RENDERED: DECEMBER 7, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001327-MR

STANLEY JACKSON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 98-CR-01084

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUIDUGLI, MILLER AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Stanley Jackson (Jackson) appeals from an order denying his CR 60.02(c) motion to void his conviction. We affirm.

Jackson was tried by a jury and convicted of two counts of complicity to commit first-degree robbery, three counts of first-degree robbery, and one count of being a persistent felony offender (PFO) in the first degree. Jackson was sentenced to a total of 52 years' imprisonment. While his direct appeal to our Supreme Court was pending,[1] Jackson filed a motion to void his

[1]Our Supreme Court affirmed Jackson's conviction in a not-to-be-published opinion rendered September 28, 2000 (No. (continued...)

conviction pursuant to CR 60.02(c). On May 8, 2000, the Fayette Circuit Court denied his motion without an evidentiary hearing. This appeal followed.

In his CR 60.02(c) motion, Jackson argued that his conviction should be voided based "on false testimony given at trial." He attached a copy of a statement from Paul Douthitt and an affidavit of Troy Cloyd, each of whom were charged in the same series of robberies as Jackson and each had testified against him at trial. Without an evidentiary hearing, the trial court denied Jackson's motion finding that "a mere retraction of testimony by a witness is not proof of prejury or falsified evidence sufficient to invoke application of the rule [CR 60.02(c)]. Absent other independent evidence of perjury with a sufficient indicia of reliability, the motion must fail." (Court order entered May 8, 2000, at page 15 of the trial record). Relying upon Commonwealth v. Spalding, Ky., 991 S.W.2d 651 (1999), Jackson contends that at a minimum he is entitled to a hearing to determine if the "recantations by Cloyd and Douthitt are credible, and whether the new testimony would "probably" change the result if a new trial were (sic) granted." Jackson then argues that the two witnesses' trial testimony may have been tainted by the favorable treatment they were to receive from the Commonwealth for their incriminating testimony against Jackson, and that after viewing the other evidence presented at trial, that there is a "probability" that the end result could have been

[1](...continued)
1999-SC-0688-MR).

different. That is, that without Douthitt's and Cloyd's testimony Jackson would not have been found guilty of the multiple charges against him. We disagree with Jackson as to each of his contentions.

In Land v. Commonwealth, Ky., 986 S.W.2d 440 (1999), the Court, addressing the issue of whether or not an evidentiary hearing is required following the filing of a CR 60.02 motion, held:

> However, contrary to Appellant's assertion, the opinion did not hold that a hearing must be held upon a subsequent CR 60.02 motion. Rather, this Court merely suggested that the defendants might benefit by requesting a more formal hearing "considering that this will give them an opportunity to bolster the sketchy proof they provided and by which they ask extraordinary relief." Id. We are of the opinion that this language should have put Appellant on notice to specifically request an evidentiary hearing. The decision to hold an evidentiary hearing is within the trial court's discretion and we will not disturb such absent any abuse of that discretion. Cf. Wheeler v. Commonwealth, Ky., 395 S.W.2d 569 (1965).

Id. at 442.

The trial court determined from the record that the retractions made by the two co-defendant witnesses were neither reliable nor credible. The witnesses had made several statements to police authorities prior to giving their trial testimony and the trial testimony was consistent with both the prior statements and other evidence gathered by the investigating authorities. Furthermore, there were numerous other individuals who were victims/witnesses to the robberies and their statements to the police and testimony at trial corroborated the trial testimony of

Douthitt and Cloyd. The trial judge heard all the evidence presented during the initial trial and was in the best position to determine the credibility of all the witnesses and the sufficiency of the evidence. During the trial itself, Jackson aggressively challenged the credibility of these two witnesses based primarily upon the favorable treatment they were to receive for their testimony. The jury heard all the evidence and was convinced beyond a reasonable doubt of Jackson's guilt on most but not all of the many charges against him. He received a fair trial and his conviction was affirmed on appeal to the Kentucky Supreme Court. As stated in Spalding, supra:

> "[I]n order for newly discovered evidence to support a motion for new trial it must be 'of such decisive value or force that it would, with reasonable certainty, have changed the verdict or that it would probably change the result if a new trial should be granted." Jennings v. Commonwealth, Ky., 380 S.W.2d 284, 285-86 (1964), quoting Ferguson v. Commonwealth, Ky., 373 S.W.2d 29, 730 (1963). And, of course, the defendant has the additional burden of showing within a reasonable certainty that perjured testimony was in fact introduced against him at trial. Anderson v. Buchanan, Ky., 292 Ky. 810, 168 S.W.2d 48, 54 (1943).

Id. 991 S.W.2d at 654.

The trial court found that Jackson had failed in his burden to present sufficient credible evidence that Douthitt or Cloyd had committed perjury during the trial on the criminal charges or that the alleged "new evidence" was "of such a decisive value or force that it would, with reasonable certainty, have changed the verdict." Spalding, Id. Having thoroughly

reviewed this matter, we agree with the trial court and find no basis to tamper with the court's ruling in this matter.

For the foregoing reasons, the order of the Fayette Circuit Court denying Jackson's CR 60.02(c) motion is affirmed.

MILLER, JUDGE, CONCURS.

SCHRODER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

SCHRODER, JUDGE, DISSENTING. RCr 12.02 and Section 110 of the Kentucky Constitution provide that an appeal from a judgment imposing a sentence of death, life imprisonment, or imprisonment for twenty years or more shall be taken directly to the Supreme Court. Here, Jackson was sentenced to 52 years' imprisonment. Hence, any appeal from that sentence should have been addressed to our Supreme Court. See also Williams v. Venters, Ky., 550 S.W.2d 547 (1977), a mandamus action seeking a transcript to be used in attacking a life sentence. Therein the Supreme Court held the Court of Appeals could hear the denial of the mandamus because it did not affect the conviction. The Court reasoned: "[a] judgment or order denying a postconviction motion, however, is not a judgment 'imposing a sentence.'" Id. at 548. I understand that to mean if the conviction and sentence itself are being attacked directly or collaterally - like in RCr 11.42 or CR 60.02 motions, where the sentence is 20 years or more, the conviction shall be appealed directly to the Supreme Court. Williams v. Venters, 550 S.W.2d 547, was a mandamus action seeking records to prepare for an attack on the final sentence. It was not an RCr 11.42 or CR 60.02 motion which seeks to attack the judgment imposing a sentence.

BRIEF FOR APPELLANT:

V. Gene Lewter
Lexington, KY

BRIEF FOR APPELLEE:

A. B. Chandler, III
Attorney General

Tami Allen Stetler
Assistant Attorney General
Frankfort, KY