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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000255-MR

GREGORY JERMAINE LANGLEY — APPELLANT

v.

APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE KAREN LYNN WILSON, JUDGE
ACTION NO. 06-CR-00192

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, THOMPSON AND VANMETER, JUDGES.

THOMPSON, JUDGE: Gregory Jermaine Langley appeals from a denial of his motion for a new trial pursuant to RCr 10.02, RCr 10.06, and CR 60.02. Langley contends that his conviction should be vacated and a new trial granted. He asserts that an affidavit signed by Deshawn Johnson, a confidential informant who refused to testify at Langley's trial, is newly discovered evidence. He further contends that

Johnson's affidavit established that the police officers' trial testimony was false warranting relief under CR 60.02(f). The trial court concluded that the affidavit was untimely and that there was no good cause to permit an extension of the one-year time limitation in RCr 10.06. It further found that the affidavit was not newly discovered evidence and, that even if a new trial was granted, there is no reasonable certainty that the verdict would change. We agree.

The facts leading to Langley's arrest, trial and conviction were summarized by the Kentucky Supreme Court as follows:

> On October 5, 2005, Detective Jamie Duvall of the Henderson Police Department spoke with a confidential informant on the telephone about setting up a controlled drug buy from Jermaine Langley. While Duvall was still on the line, the informant called Langley using his phone's three-way calling feature. Detective Duvall, who recognized Langley's voice because he had known Langley for sixteen years, listened in as the informant and Langley briefly discussed the drug transaction. Following this conversation, Duvall understood that the informant would need $100 to buy an eighth of an ounce of methamphetamine from Langley. Detective Duvall, along with another Henderson police detective, Ron Adams, then met with the confidential informant at a designated location. Detective Adams testified at trial that after searching the informant's person and car and finding no drugs or contraband, he equipped the informant with the hidden video recording unit. After activating the recording feature, Adams gave the informant $100, and the informant then left to go meet Langley.
>
> The confidential informant was gone for approximately half an hour, during which the hidden video unit made a continuous recording. For the first eighteen minutes of the thirty-two minute video, the informant drove through Henderson. Eventually, he pulled over at the corner of Vine and Adams Street, exited his vehicle, and started

> walking across the front yard of property on which a trailer is visible. The informant then got into the passenger side of a car while Langley got into the driver's side. The two stayed in the car for approximately thirty seconds. Although no drugs can be viewed from the video and there was no discussion regarding drugs, as the informant was exiting the car, Langley can be seen gathering some money and placing the bills in the console between the front seats of the car.
>
> The confidential informant then got back into his car and drove away. Approximately twelve minutes later, the informant pulled alongside Duvall and Adams, who were in a red mini-van. Without getting out of their cars, Duvall and the informant agreed to meet at a less visible location. When the two detectives arrived at the agreed upon location, the informant got into their mini-van and handed the officers a plastic bag from his pocket, which contained methamphetamine. Adams then asked the informant who gave him the drugs. The informant responded "Jermaine." Next, Adams asked the informant where the transaction happened. The informant told the officers that it occurred on "the corner of Vine and Adams."

Langley v. Commonwealth, 2008 WL 746462, 1-2 (Ky. 2008) (internal footnote omitted). Langley was indicted for first-degree trafficking in a controlled substance, second offense; and for being a persistent felony offender. At Langley's trial, Johnson refused to testify but the Commonwealth was permitted to introduce the videotape and the testimony of Detectives Duvall and Adams. The jury found Langley guilty and he was sentenced to thirty-years' imprisonment.

The Supreme Court's opinion became final on August 21, 2008. Although a petition for writ of certiorari was filed in the United States Supreme Court and denied, it did not affect the finality of our Supreme Court's opinion. CR 76.44.

Langley filed a motion for a new trial on December 3, 2009, and attached Johnson's affidavit dated November 12, 2009, stating that Johnson did not purchase methamphetamine from Langley on October 5, 2005. Johnson's affidavit states that when asked to testify, he informed the prosecutor and police that Langley did not sell him drugs and that he would not testify at trial. However, Langley did not file an affidavit explaining what, if any, diligence he used to secure the information contained in the motion.

In response to the motion, the Commonwealth filed two affidavits. Detective Duvall reiterated his trial testimony that Johnson agreed to work as a confidential informant and to make a buy from Langley. He denied that Johnson advised him that he did not buy drugs from Langley. The Commonwealth Attorney and the prosecuting attorney filed an affidavit also denying Johnson's claim.

The basis for granting a new trial pursuant to CR 60.02 is rigorous. *Commonwealth v. Tammer*, 83 S.W.3d 465, 468-469 (Ky. 2002). In *Bedingfield v. Commonwealth,* 260 S.W.3d 805, 809 (Ky. 2008), the Court explained the movant's burden:

> It is well-accepted that the standard for adjudging whether a new trial is warranted based upon newly discovered evidence is whether such evidence carries a significance which "'would with reasonable certainty, change the verdict or that it would probably change the result if a new trial should be granted.'" *E.g., Collins v. Commonwealth,* 951 S.W.2d 569, 576 (Ky. 1997) (*quoting Coots v. Commonwealth,* 418 S.W.2d 752 (Ky. 1967)); *see also Caldwell v. Commonwealth,* 133 S.W.3d

> 445, 454 (Ky. 2004). Likewise, we have consistently held that evidence which is merely cumulative, collateral, or which impeaches a nonmaterial witness is insufficient to warrant a new trial.

Moreover, RCr 10.06(1) requires that a motion for a new trial be filed within one year unless the court permits it be filed at a later time for good cause. "Further, a motion for new trial based upon newly discovered evidence must be accompanied by an affidavit showing that Appellant exercised sufficient diligence to obtain the evidence prior to his trial." *Commonwealth v. Carneal*, 274 S.W.3d 420, 432 (Ky. 2008) (quoting *Collins v. Commonwealth,* 951 S.W.2d 569, 576 (Ky. 1997)). Whether to grant a new trial lies within the sound discretion of the trial court, and it must be demonstrated that its discretion was abused to warrant reversal. *Foley v. Commonwealth,* 55 S.W.3d 809, 814 (Ky. 2000).

CR 60.02 also limits the time in which motions for relief from a judgment can be pursued. Under CR 60.02(b), motions filed on the basis of newly discovered evidence must be filed not more than one year after the judgment was entered and "relief should not be granted . . . unless the new evidence, if presented originally, would have, with reasonable certainty, changed the result." *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996). Moreover, assuming Langley's request can be properly premised on CR 60.02(f), providing relief for extraordinary reasons, his motion must have been filed within a reasonable time and he has the burden "to show both that a reasonable certainty exists as to the falsity of the testimony and that the conviction probably would not have resulted had the truth

been known before he can be entitled to such relief." *Commonwealth v. Spaulding*, 991 S.W.2d 651, 657 (Ky. 1999).

In the present case, we initially point out the procedural deficiencies. First, Langley did not tender an affidavit "showing diligence in attempting to discover the new evidence before the first trial." *Wheeler v. Commonwealth*, 395 S.W.2d 569, 571 (Ky. 1965). The rationale for the requirement was explained:

> It is contended for Wheeler that there is no reasonable basis for a rule requiring the defendant himself to make an affidavit when it is done by his attorney. This overlooks the fact that the affidavit is in the nature of testimony. Counsel cannot speak for his client in the sense of giving the client's testimony. On the question of newly discovered evidence it is necessary that the diligence of both be shown.

Additionally, the motion was not filed within one year after the entry of the final judgment. We agree with the trial court that his motion must be denied.

A similar issue was presented in *Carwile v. Commonwealth*, 694 S.W.2d 469 (Ky.App. 1985). The appellant was convicted of murder and sought a new trial based on newly discovered evidence. He submitted his brother's affidavit stating that the appellant acted in self-defense when the victim was killed. The Court noted that the affiant refused to testify at trial. Affirming the trial court's denial of the motion, the Court aligned itself with the majority of jurisdictions and held:

> [T]o succeed on a new trial motion such as this, the defendant must show that the evidence was discovered *after* the trial. *People v. Scheidt,* Colo. 528 P.2d 232 (1974). When a witness who has chosen not to testify

> subsequently comes forward to offer testimony exculpating a defendant, the evidence is not "newly discovered."

Id. at 470. The Court further held that affiant's "claimed willingness to testify now does not constitute newly discovered evidence." *Id*.

It is logical to apply the same reasoning to Langley's motion. Langley was present when the transaction occurred and would certainly know if Johnson purchased drugs from him. Further, a pretrial motion to reschedule the trial date filed by Langley suggests that he knew that if Johnson testified, his testimony would not be in conformity with evidence introduced by the Commonwealth. The motion stated:

> As grounds for said Motion, Defendant, Gregory Jermaine Langley, has learned by attempting to serve a subpoena on Terrance "Mikey" Butts, a witness for the Defendant, that the witness has within the past 72 hours been transferred and/or relocated through his employment to Louisville, Kentucky. This witness would provide exculpatory testimony on behalf of the Defendant. Mr. Butts was party to a telephonic conversation with the Commonwealth's confidential informant whereby the events in question were discussed, and the substance of the discussion purports to be drastically different than the theory currently espoused by the Commonwealth.

Thus, Johnson's allegedly exculpatory testimony was or should have been known to Langley at the time of the trial. *Id*. at 470. Johnson's alleged willingness to testify now does not justify the relied requested under RCr 10.02 or CR 60.02. *Id*.

Furthermore, we are not convinced that Johnson's testimony would change the verdict on retrial. Langley's contention that Johnson was the only possible

witness is simply incorrect. In his direct appeal, the Supreme Court did a complete review of the substantial evidence against Langley. In considering whether it was harmless error when portions of a videotape containing statements made by Johnson to Detective Adams after the drug transaction were admitted, the Court stressed the compelling evidence against Langley.

> Both Detective Adams and Duvall testified about arranging a controlled buy between the informant and Langley, searching the informant and then equipping him with the video recording unit, and receiving a baggie of methamphetamine from the informant following his encounter with Langley. The admissible portion of the video showed that from the time the informant exited the detectives' mini-van until he returned, he met with only one person-Jermaine Langley. Furthermore, the fact that the informant admitted at the end of the video that he received the drugs from Langley was cumulative since the videotape showed only one person from whom he could have received the drugs-Jermaine Langley. Therefore, due to the substantial evidence admitted against Langley at trial, the erroneous admission of the informant's testimonial statement was harmless beyond a reasonable doubt.

Langley, 2008 WL 746462, at 7. We agree with our Supreme Court that the evidence of Langley's guilt was compelling. If a new trial were granted and Johnson testified consistent with his affidavit, there is no reasonable certainty that the verdict would change.

As his basis for relief under CR 60.02(f), Langley asserts that because Johnson now states that the drug transaction did not occur, Officers Adams and Duvall gave perjured testimony when they testified that the drug transaction

occurred. To prevail, Langley has the burden of showing within a reasonable certainty that perjured testimony was in fact introduced against him at trial. *Id*. His mere assertion that we must believe Johnson's affidavit and reject the credibility of the officers who testified under oath and were subject to cross-examination is woefully insufficient. Again, we emphasize that there was compelling evidence of guilt.

Based on the foregoing, the order of the Henderson Circuit Court is affirmed.

ALL CONCUR.

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