

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000105-MR

GERALD ELVIS BROWN

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 04-CR-00210

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: DIXON, J. LAMBERT AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Gerald Elvis Brown brings this appeal from a December 19, 2013, order of the Warren Circuit Court denying Brown's Kentucky Rules of Civil Procedure (CR) 60.02 motion. We affirm.

In October 2004, Brown was found guilty by a jury of three counts of first-degree rape, two counts of first-degree sodomy, and with being a persistent

felony offender in the first degree (PFO 1). He was sentenced to a total of thirty-five years' imprisonment. The alleged incidents occurred in December 2003. On direct appeal to the Kentucky Supreme Court, Brown's conviction was affirmed on December 22, 2005, Appeal No. 2005-SC-000007-MR.

On October 12, 2012, Brown filed the instant CR 60.02 motion to vacate his sentence of imprisonment. Brown claimed that the minor victim, H.H. recanted her trial testimony and had admitted that Brown did not rape and sodomize her.¹ The circuit court held an evidentiary hearing upon Brown's CR 60.02 motion. In its December 19, 2013, order, the circuit court summarized the evidence presented at the hearing:

On February 24, 2012, Angela Brown, the defendant's sister, unexpectedly traveled to the victim's home. After being asked to leave, she located the victim's mother, [L.H.], by the telephone. Ms. Brown was denied the opportunity to speak with the mother or the victim. Four days later, Ms. Brown and her husband returned to the victim's home and confronted her about recanting her testimony against the defendant. The victim was 15 years old at the time. On February 28, 2012, Ms. Brown obtained a recorded recanting statement from the victim. Ms. Brown stated at the evidentiary hearing that she assured [L.H.] that there would not be any negative legal ramifications, nor would this matter go to [sic] back to trial as a result of her statement. While at the victim's home, Ms. Brown received a call from the defendant and she placed him on the phone with [L.H.]. On May 2, 2012, without Ms. Brown present, [L.H.] and the victim gave sworn recantations to Mr. Brown's counsel over the phone.

Following the alleged statements, and prior to the scheduled evidentiary hearing, H.H., [L.H.], and witness

¹ At the time of the crimes, H.H. was seven years old.

[D.S.], contacted and met with the Commonwealth on March 26, 2013. All three indicated that the alleged recantation provided by H.H. had not been voluntary and was not true. Further at the evidentiary hearing on May 10, 2013, the victim herself testified that her recantation was coerced by Ms. Brown and was not accurate. At the hearing, H.H. testified that she felt coerced because she was scared of the defendant's family and believed that giving such statements would make them leave her alone. H.H. then testified at the hearing that the defendant had hurt her as a child and that he had done sexual things with her, confirming her testimony at trial.

The court ultimately found that the evidence did not demonstrate with reasonable certainty that H.H.'s testimony at Brown's trial was untruthful. Thus, the circuit court concluded that H.H.'s "alleged recantation fails to qualify as an extraordinary and unusual circumstance pursuant to CR 60.02(f)." The circuit court denied the CR 60.02 motion. This appeal follows.

Brown contends that the circuit court improperly denied his CR 60.02 motion to vacate his sentence of imprisonment. Specifically, Brown alleges that the victim, H.H., committed perjury in his trial by accusing him of rape and sodomy. Brown points to H.H.'s recent recantations of her trial testimony as proof that she falsely testified at trial. And, Brown believes that absent H.H.'s perjured testimony he would have not been convicted at trial. Brown also argues that the circuit court's finding that H.H.'s recantations were coerced is not supported by substantial evidence.

Under CR 60.02(f), relief may be granted upon a "reason of an extraordinary nature." Our Supreme Court has recognized that the perjured

testimony of a witness in a criminal trial may constitute grounds of an extraordinary nature justifying relief pursuant to CR 60.02(f). To be entitled to such relief, the defendant must demonstrate:

[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[.]

Commonwealth v. Spaulding, 991 S.W.2d 651, 657, (Ky. 1999).

We review a circuit court's denial of a CR 60.02 motion for abuse of discretion. *White v. Commonwealth*, 32 S.W.3d 83 (Ky. 2000). The decision is left to the "sound discretion of the court and the exercise of that discretion will not be disturbed on appeal except for abuse." *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996) (quoting *Richardson v. Brunner*, 327 S.W.2d 572, 574 (Ky. 1959)).

In its order, the circuit court viewed H.H.'s recantations as "inherently suspicious," and the circumstances surrounding the recantations as indicative of coercion. These circumstances include unannounced arrivals of Brown's sister at H.H.'s home, a promise by Brown's sister to H.H. that upon giving a statement the matter would be put to an end, and H.H.'s audiotaped recantation taking place in a bedroom with only her mother and Brown's sister. Also, H.H. testified at the CR 60.02 hearing that she feared Brown's sister and did feel coerced by her. H.H. further claimed that she recanted her previous testimony out of fear of Brown's sister. H.H. also reaffirmed her trial testimony during the hearing.

While there was evidence to the contrary, there was certainly substantial evidence to support the circuit court's decision that a "reasonable certainty" did not exist that H.H. falsely testified at Brown's trial. Thus, we cannot conclude that the circuit court erred or otherwise abused its discretion by determining that Brown failed to demonstrate that H.H. committed perjury during Brown's trial. *See Thacker v. Commonwealth*, 453 S.W.2d 566 (Ky. 1970).

We view Brown's remaining arguments as moot.

In sum, we are of the opinion that the circuit court properly denied Brown's CR 60.02(f) motion to vacate his sentence of imprisonment.

For the foregoing reasons the order of the Warren Circuit Court is affirmed.

ALL CONCUR.

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