

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002305-MR

CHARLES E. HENSLEY, JR.

APPELLANT

v.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 00-CR-00187

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: HOWARD AND MOORE, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.

MOORE, JUDGE: Charles Hensley appeals the Harlan Circuit Court's order denying his motion for a new trial following a jury trial in which he was convicted of murder and sentenced to life imprisonment. After a careful review of the record, we affirm the Harlan Circuit Court's order.

I. FACTUAL AND PROCEDURAL BACKGROUND

During trial, Hensley's counsel moved to suppress certain statements made by the police during an interrogation of Hensley, which were tape recorded. Specifically, the interviewing police detective opined during the interrogation that Hensley's

¹ Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

statements were not making sense, and Hensley's counsel did not want those opinions played during the jury trial. The circuit court denied Hensley's motion to suppress the portions of the tape containing the detective's opinions. Hensley was ultimately convicted of murder and sentenced to life imprisonment.

Hensley appealed, arguing, *inter alia*, that "the trial court erred when it permitted the Commonwealth to play his taped police statement without redacting the detective's repeated comments stating that he was lying." *Hensley v. Commonwealth*, No. 2003-SC-000470, 2005 WL 2674974, at *1 (Ky. Oct. 20, 2005) (unpublished). The Kentucky Supreme Court held that the appropriate remedy would have been for Hensley to request "a limiting admonition," but because he "did not request an admonition, his objection in this regard was incomplete and thus unpreserved as to this issue." *Id.* at *2. The Court thus denied relief based on this claim.

Hensley subsequently filed in the circuit court a *pro se* motion for a new trial pursuant to CR 61.02,² alleging that palpable error affected his substantial rights. Specifically, Hensley contended that the trial court erred in permitting the jury to hear the uncorroborated statements made by the police on the tape recording of Hensley's interrogation. Hensley also alleged that the trial court erred by not holding an evidentiary hearing outside the jury's presence to determine whether the taped interrogation should be suppressed. Hensley believed that the jury overheard the bench conference concerning the suppression of the police statements on the tape recording, and that this violated his Sixth and Fourteenth Amendment rights.

² Kentucky Rule of Civil Procedure

The circuit court found that "the Court held a suppression hearing on the voluntariness of the Defendant's statement to the police nearly a year prior to trial," and the statement was determined to be voluntary. The court further found that Hensley's "motion to exclude evidence during the trial was not a 'suppression' issue but was instead an evidentiary issue, governed by the Kentucky Rules of Evidence, not the Fifth Amendment as alleged in [his] motion." Noting that Hensley failed to allege any grounds that would constitute palpable error, that the court had ruled on the evidentiary issues raised by Hensley's counsel, and that those evidentiary "rulings were subject to appeal," the circuit court denied Hensley's motion for a new trial.

Hensley now appeals, claiming that the circuit court erred in denying his motion for a new trial because the trial court should have held a suppression hearing outside the presence of the jury. He contends that the failure to hold the hearing outside the jury's presence violated his Sixth and Fourteenth Amendment rights.

II. ANALYSIS

As an initial matter, we note that in the circuit court, Hensley's motion for a new trial was brought pursuant to CR 61.02, rather than CR 60.02(e) and (f), as he alleges on appeal. Because he does not challenge on appeal the circuit court's denial of his motion brought under CR 61.02, those claims are deemed waived on appeal. *See Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 815 (Ky. 2004). Nevertheless, even if Hensley's claims brought under CR 61.02 were not waived on appeal, they lack merit. To the extent that Hensley's motion for a new trial was brought pursuant to CR 61.02 in the

circuit court, we note that CR 61.02, which is identical to RCr 10.26, merely defines palpable error and provides that such an error, even if "insufficiently raised or preserved for review," may provide a basis for a motion for a new trial or for a direct appeal. CR 61.02. However, Hensley's direct appeal process was completed years ago and, pursuant to RCr 10.06(1), as it applies to the present case, a "motion for a new trial shall be served not later than five (5) days after return of the verdict." Therefore, Hensley's motion for a new trial, filed four *years* after the jury returned its verdict, was untimely filed, even if he had filed it under the proper rule, RCr 10.06, rather than CR 61.02.

Furthermore, as provided in *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983), there are limited means for challenging one's criminal conviction.

Specifically, a defendant may challenge his conviction by filing a direct appeal, a motion under RCr 11.42, and/or a motion pursuant to CR 60.02. *See id.* Therefore, Hensley's attempt to challenge his conviction by means of a motion brought pursuant to CR 61.02, fails.

To the extent that Hensley's motion for a new trial was intended to be brought pursuant to CR 60.02(e) and (f), as he appears to assert on appeal, his claims likewise fail. In his appellate brief, Hensley alleges that he was entitled to relief under CR 60.02(e) and (f), which state 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: . . . (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer

equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. . . .

"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.* In the present case, because Hensley did raise, or could have raised, his claims on direct appeal or in an RCr 11.42 motion, his CR 60.02 motion fails. *Id.*

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

ALL CONCUR.

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