

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000468-MR

SHERILL D. HARSTON

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, SPECIAL JUDGE
ACTION NO. 79-CR-00024`

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: GUDGEL, CHIEF JUDGE; McANULTY AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Sherill D. Harston has appealed from an order of the Warren Circuit Court entered on January 31, 2001, which denied his motions to vacate his convictions for murder,¹ manslaughter in the first degree,² and theft by unlawful taking,³

¹Kentucky Revised Statutes (KRS) 507.020.

²KRS 507.030.

³KRS 514.030.

filed pursuant to RCr⁴ 10.06, RCr 10.26, CR⁵ 60.02(f), and CR 60.03. Having concluded that these motions are procedurally barred, we affirm.

On December 28, 1978, Harston strangled his girlfriend, Diane Marcum, during an argument. The next morning, he drowned Marcum's three-year-old son, burned the bodies, and threw them into the river. Over the next few days, he sold some of Marcum's furniture. After being apprehended in Indianapolis, Indiana, Harston confessed to the killings. He subsequently was indicted on two counts of capital murder and theft by unlawful taking. Prior to trial, he was examined by several psychiatrists and found competent to stand trial by the trial court.

At the trial, the Commonwealth sought the death penalty and Harston relied on a defense of insanity. Two psychiatrists testifying for the Commonwealth stated that Harston was sane at the time of the crimes and was faking mental incompetence. The defense countered with three psychiatrists opining that Harston was insane. The defense also called Elya Bresler, an alleged clinical psychologist who presented a long list of credentials, who testified that Harston suffered from schizophrenia, was legally insane, and represented a dangerous threat to kill again. The jury found Harston guilty of manslaughter in the first degree with respect to Marcum, murder of the child, and theft by unlawful taking. It recommended consecutive sentences of 99 years for murder, 20 years for manslaughter, and five years for

⁴Kentucky Rules of Criminal Procedure.

⁵Kentucky Rules of Civil Procedure.

theft by unlawful taking. On April 30, 1980, the trial court sentenced Harston to 124 years in prison consistent with the jury's recommendation. On direct appeal, the Supreme Court of Kentucky affirmed the convictions and sentence.⁶

On September 1, 1998, Harston, acting pro se, filed an RCr 11.42 motion to vacate his sentence on the grounds of the lack of a sanity hearing, prejudicial statements by a deputy sheriff and the trial judge concerning the lack of state facilities for the criminally insane, an illegal confession, and ineffective assistance of counsel. In November 1998, the trial court granted Harston's request for appointment of counsel to assist him. In February 1999, counsel filed a supplement to the RCr 11.42 motion which raised the issue of fraudulent conduct and false testimony by Elya Bresler about his professional qualifications. Counsel later amended his supplemental filing to raise the fraud/perjury issue under CR 60.02.

After conducting several hearings, the trial court entered an order on November 17, 1999, denying both motions. The trial court held that Harston's RCr 11.42 motion was barred by the three-year time limitation stated in RCr 11.42(10), and even if the fraudulent conduct by Bresler were considered newly discovered evidence outside the proscription of subsection 10, it would have been more appropriately raised under RCr 10.06 or CR 60.02. The trial court found that under Commonwealth v.

⁶Harston v. Commonwealth, Ky., 638 S.W.2d 700 (1982).

Spaulding,⁷ the fraud/perjury claim was not time barred under the one-year limitation in CR 60.02(d) and applied subsection (f), but it rejected the claim based on the merits. It ruled that Harston failed to show that Bresler's perjured testimony affected the outcome of the trial given the testimony by several psychiatrists, other than Bresler, supporting Harston's insanity defense. The trial court held, alternatively, that the claim was untimely as not being made within a reasonable time.

This Court on December 22, 2000, affirmed the trial court and agreed with its analysis on the merits of the fraud/perjury claim.⁸ In its opinion, this Court distinguished the case of Skaggs v. Parker,⁹ wherein the Sixth Circuit Court of Appeals reversed Skaggs' death sentence based on ineffective assistance because of defense counsel's use of Elya Bresler as a witness in the sentencing phase of his trial. Discretionary review was denied by the Supreme Court.

In January 2000, while the appeal on the RCr 11.42 and CR 60.02 motions was pending in this Court, Harston filed in the Warren Circuit Court a pro se motion to set aside the judgment of conviction pursuant to RCr 10.06 and RCr 10.26. In March 2000, Harston filed a supplement to the motion challenging his convictions and sentence based on alleged prejudicial statements

⁷Ky., 991 S.W.2d 651 (1999).

⁸This Court expressed no opinion on the RCr 11.42 claims because Harston had not appealed that portion of the trial court's order and did not address the timeliness of the CR 60.02(f) motion given its decision affirming on the merits.

⁹235 F.3d 261 (6th Cir. 2000), cert. denied, ___ U.S. ___, 122 S.Ct. 322, 151 L.Ed.2d 241 (2001).

by the original trial judge, Bresler's fraud and perjury, and inconsistent verdicts (murder as to the child and manslaughter as to Marcum). The trial court postponed consideration of these motions pending resolution of the pending appeal.¹⁰ In November 2000, Harston filed a motion to vacate the judgment and sentence pursuant to CR 60.02(f) and CR 60.03 based on Bresler's fraud/perjury citing the recent case of Skaggs.

Following completion of the first appellate proceeding, several supplemental filings by Harston, and a response by the Commonwealth, the circuit court entered an order denying Harston's RCr 10.06, RCr 10.26, CR 60.02(f), and CR 60.03 motions for relief on January 31, 2001. It ruled that the claims raised in the motions were procedurally barred under the doctrines of res judicata and the law of the case doctrine. The circuit court noted that the issues raised in the motions and supplemental filings either had been decided adversely to Harston or were not raised, but could have been raised in earlier proceedings. On March 2, 2001, the circuit court denied Harston's motion for reconsideration. This appeal followed.

We agree with the circuit court that Harston's claims are procedurally barred. Several related legal doctrines apply to prevent Harston from relitigating issues that were raised and decided in prior proceedings or could have been raised. First, under the successive motions principle set out in Gross v.

¹⁰A special judge was assigned to the case because of civil litigation by Harston against all the judges of the Warren Circuit Court, the prosecutors, defense counsel, and others.

Commonwealth,¹¹ a criminal defendant must first bring a direct appeal when available, then utilize RCr 11.42 by raising every error of which he should be aware, and use CR 60.02 only for extraordinary situations not otherwise subject to relief by direct appeal or by way of RCr 11.42.¹² More recently, in McQueen v. Commonwealth,¹³ the Supreme Court reaffirmed the procedural requirements set out in Gross when it said:

A defendant who is in custody under sentence or on probation, parole or conditional discharge is required to avail himself of RCr 11.42 as to any ground of which he is aware, or should be aware, during the period when the remedy is available to him. Civil Rule 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could "reasonably have been presented" by direct appeal or RCr 11.42 proceedings. RCr 11.42(3); Gross v. Commonwealth, supra, at 855, 856. The obvious purpose of this principle is to prevent the relitigation of issues which either were or could have been litigated in a similar proceeding.¹⁴

The successive motions principle applies even though an appeal was dismissed on procedural grounds and the merits of the first motion were not addressed in the earlier appeal proceeding.¹⁵

Similarly, res judicata is a doctrine that bars relitigation of matters decided by a court of competent

¹¹Ky., 648 S.W.2d 853 (1983).

¹²Id. at 856.

¹³Ky., 948 S.W.2d 415 (1997), cert. denied, 521 U.S. 1130, 117 S.Ct. 2535, 138 L.Ed.2d 1035 (1997).

¹⁴Id. at 416. See also Hampton v. Commonwealth, Ky., 454 S.W.2d 672 (1970) (courts have more to do than occupy themselves with successive reruns of RCr 11.42 motions); Land v. Commonwealth, Ky., 986 S.W.2d 440, 442 (1999); and Barnett v. Commonwealth, Ky., 979 S.W.2d 98, 101 (1998).

¹⁵Lycans v. Commonwealth, Ky., 511 S.W.2d 232 (1974).

jurisdiction in the same or any other judicial tribunal of concurrent jurisdiction.¹⁶ Res judicata encompasses two separate but related principles: (1) claim preclusion; and (2) issue preclusion (sometimes referred to as collateral estoppel).¹⁷

Claim preclusion bars a party from relitigating a previously adjudicated cause of action and entirely bars a new lawsuit on the same cause of action. Issue preclusion bars the parties from relitigating any issue actually litigated and finally decided in an earlier action. The issues in the former and latter actions must be identical. The key inquiry in deciding whether the lawsuits concern the same controversy is whether they both arise from the same transactional nucleus of facts [citations omitted].¹⁸

In the current case, Harston has filed several motions involving the same or similar claims. His initial RCr 11.42 motion was denied as untimely by the circuit court and he did not appeal that decision. Several of the issues raised in his RCr 10.26 motion and supplement either were raised in the initial RCr 11.42 proceeding or could have been raised during the period RCr 11.42 relief was available. The issue of Bresler's fraud/perjury, which Harston asserts he was unaware of until 1999 although Bresler's false qualifications were exposed in 1984, was addressed and rejected on the merits by the circuit court in the proceeding on the initial CR 60.02 motion. This Court affirmed

¹⁶See Yeoman v. Commonwealth, Health Policy Bd., Ky., 983 S.W.2d 459, 464 (1998); and BTC Leasing, Inc. v. Martin, Ky.App., 685 S.W.2d 191, 197 (1984).

¹⁷Moore v. Commonwealth, Cabinet for Human Resources, Ky., 954 S.W.2d 317, 318 (1997).

¹⁸Yeoman, 983 S.W.2d at 465. See also City of Louisville v. Louisville Professional Firefighters Ass'n, Ky., 813 S.W.2d 804, 806 (1991).

the denial of the CR 60.02 motion and specifically distinguished the Skaggs case, which Harston cited as new evidence supporting his second CR 60.02 motion. Harston's attempt to relitigate the same issue in a second CR 60.02 motion is barred by res judicata.¹⁹ In conclusion, all of Harston's claims are barred by either res judicata or the successive motions principle. Furthermore, his assertion that the Warren Circuit Court lacked jurisdiction to rule on the motions is without merit.²⁰

The order of the Warren Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Sherill D. Harston, Pro Se
Central City, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III
Attorney General

Ian G. Sonogo
Assistant Attorney General
Frankfort, Kentucky

¹⁹See e.g., Richardson v. Brunner, Ky., 328 S.W.2d 530 (1959) (involving multiple CR 60.02 motions), cert. denied, 362 U.S. 902, 80 S.Ct. 610, 4 L.Ed.2d 554 (1960).

²⁰See KRS 23A.010(1); Commonwealth v. Basnight, Ky.App., 770 S.W.2d 231 (1989); and Wilson v. Commonwealth, Ky., 403 S.W.2d 710 (1966).