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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001931-MR

HERMAN LEE VIRES APPELLANT

v.

APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 99-CR-00046

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND MOORE, JUDGES; ISAAC,[1] SENIOR JUDGE.

LAMBERT, JUDGE: Herman Lee Vires (Appellant) has appealed from the order and judgment of the Breathitt Circuit Court denying his motion to vacate a judgment of conviction pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 and Kentucky Rules of Civil Procedure (CR) 60.02. We affirm.

[1] Senior Judge Sheila R. Isaac 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.

Following a jury trial, Appellant was convicted of first-degree rape for engaging in sexual intercourse with his daughter, K.V., who at the time this occurred in 1999 was less than twelve years old. For this offense, he received a sentence of fifty years. We shall rely upon the Supreme Court of Kentucky's recitation of the facts in the 2002 opinion affirming the conviction on direct appeal:

> Appellant was arrested on August 28, 1999, in connection with a charge that he had raped his eight-year-old daughter, K.V.,[2] the previous day. K.V., nine years old at the time of trial, testified that her father asked her to come into his bedroom one night when her mother was not at home. After she entered his bedroom, he took off her clothes. The first time counsel asked K.V. on the stand whether her father had put his "private parts" inside her "private parts," she began crying and stated she could not tell what happened. K.V. answered "no" to counsel's questions and asked if she could leave the stand. The trial court allowed K.V. to leave and asked that she come back to finish her testimony when she was more composed.
>
> When K.V. returned to the stand later in the trial, she testified that Appellant did put his "private parts" inside her "private parts" and that he did not stop until E.V., her thirteen-year-old brother, opened the door. K.V. also testified that she was nervous during her testimony, which was why she previously denied what had actually happened.
>
> E.V. testified that he heard his sister crying after she went into her father's room. He stated that he kicked the door open and saw his father, with his pants down, on top of his sister. E.V. testified that he immediately ran next door to the home of his sister, Paula, to find help. Paula Vires' testimony verified that E.V. came to her house that night crying and he told her what he had seen. Paula

[2] While the Supreme Court's opinion refers to the victim as C.V., we shall refer to her as K.V., and, accordingly, we have changed references to her in this portion of the Supreme Court's opinion to K.V. so as to prevent confusion.

> testified that she called the police. That evening, Trooper Kevin Hurt and social services worker Julie Sandlin went to Appellant's home to investigate, but no one was there. The trooper and social services worker testified that they spoke to E.V. and Paula that night.
>
> Betty Vires, K.V.'s and E.V.'s mother, testified that she called the police and Department of Children and Family Services the next morning, and a social worker removed the children from the home. Mrs. Vires testified that K.V. initially denied that Appellant had hurt her, but Mrs. Vires stated that she expected K.V. to deny any wrongdoing because she questioned K.V. in the presence of Appellant. Mrs. Vires also testified, however, that when she was alone with K.V. and asked her if Appellant had done anything to her, K.V. responded that he did what E.V. said he had done.

Vires v. Commonwealth, 2000-SC-001154-MR, slip op. p. 3-4 (Ky. 2002).

On direct appeal, Appellant raised two issues, one addressing whether a directed verdict should have been granted and the second addressing ineffective assistance of counsel. Regarding the directed verdict issue, the Supreme Court found no error in the trial court's ruling as it related to K.V.'s inconsistent trial testimony, holding that it was up to the jury to determine the credibility of her testimony. The Court also found no merit in Appellant's argument that the trial court erred in this ruling because "the Commonwealth did not present medical evidence supporting its case, and the medical evidence in the record, but not presented to the jury, did not indicate physical evidence of rape." *Id*. at 5. The Court noted that for a conviction of first-degree rape, no supporting medical evidence is required. *Id*. Regarding ineffective assistance of counsel, the Court

held that this claim could not be considered on direct appeal based upon a lack of record to review, but did not rule out a proper collateral attack proceeding.

K.V. and her younger sister, P.V., were both removed from their mother's care following Appellant's arrest. They remained in foster care for approximately three years until after Appellant's trial. Following the return to their mother, the family moved to Missouri. Mrs. Vires took the children, including K.V. and E.V., to visit Appellant in prison and permitted them to speak with him by telephone. K.V. and E.V. then wrote letters recanting their trial testimony.

On September 11, 2003, Appellant filed a *pro se* motion to vacate, set aside, or correct sentence pursuant to RCr 11.42, CR 60.02(f), and/or CR 60.03. The basis for the motion was the recanted trial testimony, Appellant's competency to stand trial, and ineffective assistance of counsel. Appellant attached three handwritten letters to his motion, from K.V., E.V., and Mrs. Vires. The letters from K.V. and E.V. were received by Appellant's attorney on March 14, 2003.

K.V.'s letter is undated and reads as follows:[3]

> To how it may concern
>
> I [K.V.] is writing you because I tried to tell the Court on my last court date that my dad never touched me in any way and family server and a prosctiteing attorner told me if I didn't say that my farther rapped me I would never see him again. the only reason I said that was because my Sister Paula told me to because my brother and farther got in fight over a sigurater and a football game. Im asking you for help because I don't know how to ask for help and I love my dad very much. and he's in jail for something he never did he got 50 years for no reason

[3] We have not corrected any of the spelling or grammatical errors in either of the letters.

> because family server scared me and I have to tell someone the truth and I thought that I could tell you I won't to go to a different Court I know family server can't take me a way from my family because they keep me for 2 years the last time I could go home and that was after they gave my dad 50 years and it's killing me that my dads in jail. And we all made a big mistake because we all love my dad.
>
> from: [K.V.]

E.V's letter is dated September 23, 2002:

> To whom it may concern
>
> Hi my name is [E.V.] and I am writing to tell you that my sister Paul Vires told me that we could put my dad in Jail by lieing and the police that he Raped my Little sister so one day me and him got into a argument and we told the Police the story and they bought it and the next morning she told my Little sister [K.V.] what to say and she did and they locked him up for 50 years[.] I think its time [illegible portion omitted] you can help.
>
> Thanks
> [E.V.]

The trial court appointed counsel for Appellant, who filed a supplemental motion and memorandum in 2006 based upon Appellant's actual innocence (established, he claims, by the recanted testimony and lack of medical evidence showing signs of sexual abuse) and ineffective assistance of counsel. Sworn affidavits from K.V. and E.V. dated May 12, 2004, were attached to this filing. K.V.'s states as follows:

> I did not want [to] testify against at the trial because the molestation never happened. My older sister Paula told me to say my Father did this but it was not true. At the trial I tried to tell this truth but they took me off the stand

> 3 times. My mother could not come to this room. The man told me if I changed my earlier story now that I would never see my mother again. I am now 13 years old. I know that these things that my father was accussed [sic] of did not happen.

E.V.'s affidavit states as follows:

> That at urging of my sister Paula (approximately age 24 at the time), we made a report that my father [Appellant] molested my sisters [K.V.] and [P.V.]. This claim was untrue. I agreed because I was upset and my Father and I had been fighting. This claim was untrue. I tried to take it back at the time of trial. I was pulled [from the] stand by the prosecutor. I was told if I changed my earlier story I would face perjury charges and would face 1 to 5 years. The prosecutor and the judge met with me alone. They had a sheriff come up to the room. My mother was kept outside of the room. I was 11 years old at the time. I then testified after this untruthfully when I stated my father committed these crimes. My father is actually innocent of these charges. (I told the Breathitt County authorities in the conference room that he did not do it.[)]

Following a day-long evidentiary hearing, the trial court denied Appellant's motion in orders entered January 2, 2007, finding, in part, that he had failed to establish that the children's trial testimony was false. This Court affirmed the trial court's orders in an opinion rendered March 7, 2008. In that opinion, the Court addressed the recanted testimony issue and explained the children's claims as follows:

> At the evidentiary hearing both E.V. and K.V. claimed that Mr. Herald put pressure on them to testify against their father. K.V. testified that she was told she would be taken from her mother, and E.V. testified that he was handcuffed and threatened with perjury if he did not testify against his father.

> While E.V. and K.V. paint a grim picture of Mr. Herald and Ms. Sandlin, Mr. Herald and Ms. Sandlin denied the allegations under oath and penalty of perjury. Ms. Sandlin admitted that handcuffs were placed on E.V. by a bailiff, but only because E.V. was punching the walls and this was an attempt to get him under control. Ms. Sandlin testified that others were present in the room when the prosecutor spoke to the children, including a therapist and child advocate. Both Mr. Herald and Ms. Sandlin testified that no one threatened the children nor intimidated them. And, regarding the children's recantation, the trial court found that Ms. Sandlin's evidentiary testimony corroborated the children's trial testimony, not their recantation.

H.V. v. Commonwealth, 2008 WL 612343 (Ky. App. 2008) (2007-CA-000164-MR). The Court ultimately held that the trial court did not abuse its discretion in finding that the children's testimony at the evidentiary hearing was not credible. The Supreme Court denied Appellant's motion for discretionary review on August 18, 2008.

On May 5, 2009, Appellant, through appointed counsel, filed a supplemental motion for CR 60.02 relief, this time attaching medical records he claimed supported his actual innocence, but again relying on the recanted testimony of K.V. and E.V. to support his claim. He argued that the recantation of the coerced testimony of two key witnesses as well medical records showing no signs of sexual abuse supported his claims under CR 60.02 as newly discovered evidence. This motion was denied on May 18, 2009, by a new circuit judge, who did not originally sit as trial judge. Appellant moved for reconsideration of the CR 60.02 motion as well as for sentence reduction and an evidentiary hearing. Again, he

based his request on “the large amount of proof tending to show actual innocence[.]” The circuit court opted to hold an evidentiary hearing on Appellant’s motion.

Prior to the hearing, Appellant filed a new affidavit from K.V., who by then had reached the age of majority and was married. The typed document states as follows:[4]

> I [K.V.] on this date of July 29th of 2009 am giving this document to the courts of Breathitt County of Jackson, Kentucky contesting as the alleged victimoif my father, [Appellant], that the charges he was convicted of are false, 1st degree rape.
>
> I was intimidated by the official of your Social Services Department. I was coursed into saying that my father had touched me. The official told me I would not be with my family if I did not say he did this. As his daughter I have been living with this lie and I am begging the court to release my father for the unlawful act he did not do. I am also pleading with the courts to find him time served, under the condition that my family will not sue the county for the unlawful acts he did not commit.
>
> If I could appear in court I would. Yet my income will not allow me to make the trip, as well I have a newborn child, but I am still supporting my father. My home phone number is ***. My cell phone number is ***. If you need more information please feel free to call.
>
> Thank you for your time and I appreciate you to take this letter in to consideration on my fathers behalf

The Commonwealth objected to Appellant’s motion, arguing that all of the grounds raised had been previously litigated and affirmed on appeal. Furthermore,

[4] We are reproducing the document verbatim.

the medical records appended to Appellant's motion had previously been filed in the record by trial counsel.

The circuit court held a hearing on September 17, 2009, at which time Appellant introduced testimony from K.V. and P.V. Both testified that they were married and no longer lived with their mother, and K.V. stated that she had a child of her own. Both testified that Paula told them what to say and denied that Appellant had done anything wrong.

On September 18, 2009, the circuit court entered an order and judgment denying Appellant's motion. In the order, the circuit court noted that the September 17, 2009, hearing was, according to counsel, a rehearing of the same testimony from the 2006 hearing. The court then detailed the witness testimony, including the claims that the rape did not occur and that the children were pressured into testifying against their father. The court ultimately denied Appellant's motion, noting that recanted testimony is generally viewed with suspicion and that the mere recantation of testimony does not require the granting of a new trial. This appeal follows.

In his brief before this Court, Appellant argues that the circuit court abused its discretion by denying his motion for post-conviction relief, contending that the emancipation of the child witnesses changes matters. He also continues to rely upon the recantation of K.V. and E.V. as well as the medical records to support his claim of newly discovered evidence that justifies vacating his conviction. The Commonwealth, in turn, contends that the circuit court did not abuse its discretion

in denying Appellant's motion as it was successive, untimely, and otherwise without merit.

Our standard of review in such appeals is set forth in *Stoker v. Commonwealth*, 289 S.W.3d 592, 596 (Ky. App. 2009):

> We review the denial of a CR 60.02 motion under an abuse of discretion standard. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000); *Brown v. Commonwealth*, 932 S.W.2d 359, 361 (Ky. 1996). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (*citing* 5 Am.Jur.2d Appellate Review § 695 (1995)). Therefore, we will affirm the lower court's decision unless there is a showing of some "flagrant miscarriage of justice." *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

Accordingly, we shall review the circuit court's ruling for abuse of discretion.

In *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983), the Supreme Court set forth the procedure for post-conviction proceedings.

> 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 11.42, and thereafter in CR 60.02. CR 60.02 is not intended merely as an additional opportunity to raise *Boykin* 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. . . .
>
> We adopt in this case, from the opinion in *Alvey v. Commonwealth*, Ky., 648 S.W.2d 858 (1983), published this day, the following:

> "(W)e should not afford the defendant a
> second bite at the apple. . . ."

Gross, 648 S.W.2d at 856-57.

In *Stoker*, this Court also made it abundantly clear that successive motions are not permitted: "Our rules of civil procedure do not permit successive motions or the relitigation of issues which could have been raised in prior proceedings. Our courts do not favor successive collateral challenges to a final judgment of conviction which attempt to relitigate issues properly presented in a prior proceeding." *Stoker*, 289 S.W.3d at 597 (internal citation omitted).

Based upon our careful review of the record on appeal and the arguments of both parties, we hold that Appellant's motion for post-conviction relief is successive and represents an attempt to relitigate matters that have been raised and decided previously. Appellant has exercised his right to directly appeal his conviction and has already sought relief through RCr 11.42 and CR 60.02 in three levels of Kentucky's court system. In fact, Appellant described his May 5, 2009, motion as supplemental and indicated that the 2009 hearing was a rehearing of the earlier testimony.

The issues raised in the present appeal were thoroughly addressed in the prior appeals, both on direct appeal and in Appellant's post-conviction appeal to this Court. Specifically, Appellant has argued from his earliest appeal that the medical records support his claim for reversal. However, the Supreme Court held otherwise on direct appeal. Furthermore, this Court thoroughly addressed

Appellant's recantation argument and upheld the trial court's finding that the witnesses' trial testimony was true. That opinion became final upon the denial of Appellant's motion for discretionary review. A newer affidavit from K.V. stating the same claims changes nothing for purposes of this case. As such, Appellant is not entitled to relief from the circuit court or from this Court on review, and the circuit court did not abuse its discretion in denying the motion for post-conviction relief.

For the foregoing reasons, the judgment and order of the Breathitt Circuit Court is affirmed.

ALL CONCUR

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