RENDERED: JANUARY 13, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000490-MR

RONNIE LEE BOWLING APPELLANT

v. APPEAL FROM ROCKCASTLE CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 89-CR-00027

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, STUMBO, AND VANMETER, JUDGES.

KELLER, JUDGE: Following his conviction for attempted murder, Ronnie Lee Bowling (Bowling) filed a motion for a new trial under Kentucky Rule of Civil Procedure (CR) 60.02 and Kentucky Rules of Criminal Procedure (RCr) 10.02 and 10.06, arguing juror misconduct. The circuit court denied that motion and Bowling's subsequent motion to alter, amend, or vacate. On appeal, Bowling argues that the circuit court erred by denying his motion without holding an

evidentiary hearing. The Commonwealth argues that the issues raised in Bowling's motion should have been brought on direct appeal and that his motion is moot because he has effectively served out his sentence. Having reviewed the record, we affirm.

FACTS

We take the underlying facts from the Supreme Court of Kentucky's opinion on direct appeal.

> At approximately 5:55 a.m., on February 25, 1989, Appellant drove into a Gulf service station on U.S. Highway 25 in Rockcastle County and asked James Smith, the victim's father, for directions to Jackson County. James Smith recalled that Appellant was wearing a green army fatigue jacket and blue jeans and that his car had one headlight that was not working. Appellant left James Smith's service station and drove in the direction of Ricky Smith's Sunoco service station, which was also on Highway 25.
>
> Ricky Smith testified that shortly after 6:00 a.m., on the morning of February 25, 1989, Appellant came into his service station inquiring about a job. He identified himself as "Ronnie" and was driving a Ford Fairmont which had only one working headlight. Appellant was wearing a green army fatigue jacket and blue jeans. He asked Ricky Smith if he worked the service station by himself, and Smith replied that only one person worked during a shift. Appellant turned as if to leave, but spun around, drew a pistol, and began firing at Smith. Smith was able to jump behind the door-facing and down behind a metal desk. He fired three shots in return, injuring Appellant in the head and hand. Smith was not injured.
>
> Appellant ran out of the service station, followed by Smith, who unsuccessfully attempted to shoot out the front tire of Appellant's vehicle. Smith then called the

> Kentucky State Police, who pursued Appellant from a point about thirteen miles from the service station to Appellant's home, a distance of approximately thirty-two miles. The drive of the lead pursuit vehicle, Trooper Alan Lewis, saw Appellant throw two objects from his vehicle, which were later discovered to be a pair of gloves. At one point during the chase, Lewis lost sight of Appellant's vehicle. It was in this general area that Trooper Dallas Belile subsequently found a .38 caliber Smith & Wesson revolver near the side of the road.
>
> Appellant's version of the incident was that he went to Ricky Smith's service station to inquire about a job, but that Smith lost his temper and began shooting at him. Appellant then fled to his car and drove home, not stopping for the police, because he was panicked by his loss of blood. He denied firing any shots at Smith or throwing anything out of his car during the police pursuit.
>
> At the time of his trial, Appellant was on death row as a result of two Laurel County murder convictions which occurred in connection with service station robberies in Pulaski County.

Bowling v. Commonwealth, 96-SC-442-MR, (Ky. October 15, 1998).

The jury convicted Bowling of attempted murder and he received a sentence of twenty years' imprisonment. On direct appeal, Bowling raised issues regarding the admission of evidence, double jeopardy, venue, and failure to hold a speedy trial. The Supreme Court affirmed Bowling's conviction. We note that Bowling did not raise any issues with regard to *voir dire* or the composition of the jury on direct appeal.

On March 23, 2000, Bowling filed a motion for a new trial pursuant to RCr 10.02 and 10.06 and/or for relief from final judgment pursuant to CR 60.02. As

he does here, Bowling argued that jurors Linda Osborne (Osborne), James Bradley (Bradley), and an unidentified male juror failed to fully respond to questions posed during *voir dire.* Specifically, Bowling stated that Osborne knew of the Laurel County murder conviction and that she knew one of the Laurel County victims. Additionally, Bowling stated that Bradley knew the name of one of the Laurel County murder victims; knew that Bowling had been sentenced to death; and questioned why the Commonwealth was pursuing the Rockcastle County attempted murder charge. The unidentified male juror allegedly told a female juror that he had known "all along about Mr. Bowling's previous crimes;" that he knew some of the jurors who had served on Bowling's Laurel County murder trial; and that he knew Bowling was guilty.

Because *voir dire* is central to Bowling's appeal, we set forth the pertinent portions verbatim below. We note that, when the court and the attorneys use the terms "the case" and/or "the offense," they are referring to the Rockcastle County attempted murder charges, not to Bowling's Laurel County murder convictions. We also note that the Laurel County murders took place on January 20 and February 22, 1989, and the Rockcastle County attempted murder took place on February 25, 1989.

Before beginning any specific questioning of the jurors, the judge questioned the panel generally regarding any relationships the jurors might have with Bowling, Smith, or any of the attorneys. He then asked the jurors if they had heard of the case to be tried and then asked the following specific questions.

The Court: Mr. Bradley, you had your hand up.

Mr. Bradley: Yes.

The Court: Now, again I don't want you to tell me what you have heard, but do you recall from what source you have heard anything or received any information about the case?

Bradley: Just the newspaper is all I remember.

The Court: Do you remember what the facts were in the paper?

Bradley: Not really.

The Court: Do you remember the name of the person, if it was in the paper who was accused of committing the offense?

Bradley: Yes, I remember the name.

The Court: Okay. Is there anything about that that caused you to form any opinion or conclusion about it?

Bradley: No, sir.

The Court: How long has it been since you have heard anything about the case?

Bradley: I haven't heard anything since back when it happened shortly thereafter.

The Court: Ms. Osborne.

Osborne: I remember reading about it in the newspaper.

The Court: Do you remember how long ago it's been since you've read it?

Osborne: Just when the incident happened.

> The Court: Have you formed any opinion or conclusion about the case?
>
> Osborne: No, sir.
>
> The Court: Do you recall specifically any of the information in the paper?
>
> Osborne: I recall names and that's all.
>
> The Court: What are the names that you recall?
>
> Osborne: Bowling and Smith, I remember the two names.
>
> The Court: . . . I want to ask generally then of all of you, especially those of you who I have just questioned, do any of you all feel in any way that you would be unable to render a verdict in this case based solely on the information, on the evidence that's presented to you in the courtroom? Do any of you feel that you would be unable to disregard your recollection of the newspaper or the fact that something happened that was important enough to be in a newspaper? Are there any of you who feel you cannot set that aside and just decide this case simply from what we hear in the courtroom? Anybody have - - feel they might have a problem with that?

No responses to these questions are in the record.

Later, Bowling's attorney questioned the jurors as follows:

> I think Judge Venters asked you if anybody was acquainted with Ronnie Bowling. And I think we can just answer no to that. Okay. And I think people have testified they heard about this case originally I think back in '89 or '90 when it first came out in the papers, okay? Has anyone heard the name Ronnie Bowling mentioned since that time? Does that name ring a bell to anybody?

Again, there are no responses to these questions in the record.

Bowling attached to his motion several newspaper articles but did not attach any affidavits from Osborne or Bradley and did not state how he became aware of their alleged statements. We note that the newspaper articles mention the murders but do not name Bowling as a suspect or otherwise identify the perpetrator.

On March 31, 2000, the court denied Bowling's motion without conducting an evidentiary hearing. In doing so, the court held that conducting a hearing would require examination and cross-examination of jurors in violation of RCr 10.02. Furthermore, the court noted that the time to determine a juror's potential bias is before trial, not afterward. Finally, the court noted that Bowling had not attached any affidavits to support his motion, and that his allegations regarding the jurors' conduct came from interviews.

Bowling then timely filed a motion to alter, amend, or vacate the court's order. Bowling attached to that motion affidavits from jurors Martha Damrell (Damrell) and Carol Brummett (Brummett) and from investigators/mitigation specialists for the Department of Public Advocacy (DPA). Based on these affidavits, it appears that DPA personnel interviewed Osborne and Bradley and that Bowling's statements regarding those jurors and the unknown male juror came from those interviews and the affidavits of Damrell and Brummett.

In 2002, before the court had ruled on his motion to alter, amend, or vacate, Bowling filed an RCr 11.42 motion alleging ineffective assistance of counsel. The trial court denied that motion and this Court affirmed. Bowling appealed to the Supreme Court of Kentucky, which affirmed, and he unsuccessfully sought

discretionary review before the United States Supreme Court. While the RCr 11.42 appeal proceeded, the trial court did not take any action on Bowling's motion to alter, amend, or vacate its order denying his RCr 10.02 and 10.06 and CR 60.02 motion. In October 2007, Bowling sought a ruling on that motion; however, for reasons that are not clear from the record, the court did not directly address Bowling's motion until its February 8, 2010, order denying it. It is from this order that Bowling appeals. We set forth additional facts as necessary below.

STANDARD OF REVIEW

Our review of the denial of a motion to set aside a judgment under CR 60.02 "is whether the trial court abused its discretion." *White v. Commonwealth,* 32 S.W.3d 83, 86 (Ky. App. 2000); *see also Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454, 456 (Ky. 2002); and *Brown v. Commonwealth,* 932 S.W.2d 359, 362 (Ky. 1996). Likewise, whether to grant a new trial pursuant to RCr 10.02 "is within the discretion of the trial court . . . ." *Collins v. Commonwealth,* 951 S.W.2d 569, 576 (Ky. 1997). To amount to an abuse of discretion, the trial court's decision must be "arbitrary, unreasonable, unfair, or unsupported by sound legal principals." *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007) (*citing Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

ANALYSIS

As noted above, Bowling argues that he should be granted a new trial and the trial court's judgment should be set aside because of juror misconduct. We believe that Bowling's argument is both factually and legally flawed.

Factually, it is true that the two named jurors and one unnamed juror did not disclose that they knew of Bowling's Laurel County murder convictions during *voir dire*. However, based on our review of the relevant portions of *voir dire*, the jurors were only asked if they had any knowledge of Bowling's possible involvement in the Rockcastle County attempted murder case. Neither the court nor the attorneys specifically asked Osborne or Bradley if they had any knowledge of Bowling outside of the Rockcastle County case. Furthermore, because Osborne and Bradley were the only jurors identified by Bowling, we presume that no specific questions were put to the unknown juror.

Arguably, the general questions from Bowling's counsel - "Has anyone heard the name Ronnie Bowling mentioned since [1989 or 1990]? Does that name ring a bell to anybody?" - could have elicited responses from Osborne, Bradley, and the unknown juror that they knew of Bowling's Laurel County murder convictions. However, in the context of counsel's questioning - referring to "this case" and "back in '89 or '90" - it is not likely that such responses would have been forthcoming. The jurors answered the questions they were asked. They did not give inaccurate or incomplete answers. Therefore, any fault is not with the jurors' answers, but with the questions.

Legally, Bowling's argument is similarly unpersuasive. RCr 10.02(1) provides that "the court may grant a new trial for any cause which prevented the defendant from having a fair trial, or if required in the interest of justice." A "motion for a new trial shall be served not later than five (5) days after return of the verdict. A motion for a new trial based upon the ground of newly discovered evidence shall be made within one (1) year after entry of the judgment or at a later time if the court for good cause so permits." RCr 10.06(1). Bowling did not set forth in his motion that he based it on "newly discovered evidence;" however, that appears to be the case. Because Bowling did not file his motion for a new trial within one year of the entry of the judgment, he was required to provide "good cause" for the delay. Bowling has not provided any reason why he took more than one year to file his motion; therefore, the motion was not timely.

Furthermore, Bowling is not entitled to relief under CR 60.02. Under CR 60.02 a party can bring only those "claims that 'were unknown and could not have been known to the moving party by exercise of reasonable diligence and in time to have been otherwise presented to the court.'" *Sanders v. Commonwealth*, 339 S.W.3d 427, 437 (Ky. 2011) (citation omitted). Bowling has offered no explanation for his failure to present these claims on direct appeal, and we discern no reason why, with the exercise of reasonable diligence, Bowling could not have done so. Therefore, the trial court properly denied Bowling's CR 60.02 motion.

We note that Bowling raised a similar issue regarding juror misconduct in the CR 60.02 motion he filed in his Laurel County murder case. The Supreme

Court of Kentucky affirmed the trial court's denial of that motion, noting that "'a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause.'" *Bowling v. Commonwealth*, 168 S.W.3d 2, 9 (Ky. 2004) (*quoting McDonough Power Equip., Inc. v. Greenwood,* 464 U.S. 548, 556, 104 S. Ct. 845, 850, 78 L. Ed. 2d 663 (1984)). Just as he did in the Laurel County murder case, Bowling failed to set forth evidence that any jurors failed to answer honestly the questions posed in this case. Therefore, we discern no more merit to Bowling's argument here than the Supreme Court found in the Laurel County murder case.

Finally, we note that Bowling has served the twenty years' imprisonment to which he was sentenced. The Commonwealth argues that this fact renders Bowling's appeal moot. Bowling argues to the contrary. Because we have determined that Bowling's motion for relief was not proper under either RCr 10.02 or CR 60.02, we decline to address that issue.

CONCLUSION

For the forgoing reasons, we affirm the trial court's denial of Bowling's RCr 10.02 motion for a new trial and his CR 60.02 motion to set aside judgment.

ALL CONCUR.

BRIEFS FOR APPELLANT:

David H. Harshaw III
Dennis J. Burke
La Grange, Kentucky

BRIEF FOR APPELLEE:

Jack Conway,
Attorney General of Kentucky

Wm. Robert Long, Jr.,
Assistant Attorney General
Frankfort, Kentucky