

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001931-MR

RALPH RAY PERKINS

APPELLANT

v. APPEAL FROM FULTON CIRCUIT COURT
HONORABLE WILLIAM L. SHADOAN, JUDGE
ACTION NO. 97-CR-00061

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BARBER, McANULTY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is a pro se appeal from the denial of appellant's CR 60.02 motion and motion for recusal. Upon review of appellant's arguments, the record herein and the applicable law, we adjudge that the motions were properly denied and, thus, affirm.

On November 13, 1997, appellant, Ralph Perkins, was convicted pursuant to a jury verdict of first-degree wanton endangerment and sentenced to five years' imprisonment. On June 1, 2000, Perkins filed a CR 60.02 motion which listed the following grounds for relief: (1) the trial court failed to instruct the jury on lesser included offenses; (2) inadequate

voir dire prevented the empaneling of a fair and impartial jury; and (3) defense counsel failed to present mitigating evidence during the penalty phase. On the same date, Perkins filed a motion requesting recusal of the trial judge on grounds of personal bias and/or personal knowledge and that a rumored medical condition impaired the trial court's ability to perform his duties impartially. On June 22, 2000, the trial court denied Perkins's motions for CR 60.02 relief and recusal. On July 12, 2000, Perkins moved the court to alter its judgment pursuant to CR 59.05 and to issue findings of fact and conclusions of law pursuant to CR 52.01. From the denial of this motion, Perkins now appeals.

Perkins first argues that the trial court abused its discretion when it denied his CR 60.02 motion while the motion for recusal was pending. Perkins does not cite any authority for the proposition that a court cannot entertain another motion when a motion for recusal in the case is pending. Perkins simply argues that the trial judge should have recused himself. KRS 26A.015(2) states:

(2) Any justice or judge of the Court of Justice or master commissioner shall disqualify himself in any proceeding:

(a) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings, or has expressed an opinion concerning the merits of the proceeding;

. . .

(e) Where he has knowledge of any other circumstances in which his impartiality might reasonably be questioned.

In support of his claim of bias, Perkins points to the court's denial of various motions during the trial and pendency of the case. In particular, Perkins alleges that the court allowed two jurors to sit on the case who were biased in favor of the prosecution. Perkins further complains that these motions were denied without the court addressing the merits of the case. Perkins also claims that the trial judge was racially biased against him and that a stroke the judge suffered in 1998 prevented him from acting impartially.

"A party's mere belief that the judge will not afford a fair and impartial trial is not sufficient grounds to require reversal." Webb v. Commonwealth, Ky., 904 S.W.2d 226, 230 (1995), citing Howerton v. Price, Ky., 449 S.W.2d 746, 748 (1970). "The asserted belief must be predicated upon stated facts showing bias or prejudice sufficient to prevent the judge from fairly or impartially trying the case." Howerton v. Price, 449 S.W.2d at 748. The fact that the court ruled against Perkins on various motions does not indicate that the judge was biased. As for the two allegedly biased jurors, there was no evidence that these jurors were biased or that the court acted impartially in allowing them to sit on the jury. Further, Perkins presents no facts to support his claim of racial bias. As for the judge's supposed stroke, again there are no facts demonstrating the court's bias or that any health problem prevented the judge from acting impartially.

Perkins next argues that he was denied procedural due process when the Fulton Circuit Court Clerk failed to certify his

recusal motion. The first time this issue was raised was in this appeal. Hence, it is precluded from our review. McDonald v. Commonwealth, Ky., 554 S.W.2d 84 (1977).

Perkins also argues that the trial court erred when it failed to make findings of fact on the recusal motion. Findings of fact and conclusions of law are required under CR 52.01 only if issues of fact are tried before the court; rulings on motions are exempted from this rule. Clay v. Clay, Ky., 424 S.W.2d 583 (1968). Hence, the trial court was not required to make findings of fact on the recusal motion.

Perkins's remaining argument is that the trial court erred in refusing to allow adequate judicial review of the issues raised in his CR 60.02 motion. A CR 60.02 motion is for relief not available by direct appeal or under RCr 11.42. Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983). Accordingly, if the issues could have been raised on direct appeal or in an RCr 11.42 motion, they cannot be considered in a CR 60.02 motion. All three arguments raised in Perkins's CR 60.02 motion involved facts known to Perkins at the time of trial. Hence, they should have been raised on direct appeal and not in a CR 60.02 motion.

For the reasons stated above, the judgment of the Fulton Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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