

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002074-MR

DUAN C. CALLOWAY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 94-CR-003035

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: GUDGEL, CHIEF JUDGE; GUIDUGLI AND MILLER, JUDGES.

GUIDUGLI, JUDGE. The appellant, Duan C. Calloway ("Calloway"), was convicted in Jefferson Circuit Court of robbery in the first degree (KRS 515.020), assault in the first degree (KRS 508.010), and assault in the fourth degree (KRS 508.030) after a jury trial on November 28 and 29, 1997. He was sentenced to a total of fifteen (15) years' imprisonment. It is the assault in the first degree conviction that is the subject of this appeal.

On January 14, 1997, Calloway filed a motion to set aside the judgment pursuant to CR 60.02 alleging that prosecuting witnesses, Joe Brown, Jr. ("Brown") and Florence Denning ("Denning"), knowingly gave perjured testimony at the trial.

Specifically, Calloway argued that both Brown and Denning testified falsely that Calloway shot Brown in both legs when in fact Brown had only been shot in the left leg. Calloway also filed a motion for an evidentiary hearing on the matter and for appointment of counsel. The trial court denied Calloway's motions on the grounds that credibility was a determination for the jury to make. This appeal followed.

Calloway contends that the lower court erred in denying his motions. He argues that the alleged perjury committed by Brown and Denning qualifies as a justification for relief under CR 60.02 which grants discretion to the court to relieve a party from a final judgment because perjured or false evidence has been given. From the record it seems clear that Brown and Denning did falsely report the extent of Brown's injuries. However, such is not sufficient grounds to grant the relief requested by Calloway.

The Supreme Court of Kentucky recently reviewed the extend of relief available under CR 60.02 in a factually similar case. Brown v. Commonwealth, Ky., 932 S.W.2d 359 (1996). In Brown the Court reviewed the defendant's contention that a medical expert for the Commonwealth had indicated to defense counsel that portions of his testimony at the defendant's trial could have been erroneous. Nonetheless, the Court affirmed the trial court's denial of relief under CR 60.02.

In the present case Calloway must convince the court that "the real facts as later presented...rendered the original trial tantamount to none at all, and [enforcement of] the judgment as rendered would be an absolute denial of justice and

analogous to the taking of life or property without due process of law." Brown, 932 S.W.2d at 316-62 (quoting Jones v. Commonwealth, 269 Ky. 779, 108 S.W.2d 816, 917 (1937)). Actions arising under CR 60.02 are under the "sound discretion of the court and the exercise of that discretion will not be disturbed on appeal except for abuse." Brown, 932 S.W.2d at 362 (quoting Richardson v. Brunner, Ky.App., 327 S.W.2d 572, 574 (1959)).

Portions of Brown's medical record relevant to the gun shot wounds he received are in the record. It appears clear that the injury Brown received to his right leg was from a previous gun shot wound. However, Calloway admits that Brown's medical records were introduced into evidence. Further, it is undisputed that Brown was in fact shot in the left leg, and that the jury believed Calloway was responsible for such. This alone is sufficient for the assault in the first degree conviction. Moreover, it is not for the court to "underestimate a jury's intelligence in its ability to discern between the multitude of evidence and testimony presented to it and to evaluate such accordingly." Brown, 932 S.W.2d at 362 (quoting Turner v. Commonwealth, Ky., 914 S.W.2d 343, 347 (1996)). Questions of credibility and weight of the evidence are jury matters. Estep v. Commonwealth, Ky., 957 S.W.2d 191, 193 (1997). After reviewing the evidence, this Court believes the trial court correctly determined that a reasonable jury could fairly find beyond a reasonable doubt that Calloway was guilty of assault in the first degree.

Furthermore, the Supreme court in Brown noted that the trial court judge who denied the CR 60.02 motion in that case also presided over the defendant's trial. Brown, 932 S.W.2d at 362. Hence, the Court stated that the trial court judge had the opportunity to evaluate the witness' testimony during trial. Because of this, the Court held that "[the trial judge's] judgment should be afforded deference under the abuse-of-discretion standard of review." Id. In the present case, the record shows that the same judge who presided over Calloway's trial also ruled on his CR 60.02 motion. Thus, we afford a great deal of deference to his denial of Calloway's motion and find no error in his ruling on this matter.

We also agree with the trial court's denial of an evidentiary hearing. Before Calloway is entitled to an evidentiary hearing, "he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief." Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856 (1983). Although it appears certain that both Brown and Denning lied about the extent of Brown's injuries, as stated previously, there was ample evidence for the jury to find Calloway guilty of assault in the first degree. Thus, Calloway has failed to plead facts which would justify vacating the judgment. Therefore, the trial court did not err in denying the evidentiary hearing. Furthermore, since Calloway's CR 60.02 is totally meritless, the trial court's failure to appoint counsel is harmless error. Commonwealth v.

Stamps, Ky., 672 S.W.2d 336 (1984). Thus, for the reasons stated we hereby affirm.

ALL CONCUR.

BRIEF FOR APPELLANT PRO SE:

Duan C. Calloway, Pro Se
Northpoint Training Center
Burgin, KY

BRIEF FOR APPELLEE:

A. B. Chandler, III
Attorney General

Joseph R. Johnson
Assistant Attorney General
Frankfort, KY