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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001878-MR

ROBIN R. SPENCER — APPELLANT

v.

APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NO. 12-CR-00024

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, KRAMER, AND J. LAMBERT, JUDGES.

CLAYTON, JUDGE: Robin R. Spencer appeals from a Shelby County Circuit Court order denying his Kentucky Rules of Civil Procedure (CR) 60.02 motion for post-conviction relief. For the reasons set out below, we affirm.

On February 8, 2012, Spencer was indicted in Shelby County, under indictment number 12-CR-00024, on two counts of Sexual Abuse in the First Degree, and one count of Sodomy in the First Degree. These charges stemmed

from allegations that Spencer sexually abused his two step-daughters when they were both under the age of twelve. Before the case against Spencer reached trial, Spencer, on July 23, 2012, pled guilty to the two counts of Sexual Abuse in the First Degree and to the amended charge of Sodomy in the Third Degree. On September 21, 2012, in exchange for his plea of guilty the court sentenced Spencer consistent with the Commonwealth's recommendations to a total of fifteen years' imprisonment. He was ordered to serve six months incarceration with the remainder of his sentence probated for a period of five years.

In March of 2014, the two victims signed affidavits recanting their testimony. In the affidavits, the victims claimed that they made up the story about the abuse because they were angry with Spencer for divorcing their mother. On May 15, 2014, Spencer filed a "motion to withdraw his guilty plea based on recantation of the alleged victims." A hearing was held on June 26, 2014. At the hearing, both victims took the stand and testified that they wrote the letters at the request of their mother who had been in constant contact with Spencer. Their mother asked them to write the letters so that Spencer could get treatment and be able to see their other sister, who was sixteen at the time. Both victims testified that the notarized letters were in fact false, and the acts of abuse actually occurred. The trial court, convinced that the victims' mother encouraged the victims to submit the false affidavits, denied the motion.

On September 8, 2014, Spencer moved the trial court to set aside his guilty plea and judgment pursuant to CR 60.02(d) and (f).[1] In his motion, Spencer claimed that the "difference in [the victims'] testimony under oath is the very definition of fraud effecting the proceedings." He further claimed that "at the very least, this flip-flopping of stories over the years by the ONLY witnesses to the allegations qualify as extraordinary nature justifying relief." Without a hearing, the trial court denied Spencer's motion on October 24, 2014. The trial court concluded that:

> The court does not believe the two recanting affidavits fall under any of the CR 60.02 options for relief. The court heard the victims testify live, under oath, that their affidavits weren't true. Yet the court does not believe this to rise to the level of perjury or falsified evidence. The court also does not believe such conflicting testimony qualifies as extraordinary relief.

This appeal followed.

We agree with the trial court. CR 60.02 acts as a "safety valve, error correcting device for trial courts." *Kurtsinger v. Board of Trustees of Kentucky Retirement Systems,* 90 S.W.3d 454, 456 (Ky. 2002). The rule provides the trial court with the flexibility needed to correct injustice and the power to correct judgments. *Richardson v. Head,* 236 S.W.3d 17, 20 (Ky. App. 2007). The burden of proof in a CR 60.02 proceeding falls squarely on the movant to "affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief." *McQueen v. Commonwealth,* 948

[1] Spencer also cited CR 60.02(e); however, he did not advance an argument under this subsection and therefore we will not address it in this opinion.

S.W.2d 415, 416 (Ky. 1997)(*citing Gross v. Commonwealth,* 648 S.W.2d 853, 856 (Ky. App. 1983)).

"Given the high standard for granting a CR 60.02 motion, a trial court's ruling on the motion receives great deference on appeal and will not be overturned except for an abuse of discretion." *Barnett v. Commonwealth,* 979 S.W.2d 98, 102 (Ky. 1998). 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). Therefore, we will affirm the lower court's decision unless there is a showing of some "flagrant miscarriage of justice." *Gross,* 648 S.W.2d at 858.

Spencer's sole argument on appeal is that the trial court erred when it denied his motion for CR 60.02 relief in light of the victims' vacillating accountings of the salient events. Specifically, he believes that the perjured testimony amounts to fraud affecting the proceedings and that the circumstances are of such an extraordinary nature that relief is justified. We do not believe that Spencer has alleged facts under any of the provisions of CR 60.02 that justify vacating his guilty plea and judgment.

Spencer claims in his brief that "the difference in testimony under oath is the very definition of fraud upon the proceedings." However, the type of "fraud affecting the proceedings" necessary to justify reopening under CR 60.02(d) generally relates to extrinsic fraud, which involves "fraudulent conduct outside of the trial which is practiced upon the court, or upon the defeated party, in such a

manner that he is prevented from appearing or presenting fully and fairly his side of the case." *McMurry v. McMurry,* 957 S.W.2d 731, 733 (Ky. App. 1997). "[P]erjury by a witness or nondisclosure of discovery material is not the type of fraud to outweigh the preference for finality." *Id*. Obviously, Spencer's allegation that the witnesses are not credible is not a "fraud affecting the proceedings" as the term is used in CR 60.02(d).

Spencer also claims that the "flip-flopping of the only witnesses to the allegations" is so extraordinary it requires relief under CR 60.02(f). This claim is essentially a challenge to the sufficiency of the Commonwealth's evidence. However, we observed in *Taylor v. Commonwealth*, 724 S.W.2d 223, 225 (Ky. App. 1986), that "[e]ntry of a voluntary, intelligent plea of guilty has long been held by Kentucky Courts to preclude a post-judgment challenge to the sufficiency of the evidence." As we further explained in *Taylor*:

> The reasoning behind such a conclusion is obvious. A defendant who elects to unconditionally plead guilty admits the factual accuracy of the various elements of the offenses with which he is charged. By such an admission, a convicted appellant forfeits the right to protest at some later date that the state could not have proven that he committed the crimes to which he pled guilty. To permit a convicted defendant to do so would result in a double benefit in that defendants who elect to plead guilty would receive the benefit of the plea bargain which ordinarily precedes such a plea along with the advantage of later challenging the sentence resulting from the plea on grounds normally arising in the very trial which defendant elected to forego.

As the United States Supreme Court has explained, "...a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case." *Menna v. New York,* 423 U.S. 61, 96 S.Ct. 241, 242 n. 2, 46 L.Ed.2d 195 (1975) (original emphasis).

Here, Spencer's voluntary guilty plea acts as an admission that he had inappropriate sexual contact with his two step-daughters, who at the time of the contact were under the age of twelve. Spencer was convicted based on that admission, and therefore he is precluded from challenging the sufficiency of evidence.

Yet, despite his unconditional plea of guilty Spencer is attempting to challenge the sufficiency of the evidence under CR 60.02(f) in light of what he perceives as the victims' diminished credibility. He asserts that because he now has some evidence that the victims may be lying, justice requires he be granted a trial under CR 60.02(f). Spencer is mistaken.

The purpose of trial is to determine what the truth is. After the determination of the truth, justice is administered. Had Spencer gone to trial, he could have probed the victims' veracity through cross-examination. On the contrary, Spencer admitted to the charges and gave up his opportunity to have a jury decide the credibility of the victims, and decide a just result based on its findings. If Spencer believed his victims were lying, he should have sought justice at trial. CR 60.02 motions are limited to afford special and extraordinary relief not

available in other proceedings. *Baze v. Commonwealth*, 276 S.W.3d 761, 765 (Ky. 2008).

In sum, a challenge to the sufficiency of the evidence is not a basis for extraordinary relief under CR 60.02. *See Boles v. Commonwealth*, 406 S.W.2d 853, 855 (Ky. 1966) (holding that a claim of insufficient evidence must be made on direct appeal, not in a post-conviction motion). In any event, even if a challenge to the sufficiency of the evidence were a basis for relief under CR 60.02, as noted above, Spencer's plea of guilty precludes it anyway. Because Spencer presents no valid reasons of an extraordinary nature justifying relief, the trial court certainly did not abuse its discretion in denying Spencer's motion to set aside his plea.

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

ALL CONCUR.

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