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Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001389-MR

EDWIN CHANDLER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ELLEN B. EWING, JUDGE
ACTION NO. 1993-CR-02193

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: GUDGEL, Chief Judge; HUDDLESTON and KNOPF, Judges.

HUDDLESTON, Judge: Edwin Chandler appeals from the summary denial of his Ky. R. Crim. Proc. (RCr) 10.06 motion for a new trial based upon newly discovered evidence. In denying the motion, the circuit court adopted as the basis for its denial "the reasoning set forth in the [Commonwealth's] memorandum filed in opposition to the motion." Although the Commonwealth's memorandum addresses the merits of Chandler's motion, its primary focus is on Chandler's failure to timely move for a new trial; and that is the issue we shall address as its resolution is determinative of this appeal.

In September 1993, Brenda Whitfield, a cashier at a Chevron Convenience Mart in Louisville was shot during a robbery of the store. The incident was recorded on the store's surveillance camera. While reviewing a videotape of the occurrence, a detective inadvertently erased portions of the tape that had recorded the image of the perpetrator of the crimes. Other detectives had earlier viewed the videotape and had made still photographs of the events depicted thereon, but the images were not useful for identification purposes.

Following a trial and some sixteen hours of jury deliberation, Chandler was convicted of first-degree robbery and second-degree manslaughter. On March 10, 1995, Chandler was sentenced in conformity with the jury's recommendation to consecutive sentences totaling thirty years. On August 29, 1996, in an unpublished memorandum opinion, the Supreme Court affirmed the judgment of conviction, rejecting Chandler's assertion that his pre-trial confession was involuntary.

On August 4, 1997, Chandler moved for a new trial based on newly discovered evidence, and he sought an evidentiary hearing. The Commonwealth responded that, amongst other things, the motion was untimely and thus subject to summary dismissal. RCr 10.06, upon which the Commonwealth relied, provides, in pertinent part, that:

> A motion for a new trial based upon the ground of newly discovered evidence shall be made within one (1) year after the entry of the judgment or at a later date if the court for good cause so permits.

As it is obvious that Chandler's motion for a new trial was not filed within one year following entry of judgment, we must decide whether the circuit court abused its discretion when it determined that Chandler had failed to establish good cause for the delay in filing the motion, and, in doing so, we must bear in mind that the circuit court has broad discretion to decide whether a RCr 10.06 motion for a new trial based on newly discovered evidence should be granted.[1] In reviewing the court's exercise of discretion, we look to the circumstances that led to the late filing of the motion.

The "newly discovered" evidence before the circuit court by way of affidavits is as follows: In June 1996, John Gray, Chandler's fellow inmate at the Green River Correctional Complex, who Chandler had never before met, told Chandler that he had personal knowledge of the incident that precipitated Chandler's indictment, trial and convictions. On July 17, 1996, at Chandler's request, an investigator for the Department of Public Advocacy interviewed Gray who signed an affidavit stating that while incarcerated in the Louisville jail in November 1995, he wrote a letter to the Louisville police concerning the crimes committed at the Chevron store. Soon thereafter, a Louisville homicide detective, Julius Clark, interviewed Gray who told Clark that as he was pumping gas at the Chevron store he saw a black male, bald, about five feet eight inches tall,[2] run out of the store, throw

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[1] Epperson v. Commonwealth, Ky., 809 S.W.2d 835, 841 (1990).

[2] Chandler is over six feet tall. A witness at Chandler's (continued...)

something into the bushes, stop to talk to two white men in a parking lot behind Waterson Towers and then run toward the Turtle Creek Apartments. Gray also told Clark that he later met this man who said that he "did it," and he gave the man's name to Clark. Clark purportedly informed Gray that someone else had already pleaded guilty to the crimes, a statement that, if made, was not true.

John Palombi, an attorney for the Department of Public Advocacy, stated in an affidavit submitted to the circuit court that Clark admitted to having interviewed Gray and to having taken extensive notes which he could not locate. Clark acknowledged that Gray furnished him the name of someone other than Chandler who allegedly committed the crimes with which Chandler was charged.

On January 9, 1998, the circuit court heard arguments addressing the issue of whether Chandler was entitled to an evidentiary hearing, and on March 3, 1998, the court denied the motion. On May 20, 1998, the circuit court denied Chandler's motion for a new trial. This appeal followed.

Turning to the issue at hand, that is, whether the circuit court abused its discretion when it determined that Chandler had failed to establish good cause for the late filing of his new trial motion, we first note that Chandler confessed to the crimes of which he was convicted. Although Chandler claims that his confession came only after he was misled by a police officer

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[2](...continued)
trial testified that the man he identified as the perpetrator of the crime was about five feet eight inches tall and a bit heavier than Chandler.

into believing that the evidence against him was strong, when, in fact, there was only inconclusive circumstantial evidence linking him to the crimes, the Supreme Court has rejected Chandler's contention that his confession was not voluntary.

Second, it is undoubtedly true that Chandler learned that John Gray was prepared to swear that he saw another man exiting the Chevron store just after the offenses had been committed as early as June 1996, and that no later than September 1996, an investigator from the Department of Public Advocacy interviewed Gray and took an affidavit from him that implicated the other man. By September 12, 1996, Gray had informed Chandler that the other man's name was "Percy," and by January 23, 1997, Chandler learned the name of the detective who had interviewed Gray in December 1995 and taken extensive notes. Chandler claims that investigators' attempts to verify whether Gray was credible were inhibited by gang violence in the neighborhood where Gray purportedly lived and by the fact that the investigators were shown a gun as they were leaving one neighborhood residence.

Chandler filed his RCr 10.06 motion on August 4, 1997, thirteen months after Gray first approached Chandler. The Commonwealth points out that "[b]y January 1997, [Gray] had in his possession the names and all information pertinent to [his] claim." Chandler responds that his counsel waited to file a RCr 10.06 motion for a new trial because she wanted to be certain that Gray "was credible and that the information he provided was verifiable." Whether this is a valid excuse for the delay in filing the motion

is a matter that addresses itself to the sound discretion of the circuit court.

A motion for a new trial based on newly discovered evidence should be granted when the new evidence is such that it would, with reasonable certainty, change the verdict upon retrial.[3] Gray's evidence that he saw "Percy" exit the Chevron store immediately after the crimes were committed and that "Percy" later admitted that he "did it," would undoubtedly have bolstered Chandler's defense. On the other hand, Chandler's confession, which the Supreme Court has determined was voluntary, leads us to believe, as apparently did the circuit court, that the verdict upon retrial would not "with reasonable certainty" be different if Gray testified.[4] Accordingly, we conclude that the circuit court did not abuse its discretion when it found that Chandler had not shown good cause for a delay of more than two years and five months following entry of judgment in filing his motion for a new trial.

The order denying Chandler's RCr 10.06 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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[3] Carwile v. Commonwealth, Ky. App., 694 S.W.2d 469, 470 (1985).

[4] Apparently, "Percy" has not been located.