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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001333-MR

DAVID PARKER — APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE JOHN D. SEAY, JUDGE
ACTION NO. 06-CR-00138

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, MAZE, AND STUMBO, JUDGES.

MAZE, JUDGE: David Parker appeals from a Nelson Circuit Court order denying his petition for relief made pursuant to Kentucky Rules of Civil Procedure (CR) 60.02.

Parker was indicted on May 17, 2006, for one count of sexual abuse in the first degree. The charge resulted from statements made by L.O., the minor

daughter of Parker's girlfriend, that Parker had touched her inappropriately. According to the record, L.O. would have been between two to three years of age at the time. Parker entered a plea of guilty pursuant to an offer from the Commonwealth. On December 28, 2006, the Nelson Circuit Court entered judgment sentencing him in accordance with the plea agreement to three years probated for five years. He was required to complete the Sex Offender Treatment Program (SOTP) and to register as a sex offender. Parker was unable to participate in the SOTP, however, because he refused to admit his guilt, and consequently his probation was revoked.

On April 10, 2009, Parker filed a motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42, alleging that his counsel was ineffective during the guilty plea proceedings for failing to advise him he would have to participate in a mandatory SOTP, register as a sex offender for twenty years, and participate in conditional discharge for three years. Appointed counsel supplemented the motion to include a claim that counsel was ineffective for failing to investigate and discover that L.O. had recanted her statements. The motion also included an additional similar claim under CR 60.02 (e) and (f), arguing that the judgment should be vacated because L.O. had repudiated her previous statements. An attached affidavit from L.O.'s mother stated that L.O. told her she had been directed to lie by her grandmother and father. An evidentiary hearing was held on the RCr 11.42 motion on June 16, 2011. At that time counsel withdrew the CR

60.02 motion because L.O. could not be located to testify. The circuit court denied the RCr 11.42 motion and Parker appealed. The appeal was dismissed as moot on April 10, 2013, because Parker had completely served out his sentence and period of conditional discharge.

On November 5, 2014, Parker was indicted for failure to comply with the sex offender registry, two counts of sex offender social network use, and being a persistent felony offender. On March 2, 2015, he filed a motion to vacate his 2006 conviction pursuant to CR 60.02 (e) and (f), based on the recanting statements made by L.O. On this occasion, Parker was able to locate L.O. and a hearing was held at which L.O. testified that she had made up the sexual abuse claims against Parker at the instigation of her father. The trial court denied the motion and this appeal by Parker followed.

We review the denial of a CR 60.02 motion for an abuse of discretion. *Partin v. Commonwealth*, 337 S.W.3d 639, 640 (Ky. App. 2010). The test for abuse of discretion is whether the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky.1999) (internal citations omitted). Absent a "flagrant miscarriage of justice," we will affirm the trial court. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

The trial court denied Parker's motion in reliance on the principle 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." *Taylor v. Commonwealth*, 724 S.W.2d 223, 225 (Ky. App. 1986). The reasoning behind such a rule has been explained as follows:

> 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).

Id.

Parker nonetheless argues that his claim of actual innocence entitles him to post-conviction relief. He contends that newly discovered evidence, in the form of L.O.'s recantation of her accusations, would have changed the result of the plea process in that he would have rejected the plea offer and probably been acquitted at trial.

As support for his claim, Parker relies on an unpublished opinion, *King v. Commonwealth*, 2014 WL 3547480 (Ky. App. 2014) (2012-CA-001985-MR). In that case, Susan Jean King entered a plea of guilty to second-degree manslaughter and tampering with physical evidence after she was charged with murder. About four years later, another individual confessed to the murder, providing a specific and highly-detailed statement of the events leading up to the murder, the manner in which it was committed and how he disposed of the body. The trial court held that CR 60.02 did not provide an avenue of relief for King because she had entered a guilty plea. A panel of this Court reversed, holding that King was entitled to relief for extraordinary reasons under CR 60.02(f), and remanded the case for a jury trial, stating that "When a person previously convicted of a crime by jury trial or guilty plea can demonstrate actual innocence with newly discovered evidence, it is constitutionally incumbent upon the state to provide a post-conviction procedure to vacate the judgment and grant a new trial." Id., 2014 WL 3547480, at *5.

As in *King*, the United States Supreme Court has held that "a credible showing of actual innocence may allow a prisoner to pursue his constitutional claims … on the merits notwithstanding the existence of a procedural bar to relief." *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931 (2013). However, both *King* and *McQuiggin* are factually and legally distinguishable from Parker's case. The new evidence in *King* consisted not of a recantation of earlier statements by a victim or

witness, but of a factually-specific, reliable confession from another individual that he had actually committed the crime. Similarly, the new evidence in *McQuiggin* consisted of evidence which corroborated the defendant's account and strongly implicated the primary witness against him.

Recantations, by contrast, are notoriously unreliable and rarely provide grounds for a new trial:

> The general rules are that recanting testimony is viewed with suspicion; mere recantation of testimony does not alone require the granting of a new trial; only in extraordinary and unusual circumstances will a new trial be granted because of recanting statements; such statements will form the basis for a new trial only when the court is satisfied of their truth; the trial judge is in the best position to make the determination because he has observed the witnesses and can often discern and assay the incidents, the influences and the motives that prompted the recantation; and his rejection of the recanting testimony will not lightly be set aside by an appellate court.

Thacker v. Commonwealth, 453 S.W.2d 566, 568 (Ky. 1970). "[I]t is not enough [to warrant a new trial] to merely show that a prosecuting witness has subsequently made contradictory statements or that he is willing to swear that his testimony upon the trial was false, for his later oath is no more binding than his former one." *Commonwealth v. Harris*, 250 S.W.3d 637, 641 (Ky. 2008) (internal citations omitted).

Furthermore, the defendant in *King* had entered an *Alford* plea expressly refusing to admit guilt. See *North Carolina v. Alford*, 400 U.S. 25, 91

S.Ct. 160, 27 L.Ed.2d 162 (1970). An *Alford* plea "permits a conviction without requiring an admission of guilt and while permitting a protestation of innocence." *Wilfong v. Commonwealth*, 175 S.W.3d 84, 103 (Ky. App. 2004). Although Parker points out that he has never confessed and has always maintained his innocence, his guilty plea was not so qualified. He admitted that he was guilty of the charge of sexual abuse when he entered his plea. "Solemn declarations in open court carry a strong presumption of verity." *Edmonds v. Commonwealth*, 189 S.W.3d 558, 569 (Ky. 2006).

In another opinion relied on by Parker, *Sheckles v. Commonwealth*, 2003 WL 22272105 (Ky. App. 2003) (2002-CA-001977-MR), the claimant sought to withdraw his plea of guilty to an assault charge prior to sentencing after the victim, his wife, wrote to the judge trying to excuse his behavior. A panel of this Court held that the trial court did not abuse its discretion in refusing to allow withdrawal of the plea because the newly discovered of evidence was not of such decisive value or force that the claimant would not have entered a plea of guilty had he had access to it. This opinion is of limited applicability to Parker's case, however, because it involves withdrawal of a guilty plea prior to judgment as expressly contemplated by the terms of RCr 8.10.

Parker was free to maintain his innocence and to challenge the evidence against him at trial; he chose instead to plead guilty, as the trial court found, in order to "to get out of jail" and see his young son. The trial court

concluded that he had entered his plea voluntarily and intelligently under the circumstances.

As further grounds for denying the motion, the trial court found that the motion was not made within a reasonable time as required for motions made pursuant to CR 60.02(d), (e) and (f). Parker argues that the trial court prematurely denied him relief, and that he was entitled to present evidence regarding the motion's timeliness. The trial court noted that nearly nine years had elapsed since the final judgment was entered Parker's case, and that according to Parker's own pleadings, he and his appointed counsel knew about L.O.'s recantation as early as February 2010. Parker filed his CR 60.02 motion in March 2015. "What constitutes a reasonable time in which to move to vacate a judgment under CR 60.02 is a matter that addresses itself to the discretion of the trial court. . . . The 'reasonable time' requirement is a factor for the trial court to take into consideration. It may do so based on the record in the case. It is not required to hold a hearing to decide whether the 'reasonable time' restriction should apply." *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983). The trial court properly considered the record in the case and was not required to hold a hearing. It did not abuse its discretion in holding that the motion was not filed within a reasonable time.

For the foregoing reasons, the Nelson Circuit Court's order denying Parker's petition for relief pursuant to CR 60.02 is affirmed.

ALL CONCUR.

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