

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2001-CA-000934-MR

BILLY J. STONE, JR.

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE LEWIS G. PAISLEY, JUDGE  
ACTION NO. 95-CR-00854

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \*\*

BEFORE: KNOPF, McANULTY, AND TACKETT, JUDGES.

KNOPF, JUDGE: This is an appeal by Billy J. Stone, Jr. from an order of the Fayette Circuit Court denying his motion for post-conviction relief pursuant to CR<sup>1</sup> 60.02. Because the issues raised by Stone do not entitle him to relief under CR 60.02, we affirm.

On October 5, 1995, Stone was indicted for two counts of first-degree rape<sup>2</sup> and five counts of first-degree sexual

---

<sup>1</sup>Kentucky Rules of Civil Procedure.

<sup>2</sup>Kentucky Revised Statutes (KRS) 510.040.

abuse.<sup>3</sup> The charges were brought as a result of allegations made by Stone's stepdaughter that he had engaged in sexual contact with her, including intercourse, while she was less than twelve years of age.

On November 17, 1995, in conjunction with a plea offer by the Commonwealth, Stone filed a petition to enter a plea of guilty. Under the plea agreement, in exchange for Stone's plea of guilty to the amended charge of second-degree rape<sup>4</sup> and two counts of first-degree sexual abuse, the Commonwealth agreed to dismiss the remaining counts. On November 20, 1995, the trial court entered a judgment accepting the plea agreement, but reserving sentencing pending a presentence investigation. On February 12, 1996, the trial court entered final judgment sentencing Stone to ten years on the second-degree rape charge and five years on each of the two sexual abuse charges. The sexual abuse sentences were ordered to run concurrently with each other, but to run consecutively with the rape sentence, for a total of fifteen years to serve.

On June 20, 1997, Stone filed a motion captioned "Motion to Correct Sentence Motion to Correct Illegal Sentence." The motion, citing RCr<sup>5</sup> 11.42, sought to have Stone's sentences run concurrently on the basis that the consecutive sentencing was a violation of Stone's constitutional rights, including a violation of double jeopardy rules. On July 15, 1997, the trial

---

<sup>3</sup>KRS 510.110.

<sup>4</sup>KRS 510.050.

<sup>5</sup>Kentucky Rules of Criminal Procedure.

court entered an order denying the motion. No appeal was taken from this order.

On June 30, 1999, Stone filed a motion to "Modify-Amend or Vacate Judgement Pursuant to RCr 13.04 and CR 60.02." The motion alleged that the investigating officer violated Stone's Miranda rights, that his convictions were obtained without sufficient evidence, and that his guilty plea was invalid because it was not made knowingly, intelligently, and voluntarily. The filing also included a letter from the victim stating that Stone had not raped her and that "[w]hat [she] thought was rape wasn't [because] there was no sexual intercourse." On August 10, 1999, the trial court entered an opinion and order denying the motion. Stone filed an appeal to this Court; however, on April 19, 2000, the Court dismissed the appeal because Stone failed to file a brief.<sup>6</sup>

In the meantime, on January 12, 2000, Stone filed a "Motion for Permission to Refile CR 60.02 Under Newly Discovered Evidence." On January 19, 2000, the trial court entered an order granting the motion but holding the matter in abeyance pending this Court's ruling on the then pending appeal. Apparently as a result of the trial court's granting of his motion to refile, on February 23, 2000, Stone filed a "CR 60.02 Motion to Run Sentences Concurrently." The motion sought to have his sentences run concurrently on the basis that he received a sentence of "180 months [sic]" for the rape conviction whereas the "average length of sentence handed down on rape convictions nationwide is roughly

---

<sup>6</sup>See Court of Appeals Case No. 1999-CA-002060.

127 months[.]” Stone also attached to the filing the notarized affidavit of the victim which, again, recanted the rape allegation. The affidavit stated, in part, “Billy did NOT rape me, and I’m not going to go into it any further than that.”

On March 23, 2001, the trial court entered an order denying Stone’s motion on the basis that Stone had stated no grounds and offered no proof for which relief may be granted under CR 60.02. On April 2, 2001, Stone filed a motion to vacate the order denying CR 60.02 relief. On April 10, 2001, the trial court entered an order denying the motion to vacate. This appeal followed.

On appeal, Stone contends that his sentence should be modified to run his sentences concurrently because his sentence is excessive when compared to the sentences received by other persons convicted of similar crimes, and because the sworn affidavit of the victim states that he did not rape her or have sexual intercourse with her. CR 60.02 provides as follows:

On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time, and on grounds (a),

(b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.

Grounds for relief based upon the purported statistical study does not clearly fall within any of the subsection categories of CR 60.02. However, rather than attempt to classify which category of the rule this grounds falls within and whether the grounds falls within the one year limitations period, we will simply note that Stone's allegation that his sentence is excessive in comparison with other convicted rapists is based upon a flawed analysis. While we do not in any way accept the purported statistical study as valid, we note that Stone contends that the average length of a sentence handed down in a rape conviction nationwide is approximately 127 months. In fact, pursuant to the plea agreement, Stone was sentenced to 120 months for his second-degree rape conviction, which, according to the statistics advanced by Stone, is less than the national average. Hence, based upon the study relied upon by Stone, his rape sentence is less than the national average, and the study weighs against his argument that he is entitled to relief because of an excessive sentence.<sup>7</sup>

The recantation evidence most closely falls within CR 60.02(c), perjured or falsified evidence, and a motion for relief upon this ground was required to be brought within one year of

---

<sup>7</sup>In arriving at the 180 month figure, Stone apparently added the 60 months he received for the two first-degree sexual abuse convictions to the 120 months he received for the rape conviction. This is obviously not a valid calculation to determine the sentence he received for the rape conviction.

the judgment.<sup>8</sup> Final judgment was entered on February 12, 1996, and the present CR 60.02 motion was filed on February 23, 2000 - well beyond the one year limitations period. Further, the victim's initial recantation letter was filed into the record on November 18, 1997. Stone failed to file a CR 60.02 motion even within one year of the date of the original recantation.<sup>9</sup>

Moreover,

[t]he 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.<sup>10</sup>

We construe the trial court's denial of Stone's CR 60.02 motion as, in part, a rejection of the victim's recantation. We discern no basis for disturbing the trial court's disposition of the issue.

---

<sup>8</sup>CR 60.02.

<sup>9</sup>Pursuant to Commonwealth v. Spaulding, Ky., 991 S.W.2d 651 (1999), a conviction based on perjured testimony can be a reason of an extraordinary nature justifying relief pursuant to CR 60.02(f), and therefore not subject to the one year limitations period, if the perjury resulted in a violation of due process of law. Here, however, Stone knowingly and voluntarily entered a guilty plea to second-degree rape, and in conjunction therewith, his due process rights were rigorously observed. We are not persuaded that the circumstances of this case invoke CR 60.02(f).

<sup>10</sup>Thacker v. Commonwealth, Ky., 453 S.W.2d 566, 568 (1970).

For the foregoing reasons the judgment of the Fayette  
Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Billy J. Stone, Jr., *pro se*  
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III  
Attorney General of Kentucky

George G. Seelig  
Assistant Attorney General  
Frankfort, Kentucky