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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000081-MR

RICKEY BERNARD JONES — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC COWAN, JUDGE
ACTION NO. 89-CR-001476

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND VANMETER, JUDGES; HENRY,[1] SENIOR JUDGE.

VANMETER, JUDGE: Rickey Bernard Jones appeals *pro se* from the Jefferson Circuit Court's denial of his fourth post-conviction motion for relief from his 1990 conviction for two counts of murder. Finding no error, we affirm.

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

As an initial matter, we note that Jones' motion was brought under CR[2] 60.02(d) and (f). CR 60.02 permits a court to relieve a party from a final judgment on several grounds specified in the rule. Subsection (d) relates to "fraud affecting the proceedings, other than perjury or falsified evidence[,]" and subsection (f) relates to "any other reason of an extraordinary nature[.]" A motion based on these subsections must be filed "within a reasonable time[.]" *Id.*

In *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983), the Kentucky Supreme Court defined the parameters of a CR 60.02 claim in the context of a criminal conviction:

> Rule 60.02 is part of the Rules of Civil Procedure. It applies in criminal cases only because Rule 13.04 of the Rules of Criminal Procedure provides that "the Rules of Civil Procedure shall be applicable in criminal proceedings to the extent not superseded by or inconsistent with these Rules of Criminal Procedure."
>
> The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete. That structure is set out in the rules related to direct appeals, in RCr[3] 11.42, and *thereafter* in CR 60.02. CR 60.02 is not intended merely as an additional opportunity to raise *Boykin*[4] defenses. It is for relief that is not available by direct appeal and not available under RCr 11.42. The movant must demonstrate why he is entitled to this special, extraordinary relief. Before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating

[2] Kentucky Rules of Civil Procedure.

[3] Kentucky Rules of Criminal Procedure.

[4] *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

> the judgment and further allege special circumstances that justify CR 60.02 relief.
>
> CR 60.02 was enacted as a substitute for the common law writ of coram nobis. The purpose of such a writ was to bring before the court that pronounced judgment errors in matter of fact which (1) had not been put into issue or passed on, (2) were unknown and could not have been known to the party by the exercise of reasonable diligence and in time to have been otherwise presented to the court, or (3) which the party was prevented from so presenting by duress, fear, or other sufficient cause. *Black's Law Dictionary, Fifth Edition*, 487, 1444.

In further discussing the basis for relief under subsections (d), (e) and (f) of CR 60.02, the Court stated:

> The additional specified grounds for relief are [(d)] fraud, [(e)] the judgment is void, vacated in another case, satisfied and released, or otherwise no longer equitable, or [(f)] other reasons of an "extraordinary nature" justifying relief. These grounds are specific and explicit. **Claims alleging that convictions were obtained in violation of constitutionally protected rights do not fit any of these grounds except the last one**, "any other reason of an extraordinary nature justifying relief." In *Copeland v. Commonwealth*, Ky., 415 S.W.2d 842 (1967), we refused to grant CR 60.02 relief where the alleged constitutionally impermissible act (failure to provide counsel when taking a guilty plea) could have been raised in an earlier proceeding. This establishes as precedent that such grounds are not automatic, but subject to the qualification that there must be circumstances of an extraordinary nature justifying relief.

Gross, 648 S.W.2d at 857 (emphasis added).

Jones' first assignment of error appears to concern an alleged deficiency in the appointment of his trial counsel, Wilson,[5] and an alleged discrepancy as to whether attorney Wilson had represented Jones in the Jefferson District Court.[6] As pointed out by Jones, in this matter, the Commonwealth proceeded by direct indictment by the grand jury, in lieu of a preliminary hearing in district court. *See King v. Venters*, 595 S.W.2d 714, 715 (Ky. 1980) (holding that "a preliminary hearing, examining trial, or any other 'probable cause' inquiry, is not prerequisite to the consideration of a charge by the grand jury or to the validity of an indictment returned pursuant to a 'direct submission'"); *Commonwealth v. Yelder*, 88 S.W.3d 435, 437-38 (Ky.App. 2002). Thus, any complaint by Jones that he did not receive a preliminary hearing is meritless, as none was required. Any complaint that he was not present at the grand jury

[5] While our practice is not to name counsel in opinions, not doing so in this instance would make this opinion difficult to follow.

[6] The record indicates that Jones was arrested soon after the shooting, and, in fact, did appear in Jefferson District Court. The record includes a "Request for Direct Submission" dated July 30, 1989, the original Indictment by the Grand Jury, dated August 1, 1989, and a Motion for a Bench Warrant. In the latter document, the Commonwealth alleged that Jones had been indicted by direct submission, that he has been arrested on a charge in the Indictment, and that the current status of the charges was that "[a] probable cause hearing is scheduled for August 3, 1989 in District Court." Jones' release status was further stated as not out on bail, and his bond was "currently $50,000 in District Court." These documents help explain the trial court's order on arraignment, dated August 3, 1989, that "Wilson who represented Mr. Jones in district court pursuant to the assigned counsel of the public defender's office is appointed as counsel." The Public Defender's Assigned Counsel Plan was, and is, the Louisville-Jefferson County Public Defender's Office's solution to address conflicts arising by indigent co-defendants charged in capital cases. At that time, Wilson was an attorney in private practice, who contracted with the Public Defender's Office to handle conflict cases. Jones' co-defendant in this case was Casey Arnold Pettiway, who was represented by counsel in the Public Defender's Office. These facts also explain the Public Defender's acknowledgment of appointment, which states, "*Hon. . . . Wilson not* a Public Defender staff attorney, has been assigned this case*, per Asg C Plan* Dated this *3* day of *Aug, 1989* /s/ Daniel T. Goyette Public Defender." (Items in italics are handwritten on the form).

hearing also lacks merit, as such an appearance is not permitted under RCr 5.18. If Jones is complaining that he was not represented at arraignment, his argument must fail since the record reveals that he was, in fact, represented by attorney Wilson, albeit through another attorney who stood in for Wilson at the arraignment on August 3, 1989. Finally, any complaint that Jones was not appointed counsel for these charges is simply unsupported by the record.

In addition, under *Gross* and CR 60.02, Jones' claim was not made within a reasonable time. A review of the record[7] would have disclosed the facts pertinent to any possible argument by Jones regarding any alleged deficiency in his arraignment, including that an attorney stood in for Wilson at that point, or that an attorney from the Public Defender's Office may have stood in during an initial court appearance, even though representing a co-defendant. Thus, Jones' claim is precluded on temporal grounds.

Second, Jones alleges that attorney Wilson, who formerly served as an assistant Commonwealth's Attorney in Jefferson County, participated in a scheme by the Commonwealth to alter the testimony of Jones' co-defendant in order to eviscerate Jones' self-defense argument.

With respect to attorney Wilson's prior employment by the Commonwealth Attorney's office, federal courts have held that a defense attorney's prior employment by a prosecutor's office does not result in a Sixth

[7] Jones claims that he did not meet attorney Wilson until the jury selection was underway. The record amply refutes this statement. Jones was arrested in July 1989 and his trial was not held until September 1990. The record contains numerous orders reflecting Jones' and Wilson's concurrent appearance in court, the earliest such order being dated September 11, 1989.

Amendment violation. *See United States v. Villarreal*, 324 F.3d 319, 327-28 (5th Cir. 2003) (mere fact that trial counsel had been employed "in the district attorney's office at the time of [the defendant's] prior conviction did not represent a conflict of interest"); *Brownlee v. Haley*, 306 F.3d 1043, 1064 (11th Cir. 2002) (defendant "made no showing that [trial counsel] had inconsistent interests simply because he worked in the district attorney's office at a time when [the defendant] was prosecuted years earlier"). Both *Villarreal* and *Brownlee* involved situations in which trial counsel's earlier employment in a prosecutor's office coincided with an earlier prosecution of the defendant. If those situations do not implicate the Sixth Amendment, then certainly Jones' situation does not, since the record contains no suggestion that the Jefferson County Commonwealth's Attorney's Office ever prosecuted Jones previously.[8]

With respect to Jones' assertion that attorney Wilson acquiesced in the Commonwealth's fabrication of the evidence, the trial court correctly noted that Jones provides no proof or affidavit to support this claim in his pleading. Jones further fails to allege how he learned of this alleged fabrication, or that he "could not have . . . known [of it] by the exercise of reasonable diligence and in time to have been otherwise presented to the court." *Gross*, 648 S.W.2d at 856. This defect is fatal to his CR 60.02 motion.

[8] According to the record, Jones' earlier crimes were prosecuted in Florida, not Kentucky.

The Jefferson Circuit Court's order dismissing Jones' CR 60.02 motion is affirmed.

ALL CONCUR.

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