RENDERED: SEPTEMBER 30, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000374-MR

RICKY L. BARNARD — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 85-CR-000582

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DYCHE AND SCHRODER, JUDGES; ROSENBLUM, SENIOR JUDGE.[1]

ROSENBLUM, SENIOR JUDGE: Ricky L. Barnard (Barnard), *pro se*, brings this appeal from an opinion and order of the Jefferson Circuit Court, entered June 1, 2004, summarily denying his *pro se* motion for relief pursuant to Kentucky Rules of Civil Procedure (CR) 60.02(f),[2] motion for appointment of counsel, and

[1] Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

[2] 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: . . . (f) any other reason of an extraordinary nature

motion for an evidentiary hearing. Finding no abuse of discretion by the circuit court, we affirm.

On April 9, 1985, a Jefferson County Grand Jury returned Indictment Number 85-CR-000582, charging Barnard with the capital offense of murder, a violation of Kentucky Revised Statutes (KRS) 507.020, for "intentionally or wantonly causing the death of Loriann Barnard" on March 30, 1985. Shortly thereafter the Commonwealth filed notice of intent to seek the death penalty by relying on the aggravating circumstance of murder for profit. Due in part to the inability of the Commonwealth to produce the life insurance policy that formed the basis of this aggravator, the circuit court excluded the death penalty.

The case proceeded to trial after numerous pretrial motions and hearings, including motions to suppress evidence. The jury, instructed only on intentional murder, found Barnard guilty and recommended the maximum punishment of life imprisonment. Post-trial motions were denied and on May 15, 1987, the circuit court entered a final judgment sentencing Barnard pursuant to the jury's recommendation.

Barnard, with the assistance of counsel, initially sought direct appeal of the judgment and sentence in the Kentucky Supreme Court. On Barnard's motion the appeal was

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justifying relief. The motion shall be made within a reasonable time . . . .

dismissed with prejudice. Barnard v. Commonwealth, Number 87-SC-000549.

Ten years later, on August 11, 1997, Barnard's *pro se* petition for writ of habeas corpus,[3] filed in the United States District Court, was dismissed without prejudice for failure to exhaust state court remedies. *See* Barnard v. Conley, 36 Fed.Appx. 813 (6th Cir. 2002). On September 24, 1997, Barnard's motion in the Kentucky Supreme Court to reinstate his direct appeal was denied. Barnard v. Commonwealth, Number 97-SC-000531.

One year later, Barnard's subsequent *pro se* habeas corpus motion, filed in the United States District Court, was dismissed with prejudice. On April 9, 2002, the Sixth Circuit Court of Appeals affirmed that order. Barnard v. Conley, *supra*.

On March 5, 2004, Barnard filed the *pro se* CR 60.02(f) motion that forms the basis for this appeal, asking that his nearly seventeen year-old judgment and sentence be vacated and remanded for discharge, resentencing, or a new trial. He argued that alleged inconsistencies between police officers' testimony and investigative reports were extraordinary or unusual circumstances justifying relief as to 1) which officer actually advised Barnard of his rights pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); 2) at what

[3] 28 United States Code Annotated § 2254.

point Barnard's driver's license was obtained, while he was initially in the police car or during a search of the residence; and 3) which officer retrieved Barnard from his initial location at the police station in the "youth bureau office" and brought him to the homicide offices. More specifically, he alleged that the inconsistencies amounted to perjury which ultimately affected the introduction of evidence and statements obtained while he was detained. He also requested appointment of counsel and an evidentiary hearing.

On June 1, 2004, the circuit court entered an opinion and order summarily denying Barnard's motions as not filed within a reasonable time, concluding 1) that he was not entitled to appointed counsel for CR 60.02 relief under Gross v. Commonwealth, 648 S.W.2d 853, 858 (Ky. 1983); 2) that he was not entitled to an evidentiary hearing on the perjury allegation because the record refuted the allegation, citing Gross, *supra*; and 3) that he was not entitled to CR 60.02 relief because the perjury allegations a) were an attempt to relitigate issues which could have been brought on direct appeal, citing McQueen v. Commonwealth, 948 S.W.2d [415, 416 (Ky. 1997)]; or alternatively, b) would not have affected the outcome of the

trial, citing Brown v. Commonwealth, 932 S.W.2d 359, 362 (Ky. 1996).[4] This appeal followed.

In McQueen, *supra* at 416, the Kentucky Supreme Court stated:

> The interrelationship between CR 60.02 and RCr 11.42 was carefully delineated in Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983). In a criminal case, these rules are not overlapping, but separate and distinct. A defendant who is in custody under sentence or on probation, parole or conditional discharge, is required to avail himself of RCr 11.42 as to any ground of which he is aware, or should be aware, during the period when the remedy is available to him. 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. RCr 11.42(3); Gross v. Commonwealth, *supra,* at 855, 856. The obvious purpose of this principle is to prevent the relitigation of issues which either were or could have been litigated in a similar proceeding.

Barnard took a direct appeal to the Kentucky Supreme Court, which was dismissed on his motion. He never sought relief

[4] The circuit court originally denied Barnard's CR 60.02 motion by opinion and order entered April 16, 2004. On April 23, 2004, Barnard, *pro se*, filed a CR 59.05 motion to alter, amend, or vacate the April 16, 2004, opinion and order, reiterating his perjury allegation with more specificity as it pertained to an unconstitutional arrest and search and the fruits thereof. While this motion was pending, Barnard tendered a notice of appeal of the April 16, 2004, opinion and order and a motion to proceed *in forma pauperis*. On June 1, 2004, the circuit court denied the *pauper* motion, effectively delaying the filing of the notice of appeal until the payment of a filing fee. Also on June 1, 2004, the circuit court re-entered the April 16, 2004, opinion and order. Barnard then tendered a new notice of appeal as to the later opinion and order, along with a motion to proceed *in forma pauperis*. In February, 2005, while waiting for the ruling on his *pauper* motion, Barnard paid the filing fee for the appeal, and the notice of appeal herein was filed February 16, 2005.

pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. The alleged perjury issues raised herein were issues that were required to be raised, if at all, by direct appeal or RCr 11.42 motion. As indicated above, CR 60.02 is not a separate avenue of appeal but is only available to raise issues which cannot be raised in other proceedings, as a mechanism to increase judicial economy and bring finality to the proceedings. McQueen, *supra,* 948 S.W.2d at 416. As the issues that Barnard now raises could have been raised more than a decade ago on direct appeal or via RCr 11.42, the circuit court properly denied his motion for CR 60.02 relief.

In denying Barnard's motion, the circuit court alternatively concluded that any alleged perjury would not have affected the outcome of the trial. As stated in Brown, *supra* at 362:

> Rule 60.02(f) "may be invoked only under the most unusual circumstances...." Howard v. Commonwealth, 364 S.W.2d 809, 810 (1963); *see also,* Cawood v. Cawood, 329 S.W.2d 569 (1959) and relief should not be granted, pursuant to Rule 60.02(f), unless the new evidence, if presented originally, would have, with reasonable certainty, changed the result. *See,* Wallace v. Commonwealth, 327 S.W.2d 17 (1959).

According to Commonwealth v. Spaulding, 991 S.W.2d 651, 654 (Ky. 1999):

> Th(e) use of perjured testimony is treated like newly discovered evidence for the

> purposes of CR 60.02. *Cf.* Mullins v. Commonwealth, Ky., 375 S.W.2d 832, 834 (1964); *see also* North Dakota v. Thiel, 515 N.W.2d 186, 188 (N.D.1994). "[I]n order for newly discovered evidence to support a motion for new trial it must be 'of such decisive value or force that it would, with reasonable certainty, have changed the verdict or that it would probably change the result if a new trial should be granted.' " Jennings v. Commonwealth, Ky., 380 S.W.2d 284, 285-86 (1964), quoting Ferguson v. Commonwealth, Ky., 373 S.W.2d 729, 730 (1963). And, of course, the defendant has the additional burden of showing within a reasonable certainty that perjured testimony was in fact introduced against him at trial. Anderson v. Buchanan, Ky., 292 Ky. 810, 168 S.W.2d 48, 54 (1943).

Barnard argues that he agreed to a search of the residence while illegally detained, thus tainting the evidence obtained as a result of that search. To support this claim, Barnard contends that Louisville Police Detective Eugene Sherrard perjured himself to sanitize the detention and search. These arguments fail on two levels.

First, pursuant to Spaulding and Anderson, *supra*, Barnard has failed to meet the dual burden under CR 60.02(f) of establishing 1) that perjured testimony was introduced against him, and 2) that without the perjured testimony the outcome would have been different. Specifically, Barnard alleges perjury in the following inconsistencies:

> 1. Between Detective Sherrard's testimony that he read Barnard his Miranda rights, and Detective Sherrard's investigative report

> stating that Detective Bernie Burden read Barnard his Miranda rights;
> 2. Between Detective Sherrard's testimony that he asked for and received Barnard's driver's license from Barnard at the scene when Barnard exited the police car, and Detective John Tartar's investigative report stating that he found Barnard's 'identification' in a wallet in a pair of pants in Barnard's residence; and
> 3. Between Detective Sherrard's testimony that he did not know whether he or Detective Burden brought Barnard from the "youth bureau offices" to the homicide offices, and Detective Burden's trial testimony that he was the one who brought Barnard from the "youth bureau offices" to the homicide offices.

According to Anderson, *supra*, at 53, to establish perjury "it is not enough merely to show that a prosecuting witness has subsequently made contradictory statements." First or second-degree perjury[5] requires a showing that the statements made were material. It is difficult to see how the above inconsistencies were material herein given that Barnard does not dispute that he received the Miranda warnings in a timely fashion nor does he dispute that he signed the waiver form; he also does not dispute that he signed the waiver to search form. As such, it is also difficult to see how these inconsistencies would have affected the outcome of the trial. Thus, Barnard has failed to meet the dual burden.

[5] Kentucky Revised Statutes 523.020 and .030.

Also, prior to trial, these issues were the subject of a suppression hearing. In denying the motion, the circuit court rendered the following findings and order:

> (T)he Court hereby enters its findings relating to Defendant Barnard's motion to suppress Defendant's consent, subsequent search of his residence and oral statements to the police.
>
> 1. On March 30, 1985, Defendant placed a call to the Jefferson County Police Department. Upon determining that the address was located within the City of Louisville the county dispatcher transferred the call to the Louisville Division of Police.
>
> 2. Shortly after 5:00 a.m. on said date officers of the Louisville Police Department arrived at the scene and met two white males, one of which was the Defendant Barnard.
>
> 3. Defendant Barnard informed the beat officers that "she's inside" whereupon they went inside and discovered her body.
>
> 4. Detective Sherrard, Louisville Police Department, arrived at the scene and asked Defendant for permission to search the premises. Sherrard presented the Defendant with a consent form which was executed and witnessed.
>
> 5. Defendant had been drinking prior to executing this form, however, the evidence does not establish that he was lacking sufficient capacity to perform a voluntary act.
>
> 6. At the police station the Defendant became a target of the investigation and at that point was advised by Detective Sherrard of his Miranda Rights. The interrogation continued after Defendant waived his right to remain silent. Subsequently he chose to remain silent and sought counsel at which point the questioning ceased.

> The Court having considered the testimony at the hearing finds specifically that the Defendant voluntarily consented to the search of the apartment and the motor vehicles and voluntarily made statements to the law enforcement officials after being duly advised of his Miranda Rights.

Pursuant to RCr 9.78, these findings are conclusive if supported by substantial evidence. Barnard's arguments essentially concede that substantial evidence supported these findings because a basis for his inconsistent testimony argument is that Detective Sherrard did testify in the manner that forms the basis for the above findings. We cannot conclude how raising issues for the first time pertaining to these findings, almost seventeen years after their initial rendering, demonstrates a "reason of an extraordinary nature justifying (CR 60.02(f)) relief." McQueen, *supra*.

The circuit court concluded that Barnard's CR 60.02(f) motion was not filed within a reasonable time, also denying his motion for an evidentiary hearing and appointment of counsel. A motion pursuant to CR 60.02(f) is to be made within a "reasonable time," the definition of which is a "matter that addresses itself to the discretion of the trial court. . ." and that may be done based on the record without a hearing. Gross, *supra* at 858. Also, the right to appointed counsel does not extend to a CR 60.02 motion. Gross, *supra* at 857.

We review trial court decisions on CR 60.02 motions under an abuse of discretion standard:

> (A)ctions under CR 60.02 are addressed to the "sound discretion of the court and the exercise of that discretion will not be disturbed on appeal except for abuse." Richardson v. Brunner, 327 S.W.2d 572, 574 (1959).

Brown, *supra* at 362. After waiving his direct appeal and failing to file an RCr 11.42 motion, Barnard waited almost seventeen years to file this CR 60.02 motion, the basis for which was available in the record from the time of the original proceedings, and thus not "extraordinary" under CR 60.02(f). As stated in Gross, *supra* at 858:

> Absent some flagrant miscarriage of justice an appellant (sic) court should respect the trial court's exercise of discretion in these circumstances.

We find no abuse of discretion by the circuit court in denying the motion as 1) an improper attempt to relitigate; 2) not affecting the outcome; and 3) not brought within a reasonable time. Furthermore, there was no abuse of discretion in failing to hold an evidentiary hearing or appointing counsel.

For the foregoing reasons, the opinion and order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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