

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001304-MR

DAVID LEE LEWIS, JR.

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 93-CR-00001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT, MOORE, AND NICKELL, JUDGES.

MOORE, JUDGE: David Lee Lewis, Jr. appeals the Bell Circuit Court's order denying his Kentucky Rule of Civil Procedure (CR) 60.02 motion for relief from the court's judgment convicting him of murdering his wife and sentencing him to life imprisonment. After a careful review of the record, we affirm the Bell Circuit Court's order.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant was tried by a jury on the charge of murdering his wife, Sheila Mills Lewis, by stabbing her to death with a knife. During trial, Appellant contended that

his wife had committed suicide. The jury found Appellant guilty of murder, and he was sentenced to serve life imprisonment. He appealed, and the Kentucky Supreme Court affirmed the judgment against him.

Appellant moved to vacate, set aside, or correct his sentence, pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. He argued that the trial court erred when it excluded testimonial evidence supporting his allegation that the victim had committed suicide. Appellant also asserted, *inter alia*, that he was denied the right to be present during his trial counsel's closing arguments. The circuit court denied his motion. This Court previously affirmed the trial court's denial of Appellant's motion.

Next, Appellant filed another RCr 11.42 motion, as well as a motion to file a successive RCr 11.42 motion. The trial court denied both motions. Appellant appealed, alleging, *inter alia*, that he could not have obtained a copy of his trial transcript before he filed his first RCr 11.42. This Court affirmed the circuit court's judgment.

Appellant then filed his *pro se* CR 60.02 motion in the circuit court, raising the following claims: (1) the trial court kept the toxicology report away from the jury to ensure that Appellant was convicted; (2) the prosecutor's closing argument concerning the amount of time Appellant would have to spend in prison before being eligible for parole could have been misinterpreted by the jury; (3) Appellant was unable to discover the mental health and medical records of witnesses that would have provided exculpatory evidence bearing on the credibility of the witnesses; and (4) the trial court's admonition of the jury was insufficient because it is apparent from the verdict that "the jury did not steer

clear of the prejudicial testimony they had heard." The circuit court denied Appellant's CR 60.02 motion, reasoning that "[t]he Motion is simply a rehash of issues that were previously determined on appeal."

Appellant filed the present notice of appeal. He also filed a motion for the appointment of counsel on appeal, which was denied by the circuit court.

Appellant moved this Court for the appointment of counsel on appeal. We ordered the record to be transmitted to the Department of Public Advocacy (DPA). The DPA reviewed the record and moved to withdraw as counsel and to allow Appellant to file a *pro se* brief. We granted the DPA's motion to withdraw and directed Appellant to file a *pro se* brief.

On appeal, Appellant, acting *pro se*, raises the following issues: (1) the circuit court erred in denying his CR 60.02 motion because he had "new evidence" showing that the trial court and the prosecutor conspired to put him in prison; (2) he received the ineffective assistance of trial counsel due to counsel's failure to investigate and interview witnesses and due to counsel's failure to object to instances of prosecutorial misconduct; (3) his motion for the appointment of counsel on appeal of his CR 60.02 motion was improperly denied;¹ (4) the prosecutor improperly argued during trial that Appellant was not mentally ill because Appellant was merely mentally anguished after seeing his wife commit suicide in front of him; (5) the trial court and the prosecutor acted vindictively and unconstitutionally when the prosecutor helped the "star" witness, Steve

¹ It is not clear whether Appellant is challenging the circuit court's denial of his motion to appoint counsel or this Court's order permitting the DPA to withdraw as counsel and directing Appellant to file a *pro se* brief.

Washam, lie when Mr. Washam alleged that he called 9-1-1; (6) the trial court erred when it did not allow the introduction of evidence at trial concerning the victim's mental health problems; (7) evidence of Appellant's good character should have been presented at trial; (8) Appellant requests permission to introduce four affidavits and a letter from an attorney in Virginia that he asserts are "very crucial" for him; (9) Appellant requests permission to introduce the certificate of Appellant and the victim's marriage; and (10) he asserts that the victim was mentally ill, that she had been raped by her brother, and that Appellant sought help from the Kentucky Attorney General regarding the rape.

II. STANDARD OF REVIEW

On appeal, we review the denial of a CR 60.02 motion for an abuse of discretion. "A movant is not entitled to a hearing on a CR 60.02 motion unless he affirmatively alleges facts which, if true, justify vacating the judgment and further allege[s] special circumstances that justify CR 60.02 relief." *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky.App. 2000) (internal quotation marks and citation omitted).

"Civil Rule 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." *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997) (internal quotation marks and citation omitted). Civil Rule 60.02 "is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings." *Id.*

III. ANALYSIS

A. CLAIMS NOT RAISED IN CIRCUIT COURT

Many of the claims that Appellant raises in the present appeal were not raised below in the circuit court as part of Appellant's CR 60.02 proceedings. Specifically, Appellant's second, fourth, fifth, sixth, seventh, and ninth claims were not raised in the circuit court. Additionally, the affidavits of both Rex Miller and Appellant and the letter from Virginia attorney James P. Carmody, which Appellant seeks to introduce as part of his eighth claim on appeal, were not part of the trial court record. Therefore, those claims and evidence "are not subject to review" on appeal and "will not be considered." *Parker v. Commonwealth*, 465 S.W.2d 280, 281 (Ky. 1971).

B. CLAIMS CONCERNING AFFIDAVIT OF RICKY WAYNE MINK

In his first claim, Appellant contends that the circuit court erred in denying his CR 60.02 motion because he had "new evidence" showing that the trial court and the prosecutor conspired to put him in prison. The "new evidence" allegedly consists of an affidavit by prisoner Ricky Wayne Mink, and Appellant also seeks to introduce this affidavit as part of his eighth claim. Therefore, Appellant's first claim and the part of his eighth claim involving Mr. Mink's affidavit will be discussed together in this section.

In his affidavit, Mr. Mink attests that in the spring of 1993, he was at a party at his sister's house where Terry and Jerry Moyers, the victim's brothers, talked about the fact that the victim had died. The affidavit, signed thirteen years later, on April

26, 2006, alleges that the victim's brothers stated at the party that Appellant "was gonna do time for [her death] whether he killed her or not" because they had

been told by the prosecutor "Bill Hayes" that him (sic) and the Judge "Farmer Helton" have come up with a way to keep key evidence out of the trial, specifically psychiatry (sic) reports and suicidal hospital reports[.] . . . "Terry Moyers" said that Mr. Hayes told him they would have the evidence in the court room on a table [but they] wouldn't allow anyone to ask about or make reference to it except the jury and how could the jury possibly know to ask about a stack of paper work lying on a table in the court room that no one is talking about[?]

(Capitalization changed; emphasis removed).

The Commonwealth asserts that Appellant's CR 60.02 motion was untimely filed. A motion brought under CR 60.02 must be filed "within a reasonable time." CR 60.02. In the present case, Appellant was convicted in 1993. Obviously, a significant amount of time passed between the time Appellant was convicted and the time Mr. Mink signed his affidavit on April 26, 2006. Although we do not know when Appellant became aware of the events described in Mr. Mink's affidavit, even if we were to assume that Appellant brought this affidavit to the court's attention within a reasonable time, Appellant's claim concerning the allegations made in Mr. Mink's affidavit nevertheless fails on the merits.

Mr. Mink's affidavit is inadmissible under Kentucky's hearsay rule, KRE 801, because the statement is offered for the truth of the matter asserted, i.e., for the proposition that the prosecutor informed Terry and Jerry Moyers that the prosecutor and the trial court had conspired to keep evidence from being admitted. Further, Mr. Mink's

affidavit does not fit within any exception to the hearsay rule. *See* KRE 801A, 802, 803, and 804. Therefore, the affidavit is inadmissible, and the circuit court did not abuse its discretion when it denied CR 60.02 relief based on Mr. Mink's affidavit. *See generally White*, 32 S.W.3d at 86.

To the extent that Appellant's claim alleges that the victim's psychiatric reports and suicidal hospital reports should have been admitted at trial, Appellant raised this claim on direct appeal and the Kentucky Supreme Court, in denying relief based on this claim, noted that various medical records concerning the victim's suicidal tendencies were introduced at trial. Therefore, because Appellant raised this claim in his direct appeal, it is not properly before this Court under the guise of CR 60.02 proceedings. *See McQueen*, 948 S.W.2d at 416.

C. CLAIM CONCERNING THE AFFIDAVIT OF BOBBI BROOKS

The remainder of Appellant's eighth claim on appeal seeks to introduce an affidavit of Bobbi Brooks, Appellant's aunt, who attests that she went to the circuit court on June 16, 2006, to pay the appellate filing fee in the present case, but she was told that there was no filing fee that needed to be sent to this Court. Ms. Brooks's affidavit asks this Court to consider Appellant's appeal.

The circuit court denied Appellant's CR 60.02 motion on May 25, 2006, and Appellant filed his notice of appeal on June 8, 2006. On June 16, 2006, the same day that Ms. Brooks attempted to pay the filing fee, the circuit court granted Appellant pauper status on appeal. Because Appellant's notice of appeal was timely filed, *see* CR 73.02,

and he was granted pauper status by the circuit court, we are reviewing Appellant's appeal. Therefore, this claim is moot.

D. CLAIM CONCERNING APPELLANT'S MOTION TO APPOINT COUNSEL ON APPEAL

In his third claim on appeal, Appellant asserts that his motion for the appointment of counsel in the present appeal was improperly denied. Civil Rule 60.02 does not contain a provision concerning the appointment of counsel. Under KRS 31.110, "needy" people are entitled to the appointment of counsel in a post-conviction proceeding unless appointed counsel "determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense." KRS 31.110(2)(c). In such a case, "there shall be no further right to be represented by counsel under the provisions of this chapter." *Id.* As previously mentioned, the DPA represented Appellant in past proceedings. The DPA moved this Court to withdraw as counsel and to allow Appellant to file a *pro se* brief, reasoning that it had "reviewed the record in this case and . . . determined that this post-conviction proceeding . . . is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense." (internal quotation marks and citation omitted). This Court granted the DPA's motion to withdraw and ordered Appellant to file a *pro se* brief. Thus, because this Court has previously addressed the issue of Appellant's motion to appoint counsel and we have determined that Appellant is not entitled to the CR 60.02 relief he seeks, we decline to revisit his claim regarding the appointment of counsel.

Further, to the extent that Appellant challenges the circuit court's denial of his motion for the appointment of counsel, the Kentucky Supreme Court has declined to extend KRS 31.110 to make it applicable to CR 60.02 motions. *See Gross v. Commonwealth*, 648 S.W.2d 853, 857 (Ky. 1983). Therefore, the circuit court did not abuse its discretion when it denied Appellant's motion for the appointment of counsel.

Accordingly, the order of the Bell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

David Lee Lewis, Jr.
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Michael L. Harned
Assistant Attorney General
Frankfort, Kentucky