RENDERED: JUNE 1, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000646-MR

DONALD RAY VIOLETT — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NOS. 92-CR-00532 & 92-CR-00626

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; BUCKINGHAM,[1] SENIOR JUDGE.

COMBS, CHIEF JUDGE: Donald Ray Violett, proceeding *pro se*, appeals from an order of the Warren Circuit Court that denied his motions for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 and Kentucky Rules of Civil Procedure (CR) 60.02. After our review, we affirm.

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

In October 1993, following a jury trial in the Warren Circuit Court, Violett was convicted of 123 counts of first-degree sexual abuse of his stepdaughter and five counts of first-degree rape of his biological daughter. He was sentenced to a total of 754 years in prison. The Supreme Court of Kentucky affirmed Violett's conviction and sentence on October 19, 1995, in *Violett v. Commonwealth*, 907 S.W.2d 773 (Ky. 1995), *cert. denied*, 522 U.S. 1151, 118 S.Ct. 1172, 140 L.Ed.2d 181 (1998).

Since his conviction was affirmed, Violett has filed numerous pleadings seeking post-conviction relief in both state and federal courts – including multiple RCr 11.42 and CR 60.02 motions. *See* 1995-CA-003306; 1997-CA-003118 & 1998-CA-000297; 2001-CA-001423; 2003-CA-000466. All of these previous motions have been unsuccessful. The Warren Circuit Court denied this most recent effort at post-conviction relief in an order entered on February 27, 2006. This appeal followed.

Violett now raises the following arguments: (1) that he was entitled to a full evidentiary hearing on his RCr 11.42 and CR 60.02 motions; (2) that he was prejudiced by the opinion testimony given by a police officer who was not qualified to give expert opinion testimony; (3) that there was insufficient evidence to support his convictions and that, therefore, his attorney was ineffective in failing to protect him from malicious prosecution; (4) that his convictions should be voided because they were procured by means of various violations of statutes; (5) that he is entitled to post-conviction forensic testing to rebut testimony that was given at trial; (6) that he was improperly denied the right to present evidence that another person committed the crimes

for which he was convicted; and (7) that he is entitled to a new trial because one of his accusers was prepared to testify that she gave perjured testimony at trial.

We first address Violett's argument that he was entitled to a full evidentiary hearing on his RCr 11.42 and CR 60.02 motions. Because Violett's claims can be fully resolved by reference to the record, an evidentiary hearing was not required. *See Baze v. Commonwealth*, 23 S.W.3d 619, 622 (Ky. 2000); *Newsome v. Commonwealth*, 456 S.W.2d 686, 687 (Ky. 1970).

Violett's next five arguments involve issues that were asserted during one of his previous post-conviction proceedings, that were raised on direct appeal, or that could have been raised during any of those proceedings. RCr 11.42(3) provides that a motion to vacate or to set aside a conviction under the provisions of RCr 11.42:

> shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude **all issues that could reasonably have been presented in the same proceeding**. (Emphasis added.)

A defendant "is required to avail himself of RCr 11.42 as to any ground of which he is aware, or should be aware, during the period when the remedy is available to him." *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997).

Our case law has long held that we will not consider successive motions to vacate a conviction when those motions recite grounds for relief that have been or should have been raised earlier. *See Butler v. Commonwealth*, 473 S.W.2d 108, 109 (Ky. 1971); *Hampton v. Commonwealth*, 454 S.W.2d 672, 673 (Ky. 1970); *Kennedy v. Commonwealth*, 451 S.W.2d 158, 159 (Ky. 1970). "The courts have much more to do

than occupy themselves with successive 'reruns' of RCr 11.42 motions stating grounds that have or should have been presented earlier." *Hampton*, 454 S.W.2d at 673. Therefore, we decline to consider these renewed arguments once again in this appeal. *See Crick v. Commonwealth*, 550 S.W.2d 534, 535 (Ky. 1977); *Hampton*, 454 S.W.2d at 673.

We also note that Violett's arguments are time-barred on their face by RCr 11.42(10), which provides:

> (10) Any motion under this rule shall be filed within three years after the judgment becomes final, unless the motion alleges and the movant proves either:
>
> (a) that the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence; or
>
> (b) that the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.
>
> If the judgment becomes final before the effective date of this rule, the time for filing the motion shall commence upon the effective date of this rule. If the motion qualifies under one of the foregoing exceptions to the three year time limit, the motion shall be filed within three years after the event establishing the exception occurred. Nothing in this section shall preclude the Commonwealth from relying upon the defense of laches to bar a motion upon the ground of unreasonable delay in filing when the delay has prejudiced the Commonwealth's opportunity to present relevant evidence to contradict or impeach the movant's evidence.

The judgment at issue became final more than a decade ago; more than three years have elapsed since RCr 11.42(10) went into effect in October 1994. Moreover, Violett's

arguments do not fit within any of the exceptions set forth in RCr 11.42(10). They do not present newly-discovered facts, and they do not raise newly-established constitutional rights that have been held to apply retroactively. Therefore, Violett's claims for relief are unfounded under RCr 11.42.

Similarly, he fails to qualify for relief under CR 60.02. CR 60.02 is an extraordinary remedy to be invoked only when RCr 11.42 has no application. It is not intended to serve as a substitute or an afterthought for RCr 11.42, and it "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." *McQueen*, 948 S.W.2d at 416; *see also Gross v. Commonwealth*, 648 S.W.2d 853, 857 (Ky. 1983).

Violett last argues that he is entitled to a new trial pursuant to CR 60.02 because one of his daughters was prepared to testify that she gave perjured testimony at trial. In reviewing the record, we question whether this argument has been preserved for our review. Violett argued below that his daughter suffers from "repressed memory syndrome" and that she was subjected to "suggestive or coercive interviewing techniques...."

In addition to the preservation problem, there is no indication that Violett ever argued that his daughter intentionally perjured herself. Nonetheless, even if we were to assume that Violett presented his position inarticulately and that his argument should be treated as preserved for our review, he is still not entitled to relief. CR 60.02 allows a party to be relieved from a final judgment, order, or proceeding on the grounds of

"perjury or falsified evidence." CR 60.02(c). CR 60.02 also sets forth the requirement that a motion for relief on these grounds must be made "not more than one year after the judgment, order, or proceeding was entered or taken." However, our Supreme Court has held that a claim that a criminal conviction was based on perjured testimony can also be brought pursuant to CR 60.02(f), which encompasses "any other reason of an extraordinary nature justifying relief." This portion of the rule is subject to the "reasonable" time limitation of the rule. *Commonwealth v. Spaulding*, 991 S.W.2d 651, 657 (Ky. 1999).

It is well established that a movant must make a substantial showing to be entitled to pursue the extraordinary relief offered by CR 60.02. *Ringo v. Commonwealth*, 455 S.W.2d 49, 50 (Ky. 1970). We review denials of CR 60.02 motions under an "abuse of discretion" standard. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky.App. 2000).

A claim that a conviction was based on perjured testimony is treated as a claim of newly discovered evidence for purposes of CR 60.02. *Spaulding*, 991 S.W.2d at 654. In such cases, the burden is on the defendant:

> to show both that a reasonable certainty exists as to the falsity of the testimony and that the conviction probably would not have resulted had the truth been known before he can be entitled to such relief.

Id. at 657. Violett failed to present the trial court with an affidavit from the proposed witness as to the alleged perjury or as to any newly discovered evidence. This omission is fatal to his motion. *Hampton*, 454 S.W.2d at 673; *Wheeler v. Commonwealth*, 395

S.W.2d 569, 571 (Ky. 1965). As our predecessor court held long ago in *American Central Ins. Co. v. Hardin*, 148 Ky. 246, 146 S.W. 418 (1912):

> When a party desires to obtain a new trial on the ground of newly discovered evidence, he should, in addition to his own affidavit stating the reasons why the evidence was not procured and its materiality, file the affidavit of the proposed witness, setting out what he would testify to if introduced as a witness or if this affidavit cannot be obtained the affidavit of some other person who could state what the proposed witness would say.

Id., 146 S.W. at 420; *see also Roark v. Commonwealth*, 221 Ky. 253, 298 S.W. 683, 684-85 (1927). Without an appropriate affidavit, Violett's argument cannot be considered. Therefore, we conclude that the trial court did not abuse its discretion in denying his claim for relief pursuant to CR 60.02.

We affirm the judgment of the Warren Circuit Court.

ALL CONCUR.

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