] sight, refused to participate in [Henderson's] criminal schemes and invented explanations for his failures; (3) explained that, on the day in question, [Henderson] gave him a toboggan to put on, gave him a gun, and told O'Neal that he wanted him to do some "licks" (robberies) by himself; (4) testified that [Henderson] became angry after O'Neal allowed two (2) would-be victims to escape, and O'Neal eventually returned the handgun to [Henderson] and told him, "Robbing nobody ain't gonna make me no

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<sup>2</sup> The Louisville Police Department searched the area described by O'Neal, but never located the handgun.

man."; (5) testified that [Henderson] then bumped into a young man (Hammond) walking towards them and that gunfire erupted immediately after [Henderson] confronted the young man regarding the collision, but that he never saw [Henderson] produce the firearm, that he could not recall how many shots were fired, and that he did not even discover his own gunshot wound until later; (6) explained that he began running as soon as he heard the shots and that [Henderson] joined him after the gunfire stopped; (7) testified that he and [Henderson] ran to the O'Neal house on 34<sup>th</sup> Street and that [Henderson] stated to him that, "If you was doing what you were supposed to be doing, none of this shit would have never happened."; (8) explained that, once he and [Henderson] arrived at the house, his sister Victoria suggested that O'Neal claim that he received his wound when someone attempted to rob him; and (9) testified that he did not implicate [Henderson] in the offense because [Henderson] warned him not to mention [Henderson]'s name so that "he [Henderson] didn't have to hurt anybody," a statement O'Neal testified that he interpreted as a threat against the O'Neal family, and because there was no reason for them to "both go down" when O'Neal, a juvenile, would receive only a light punishment even if caught.

In his defense, O'Neal also called Michael Brown, an inmate and former bunkmate of [Henderson]. Brown testified that [Henderson] spoke of the crime and admitted that he had shot the victim but intended to deny involvement and blame O'Neal in order to avoid the death penalty.

Although [Henderson] himself did not testify at trial, he called in his defense the detective to whom O'Neal had made the prior taped confession and attempted to cast doubt upon O'Neal's in-court version of the events.

On July 29, 2002, Henderson filed a motion to vacate his sentence pursuant to CR 60.02. The basis for the motion was a December 13, 2001 affidavit of O'Neal that "[t]he statements and the testimony given on 5-26-98 are false and untrue as it relates to the involvement of Kevin Henderson being involved in the crime that was committed on 8-20-97 resulting in the death of one Quinton Hammond."

Following the appointment of counsel for Henderson and two hearings, the Jefferson Circuit Court entered an Opinion and Order denying the motion. The Court made the following findings:

After reviewing the trial tapes, it is the opinion of this Court that the verdict would most probably have been the same even if Mr. O'Neal had not testified against Mr. Henderson. Many of the witnesses relied upon by the defense had told different versions of what happened. The jury could have chosen from three different scenarios in rendering their verdict. Two of the scenarios involved Mr. Henderson being there. One was with Mr. Henderson being the "shooter" and the other one was as the Jury found: Mr. Henderson present with Mr. O'Neal, with the latter pulling the trigger. The final scenario would have been with Mr. Henderson not present, but instead, with Billy McAtee present. It is apparent to this Court when reviewing the tapes, that the jury had differing accounts throughout the trial as to who was involved in the incident and they chose to believe Mr. Henderson was.

Consequently, this Court cannot say that the jury would most probably have found

differently had Mr. O'Neal not testified as he did against Mr. Henderson.

This appeal followed.

In *Commonwealth v. Spaulding*,<sup>3</sup> the Kentucky Supreme Court held that in order for a criminal defendant to be entitled to a new trial under CR 60.02 based on perjured testimony, the defendant has the burden of proving with a reasonable certainty that perjured testimony was in fact introduced against him at trial, and that its use changed the verdict or would probably change the result if a new trial was to be granted.<sup>4</sup>

Henderson's claim, that O'Neal's affidavit entitles him to a new trial under CR 60.02, fails both parts of the *Spaulding* standard. As to the first, "no rule of law, logic or nature . . . dictates that as between two contradictory statements, one of them must be true."<sup>5</sup> The court in *Spaulding* stated that "neither contradictory statements by a witness nor a sworn statement by the witness that he lied at trial is sufficient to establish perjury was committed at trial, because the witness's oath at one proceeding is no more binding than his former oath."<sup>6</sup> Thus, O'Neal's affidavit is insufficient to

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<sup>3</sup> 991 S.W.2d 651 (Ky. 1999).

<sup>4</sup> *Id.* at 654.

<sup>5</sup> *Id.* at 657.

<sup>6</sup> *Id.* at 657-58 (citing *Anderson v. Buchanan*, 292 Ky. 810, 820, 168 S.W.2d 48, 53 (1943)).

establish that his testimony during Henderson's trial was perjured.

As to the second part of the *Spaulding* test, the trial court made a finding, based on a review of the original trial proceedings, that the verdict probably would have been the same even if O'Neal had not testified against Henderson. We review this finding based on an abuse of discretion standard.<sup>7</sup> Based on the evidence presented against Henderson, as summarized above, we agree that Henderson failed to demonstrate that a change in O'Neal's testimony "would, with a reasonable certainty, have changed the verdict, or that it would probably change the result if a new trial should be granted."<sup>8</sup> Thus the trial court did not abuse its discretion.

Henderson's final claim, that he was entitled to bail on appeal of his CR 60.02 motion, is without merit. RCr 12.78 permits the establishment of bail on appeal, "except when the defendant has been sentenced to death or life imprisonment." As we read the rule, Henderson's receipt of a life sentence automatically eliminates him from consideration for bail pending any appeal. Further, as we believe that "appeal" means the direct appeal following his conviction, and his direct appeal

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<sup>7</sup> *Spaulding*, 991 S.W.2d at 658.

<sup>8</sup> *Id.* at 657 (quoting *Jennings v. Commonwealth*, 380 S.W.2d 284 (Ky. 1964)).

was decided in 2002, the rules would provide no relief at this point in any event.<sup>9</sup>

The Opinion and Order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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<sup>9</sup> Although Henderson provides ample citation to the rules governing bail in federal criminal proceedings, See 18 U.S.C.A. §§ 3142 and 3143, those rules are inapplicable to the instant matter.