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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001780-MR

CARL TOWNSLEY — APPELLANT

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE THOMAS L. JENSEN, JUDGE
ACTION NO. 88-CR-00053

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, D. LAMBERT, AND THOMPSON, JUDGES.

D. LAMBERT, JUDGE: Carl Townsley brings a *pro se* appeal from a September 25, 2013 order denying his motion made pursuant to Kentucky Rules of Civil Procedure (CR) 60.02 and Kentucky Rules of Criminal Procedure (RCr) 10.02. After careful review, and for reasons stated hereafter, we affirm.

In 1989, a jury convicted Townsely of murder and sentenced him to life imprisonment. In 1983, Barbourville Police found the victim, Carol Logan, in the hallway of the building in which she lived. She was lying unconscious in a pool of blood after being beaten in the head with a blunt instrument. She had defensive wounds on her hands and extensive damage to her left ear. She was rushed to the local hospital emergency room, but she never regained consciousness. She died five days later.

There was no physical evidence connecting Townsley to the murder and no eyewitnesses identifying Townsley as the murderer. The case against Townsley consisted primarily of the testimony of several witnesses to whom Townsley had admitted murdering Logan.

Townsley testified on his own behalf and denied killing the victim. He stated that he did not know the victim and was twenty-six miles away in Corbin at the time of the murder. He appealed his conviction and sentence to the Kentucky Supreme Court, which affirmed on July 26, 1990. *Townsley v. Commonwealth*, 1989-SC-000536-MR.

In 1997, Townsley moved to vacate his judgment pursuant to RCr 11.42 and CR 60.02, asserting, *inter alia*, that newly discovered evidence entitled him to post-conviction relief. Specifically, Townsley claimed that two individuals, Melissa Simpson and Virgil Sizemore, knew that another individual had confessed to Logan's murder. The trial court denied Townsley's motion. Townsley

subsequently appealed the denial to this Court and we affirmed. *Townsley v. Commonwealth*, 1998-CA-000832-MR.

On April 22, 2013, the Kentucky Innocence Project filed motions under RCr 10.02(1) and CR 60.02(e) and (f) to vacate Townsley's conviction and hold a new trial. In support thereof, Townsley provided affidavits from Melissa Simpson, Virgil Sizemore, and Kim Durbin (Simpson's sister), claiming they overheard a man named Yeager confess to the murder. He also provided an affidavit from Wesley Roark in which Roark claimed Yeager came to his house the night of the attack wearing bloody clothes. The trial court, without holding an evidentiary hearing, overruled Townsley's motion. The trial court found that Townsley's CR 60.02 motion was a rehash of his prior CR 60.02 motion and that the law of the case doctrine applied. The trial court further found that the "new evidence" was not of such decisive value as it would, with reasonable certainty, have changed the result of the trial. After Townsley's motion was denied, the Kentucky Innocence project withdrew from the case.[1] This *pro se* appeal followed.

The standard of review concerning the trial court's denial of a CR 60.02 motion is whether the trial court abused its discretion. *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996); *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal

[1] The Kentucky Department of Public Advocacy determined that the post-conviction proceeding was not a proceeding that a person with adequate means would be willing to bring at his own expense. Kentucky Revised Statutes (KRS) 31.110(2)(c): *Anders v. State of California*, 386 U.S. 738, 744, 87 S.Ct. 1396, 1400, 18 L.Ed.2d 493 (1967).

principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999); *Johnson v. Commonwealth*, 184 S.W.3d 544, 551 (Ky. 2005).

Upon review, we agree with the trial court's determination that Townsley is precluded from raising issues previously ruled upon by this Court. We have consistently held that matters which have been or should have been raised and reviewed in prior motions to vacate will not be reviewed in successive motions. *Stoker v. Commonwealth*, 289 S.W.3d 592, 594 (Ky. App. 2009). CR 60.02 was never meant to be used as just another vehicle to revisit issues that should have been included or could have been included in prior requests for relief. It is not intended to be used as a method of gaining yet another chance to relitigate previously determined issues. In his previous motion made pursuant to CR 60.02, we addressed Townsley's claim that he was entitled to relief based on third-party confessions. In the instant appeal, Townsley's issue is the same—only with additional support. The issues being identical, the trial court did not abuse its discretion in denying Townsley's successive CR 60.02 motions.

Additionally, the law of the case doctrine does not permit Townsley to request that this Court address the same issues over and over again. On review of Townsley's original CR 60.02 appeal, we determined that Townsley's claim that he was entitled to relief based on a third-party confession was time-barred pursuant to CR 60.02(b) and did not fall within the parameters of CR 60.02(e). We further held the claim was not of such a nature as to constitute "any other reason of an extraordinary nature justifying relief" pursuant to CR 60.02(f). The trial court held

that our prior ruling was "the law of the case, which must be followed." While we may deviate from the doctrine if we find our previous decision was "clearly erroneous and would work a manifest injustice[,]" *Brown v. Commonwealth*, 313 S.W.3d 577, 610 (Ky. 2010) (quoting *Arizona v. California,* 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983)), Townsley offers no support for a finding that the earlier panel opinion was unreasonable or obviously wrong. Townsley's belief that he may be able to make a more convincing argument the second time around does not justify reconsideration. Therefore, we agree with the trial court that the law of the case doctrine applies in this case.

Townsley also seeks relief under RCr 10.02. RCr 10.02 permits a trial court to grant a new trial "for any cause which prevented the defendant from having a fair trial, or if required in the interest of justice." RCr 10.02 (1). Granting a new trial is within the discretion of the trial court and is disfavored when the grounds are newly discovered evidence which is merely cumulative or impeaching in nature. *Foley v. Commonwealth*, 425 S.W.3d 880, 888 (Ky. 2014) (citing *Epperson v. Commonwealth,* 809 S.W.2d 835 (Ky. 1990)). To warrant setting aside a verdict and granting a new trial, the newly discovered evidence "must be of such decisive value or force that it would with reasonable certainty, change the verdict or that it would probably change the result if a new trial should be granted." *Id*. RCr 10.06(1) allows entry of a motion "for a new trial based upon the ground of newly discovered evidence . . . made within one (1) year after the entry of the judgment or at a later time if the court for good cause so permits."

In the instant case, Townsley claims the trial court abused its discretion when it found his four hearsay affidavits were not of such value to warrant granting his motion for a new trial. On the contrary, our Supreme Court has held in *Epperson v. Commonwealth* that affidavits from witnesses claiming a third person admitted to the crime were not of such a nature as to disturb the broad discretion vested in the trial judge. The holding is based on the principle that

> a defendant is entitled to one fair trial and not to a series of trials based on newly discovered evidence unless that evidence is sufficiently compelling as to create a reasonable certainty that the verdict would have been different had the evidence been available at the former trial; and that mere hearsay evidence . . . [of] a post-trial statement . . . is insufficient.

Foley v. Commonwealth, 55 S.W.3d 809, 814-815 (Ky. 2000).

Here, Townsley seeks relief from this Court based on hearsay evidence. Therefore, the trial judge correctly found that Townsley's "new evidence" was not of a nature sufficient to interfere with the original judgment. We see no abuse of discretion.

Finally, Townsley claims he was entitled to a hearing on his motion. The decision whether to hold an evidentiary hearing is well within the trial court's discretion and a reviewing court will not disturb the decision absent abuse of that discretion. *Land v. Commonwealth*, 986 S.W.2d 440 (Ky. 1999). The trial court was in possession of the record and the "new evidence" at the time it made its determination. A hearing was unnecessary to determine that the issues had been previously decided and that the affidavits were not of such a decisive value as to

warrant a new trial. Accordingly, the trial judge did not abuse his discretion when he denied Townsley an evidentiary hearing.

For the foregoing reasons, the order of the Knox Circuit Court is affirmed.

DIXON, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

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