

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-001869-ME

SHANNON BILLY RILEY

APPELLANT

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 06-CI-00319

RODERICK MESSER, JUDGE; CABINET
FOR HEALTH AND FAMILY SERVICES;
and GREGORY A. LAY, JUDGE

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: THOMPSON AND VANMETER, JUDGES; PAISLEY,¹ SENIOR JUDGE.

THOMPSON, JUDGE: Shannon Riley appeals from two orders of the Knox Circuit Court denying his motions for post-judgment relief pursuant to Kentucky Rules of Civil Procedure (CR) 60.03, for recusal of the trial judge, and for the court to issue findings of facts pursuant to CR 52.04. Concluding that the trial court did not err, we affirm.

¹ 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.

On November 5, 2003, an order signed by Judge Roderick Messer was entered that terminated the parental rights of Shannon Riley. Several months earlier, Riley had been convicted and sentenced to twenty-five years' imprisonment for first-degree robbery and for being a first-degree persistent felony offender. Riley appealed the termination order; however, due to his failure to file a brief, despite this Court's granting of his repeated motions for filing extensions, his appeal was dismissed by order entered on December 22, 2004. The Kentucky Supreme Court denied Riley's motion for discretionary review. Riley then petitioned the United States Supreme Court for a writ of certiorari but this motion was also denied.

On April 13, 2006, Riley filed a motion to set aside the termination order pursuant to CR 60.03. In his CR 60.03 motion, Riley alleged that: (1) Judge Messer erred by failing to *sua sponte* recuse himself from his termination case; (2) Judge Messer improperly admitted hearsay testimony during the termination hearing; (3) Judge Messer's termination order improperly relied on fraudulent testimony; and (4) Judge Messer improperly admitted his robbery conviction into evidence during the termination hearing.

On August 14, 2006, the Knox Circuit Court, Judge Gregory A. Lay presiding, denied Riley's CR 60.03 motion for relief. In its order, the trial court ruled that some of Riley's claims should have been brought on direct appeal or were time barred by the one-year statute of limitations period set out in CR 60.02 and incorporated by reference in CR 60.03.

In response to this order, Riley filed multiple motions in the trial court in which he argued the following: (1) that Judge Lay should have recused himself from presiding over his CR 60.03 case; and (2) that Judge Lay needed to make additional findings of fact pursuant to CR 52.04. These motions were denied by order entered on August 30, 2006, and this appeal followed.

On appeal, Riley alleges the following grounds for relief: (1) that Judge Lay erred when he did not *sua sponte* recuse himself; (2) that the trial court erred when it ruled that one of his claims was time barred pursuant to CR 60.02 and CR 60.03; (3) that the trial court erred by ruling that his inadmissible hearsay claim was improper because it should have been brought on direct appeal; (4) that the trial court erred in ruling that Judge Messer did not have to recuse himself from the termination case; (5) that the trial court erred in ruling that Riley's claim that Judge Messer improperly admitted his robbery conviction was barred because it should have been brought on direct appeal; (6) and that the trial court erred by not making findings of fact pursuant to CR 52.04.

As an initial matter, we will address Riley's allegation that Judge Lay should have *sua sponte* recused himself. A fundamental principle of our judicial system is that every individual has a right to an impartial judicial tribunal. *Hilltop Basic Resources, Inc. v. County of Boone*, 180 S.W.3d 464, 468 (Ky. 2005). Moreover, judges must adhere to very high standards of conduct in order to ensure the highest possible degree of impartiality in both fact and appearance. *Id.* In *Carter v.*

Commonwealth, 641 S.W.2d 758 (Ky.App. 1982), the Court held that a trial judge must disqualify himself when presiding over a proceeding would violate statutory mandates for impartiality. If a trial judge fails to adhere to this requirement, reversible error is committed and the case will be remanded for new proceedings. *Id.* at 759-760.

After reviewing the record on appeal, the facts giving rise to Riley's allegation that Judge Lay should have disqualified himself are simple. In 2003, with Judge Messer presiding, a Knox County jury found Riley guilty of robbing a bank in Barbourville. Gregory Lay was the prosecuting attorney in the robbery case. Several months later, after a hearing in which the admission of Riley's robbery conviction was permitted, Judge Messer ordered the termination of Riley's parental rights to his four minor children. After his appeal of the termination order was dismissed, Riley filed a motion to vacate the order pursuant to CR 60.03. By order, entered August 14, 2006, Judge Gregory Lay, who had been the prosecuting attorney in Riley's robbery case, denied Riley's motion for post-judgment relief.

We now consider Riley's legal argument. Citing *Small v. Commonwealth*, 617 S.W.2d 61 (Ky.App. 1981), Riley alleges that Judge Lay should have disqualified himself from the CR 60.03 case because Judge Lay served as the prosecuting attorney in a related matter, his criminal case. Essentially, since one of his CR 60.03 claims challenged the admission of his robbery conviction during the termination hearing, Riley alleges that Judge Lay, who prosecuted him for this robbery, was required to

disqualify himself from the CR 60.03 case pursuant to *Small* and KRS 26A.015(2). We disagree.

In *Small*, the defendant accepted a plea agreement, offered by a Commonwealth Attorney, in which he would receive a five-year sentence on a reduced charge of reckless homicide. After serving several weeks of his sentence, Small petitioned and was granted shock probation. Within a year, Small was arrested for driving under the influence and pled guilty to reckless driving. Proceedings were initiated to revoke Small's probation for his reckless homicide conviction as a result of this infraction. Subsequently, with now Judge Willard Paxton presiding, the prosecutor in Small's homicide case, Small's probation was revoked.

On appeal, Small argued that Judge Paxton should have, *sua sponte*, recused himself from presiding over his revocation hearing because Judge Paxton was the prosecuting attorney in the underlying matter. This Court agreed and ruled that Judge Paxton should have disqualified himself because he participated in the plea bargaining of Small's underlying sentence. *Id.* at 63. The Court further held that “K.R.S. 26A.015(2)(b) provides that a judge shall disqualify himself in any proceeding in which he or she had previously served as a lawyer in the matter in controversy.” *Id.* While noting that Small's revocation hearing and his reckless homicide prosecution were not identical, the Court held that “we feel it [the revocation hearing] is sufficiently related to the underlying criminal action as to present the appearance of impartiality

which is ‘next in importance on to the fact itself.’” *Id.* citing *Wells v. Walter*, 501 S.W.2d 259, 260 (Ky. 1973).

From our review of *Small* and application of KRS 26A.015, *et seq.*, we conclude that Judge Lay did not err by presiding over Riley's CR 60.03 case. Although he prosecuted Riley in the robbery case, Riley's criminal case and his CR 60.03 case are not the same “matter in controversy,” as provided in KRS 26A.015(2)(b), nor are the factual issues in Riley’s two cases sufficiently related. In Riley’s criminal case, the matter in controversy was whether Riley robbed a bank.

In his CR 60.03 case, the matter in controversy was the validity of the termination of Riley’s parental rights, in which the termination was predicated on Judge Messer's application of KRS Chapter 625. This statutory provision only provides courts with the authority to terminate parental rights of parents who neglect or abuse their children. Accordingly, although Riley’s robbery conviction was admitted into evidence, it was not the underlying basis for the termination of his parental rights. Consequently, *Small* is not analogous to the case *sub judice* and does not require the granting of the relief that Riley seeks.

Additionally, Riley alleges that two occurrences, which took place during his criminal trial, demonstrate that Judge Lay was prejudiced against him and should have disqualified himself. Specifically, he alleges that Lay participated in the denial of his request to discharge his defense counsel and in the restraining (gagging and handcuffing) of him during the early stages of his trial.

When a defendant makes a claim that a judge is biased against him, the defendant must demonstrate by evidence that the judge is prejudiced to such a degree that he could not be impartial toward him. *Brand v. Commonwealth*, 939 S.W.2d 358, 359 (Ky.App. 1997). After reviewing the facts of this case, we conclude that Riley has not met this burden.

First, the decision to grant a defendant's motion to discharge his trial counsel is placed within the sound discretion of the trial court and not the prosecutor. *Partee v. Commonwealth*, 652 S.W.2d 89, 90 (Ky. 1983). Secondly, the restraining of Riley during his criminal trial was the result of his profanity-laced outbursts during voir dire. On direct appeal, in an unpublished opinion, No. 2003-SC-0366-MR, the Kentucky Supreme Court held that the “trial court did not abuse its discretion when it took steps to control Appellant's disruptive behavior....” Since we conclude that then Prosecutor Lay was not involved in these two occurrences, Riley's allegations do not form a sufficient basis to cast any doubt on the impartiality in which Judge Lay presided over the matter now on appeal.

We next turn to the consideration of Riley's next two arguments that the trial court erred by ruling that one of his claims was barred by CR 60.02's one-year statute of limitations period as to perjury claims, and that the trial court erred by concluding that his hearsay claim was improper because it should have been brought up on direct appeal.

As to the statute of limitations issue, the trial court ruled that Riley's allegation that the termination order was based on the false testimony of a social worker was time barred. The trial court wrote that this claim was not brought within one year of the entry of the termination order. The trial court further noted that CR 60.03 specifically provides that independent actions pursuant to its language cannot defeat the one-year statute of limitations period under CR 60.02 for perjury allegations. Therefore, since the termination order was entered on November 5, 2003, and his CR 60.03 action was filed over two years later on April 13, 2006, the trial court ruled that his claim was procedurally precluded.

Although Riley alleges that the trial court failed to make a determination as to whether all of his claim pertained to perjured or falsified evidence, we conclude that the trial court properly ruled that this allegation was barred by the statute of limitations period contained within CR 60.02 and incorporated by reference in CR 60.03. Riley's allegation regarding the testimony of the social worker amounts to no more than a mere allegation that she gave false testimony during the termination hearing. When a claim is based on perjury or falsified evidence, it must be brought "...not more than one year after the judgment, order, or proceeding was entered or taken." CR 60.02. This is true even when the action is being brought under CR 60.03. *Copley v. Whitaker*, 609 S.W.2d 940, 942 (Ky.App. 1980). Accordingly, Riley's two and a half year delay in making his allegation bars his claim.

Additionally, Riley makes several due process arguments that he deserves extraordinary relief pursuant to CR 60.03. Specifically, he alleges that his due process rights would be infringed if the termination order were to be upheld despite being based on false testimony. However, since Riley has offered no proof that false testimony was given beyond his mere allegations of perjury, he has failed to meet his burden of “showing within a reasonable certainty that perjured testimony was in fact introduced against him at trial.” *Commonwealth v. Spaulding*, 991 S.W.2d 651, 654 (Ky. 1999) (a defendant has the burden of showing within a reasonable certainty that perjured testimony was used against him). Accordingly, Riley's due process rights were not violated.

Riley also alleges that the trial court erred by ruling that his CR 60.03 motion was improper because it presented issues that should have been brought on direct appeal. In Riley's CR 60.03 motion, he alleged that Judge Messer improperly admitted hearsay testimony during the termination hearing. The trial court ruled that this claim was procedurally barred because it should have been addressed on direct appeal.

Riley admits in his brief that this issue was not preserved for appellate review because he did not object to the admission of this evidence during the termination hearing. Moreover, as already noted in this opinion, Riley's direct appeal was dismissed due to his failure to file an appellate brief despite being given repeated extensions. In *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997), the court

held that extraordinary relief did not allow the relitigation of issues that could have reasonably been presented on direct appeal. Consequently, since Riley failed to preserve this reasonably presentable evidentiary issue on direct appeal, the trial court did not err by barring his challenge to the admission of the hearsay testimony.

Riley next alleges that the trial court erred in ruling that Judge Messer did not have to recuse himself in the termination case. Specifically, Riley alleges that Judge Messer's prejudice against him should have resulted in the vacating of the termination order. As evidence of Judge Messer's partiality, Riley notes that Judge Messer restrained him during his criminal trial, and relied on hearsay and false testimony during the termination hearing. We conclude that the trial court did not err.

Our Supreme Court addressed the restraining issue on direct appeal and held that Judge Messer's restraining of Riley was appropriate considering his disrespectful courtroom outbursts. As to the admission of the improper testimony, Riley has not established that false or hearsay testimony was introduced against him during the hearing. Even if we were to assume that his evidentiary claims are true, such adverse evidentiary rulings, without more, fall short of demonstrating that the judge was prejudiced against him to such a degree that he could not be impartial toward Riley as required in *Brand v. Commonwealth*, 939 S.W.2d at 359.

Riley next alleges that the trial court erred by ruling that his allegation that his robbery conviction was improperly admitted into evidence was procedurally barred. The trial court ruled that this claim should have been presented on direct appeal. Since

this evidentiary issue, as the hearsay issue, was reasonably presentable on direct appeal, the trial court did not err because Riley cannot be permitted to relitigate issues that could have been reasonably presented on direct appeal. *McQueen*, 948 S.W.2d at 416.

Finally, Riley argues that the trial court erred by denying his motion for additional findings of fact pursuant to CR 52.04. Riley alleges that the trial court failed to make factual findings regarding all of his issues in his CR 60.03 motion. However, we conclude that the trial court made satisfactory findings of fact as to every essential issue in Riley's case. We have been able to review each of Riley's allegations; thus, the purpose of the trial court's findings of fact has been achieved and its findings did not need to be supplemented. *Standard Farm Stores v. Dixon*, 339 S.W.2d 440, 441 (Ky. 1960). Accordingly, the trial court did not err by denying Riley's motion for additional findings of fact.

For the foregoing reasons, the two orders of the Knox Circuit Court denying Riley's motions are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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