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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000786-MR

KEVIN BARKER — APPELLANT

v.

APPEAL FROM McCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 97-CR-00155

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: Kevin Barker has appealed from an order entered by the McCracken Circuit Court on March 25, 2002, which denied his CR[1] 60.02(d) motion for relief from his conviction for sexual abuse in the first degree.[2] Having concluded that the trial court properly denied Barker's CR 60.02(d) motion, we affirm.

[1] Kentucky Rules of Civil Procedure.

[2] Kentucky Revised Statutes (KRS) 510.110.

On May 16, 1997, a McCracken County grand jury returned an indictment against Barker charging him with one count of sexual abuse in the first degree. The indictment alleged that Barker subjected his daughter, P.B., to sexual contact "[b]efore and during December, 1996[.]" On June 23, 1997, Barker entered a plea of not guilty and the case proceeded to trial.[3] At the jury trial, P.B., who was five-years old at the time, testified during the Commonwealth's case-in-chief that her father had sexually abused her on more than one occasion. More specifically, P.B. testified that on one occasion in particular, her father held her down and made her watch pornographic movies while he placed his fingers in her genital area.

Based on observations by the trial judge that P.B. appeared to be nervous and confused, the trial judge, sua sponte, decided to question P.B. outside of the presence of the jury. The trial judge asked P.B. if anyone in the audience was bothering her as it appeared to him that she kept looking in the same place each time she was asked a question. P.B. explained that she was looking at Kim and Lameta. The trial judge then asked P.B. who Kim and Lameta were and P.B. explained that Kim

[3] A mistrial was granted on October 31, 1997, due to certain improper comments made by the trial court during voir dire. Shortly thereafter, the case was reset for trial.

was her aunt and Lameta was her cousin.[4] In closing, the trial judge asked P.B. if anyone in the audience was attempting to help her answer the questions posed by the attorneys, to which P.B. responded in the negative. P.B. was subsequently excused and the Commonwealth proceeded with its case-in-chief.[5]

The Commonwealth's evidence also included testimony from several witnesses who testified concerning statements that P.B. had made to them regarding Barker's alleged acts of sexual abuse. Barker, who was not present during any portion of P.B.'s testimony, testified in his own defense and denied sexually abusing his daughter.[6]

On January 7, 1998, the jury found Barker guilty of sexual abuse in the first degree. The jury recommended a prison sentence of one year; however, the jury further recommended that Barker's sentence "be suspended in lieu of his receiving intensive counseling." On February 20, 1998, the trial court sentenced Barker to a prison term of one year, but it ordered the sentence to be probated for a period of five years. Barker did not file a direct appeal.

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[4] As it turns out, Lameta is in fact Barker's ex-wife and of no relation to P.B.

[5] Barker's trial counsel did not raise any objection to P.B.'s testimony during or immediately following the trial.

[6] Barker was not excluded from the courtroom pursuant to any court order; he chose not to be present during P.B.'s testimony based on the advice of his counsel.

On February 21, 2002, four years after Barker had been sentenced by the trial court, he filed a motion for relief from judgment pursuant to CR 60.02(d). Barker claimed his conviction was obtained by "fraud affecting the proceedings." More specifically, Barker claimed that P.B. had been coached or influenced while on the witness stand by his ex-wife, Lameta. In support of his motion, Barker attached several affidavits signed by courtroom spectators who were present during P.B.'s testimony. All of the affidavits suggested that while P.B. was on the witness stand, she had been somehow coached or influenced by Lameta. The Commonwealth claimed that Barker's CR 60.02 motion was time-barred as it was predicated upon an allegation of perjured or falsified evidence which is subject to a one-year time limitation. On March 25, 2002, the trial court summarily denied Barker's CR 60.02 motion. This appeal followed.

Barker argues on appeal that his CR 60.02 motion is not time-barred as the one-year limitation applicable to motions filed pursuant to CR 60.02(a), (b), and (c) does not apply to claims brought under CR 60.02(d). 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.

As noted above, a motion alleging "fraud affecting the proceedings, other than perjury or falsified evidence" must be brought "within a reasonable time."[7] Consequently, Barker insists that he is alleging "fraud affecting the proceedings" and that he is not seeking relief on the issue of whether P.B. committed perjury or falsified evidence. Barker cites Terwilliger v. Terwilliger,[8] in primary support of this contention.

In Terwilliger, the Supreme Court of Kentucky held that "fraud on a party is, in fact, 'fraud affecting the proceedings.'"[9] The case arose out of a settlement agreement entered into between Thomas and Judith Terwilliger, which, among

[7] CR 60.02.

[8] Ky., 64 S.W.3d 816 (2002).

[9] Id. at 818.

other things, divided the couple's marital property and debts.[10] The Terwilligers owned several closely-held corporations which were subject to division as marital property. Thomas represented to Judith that those corporations, including TransAmerica Cable, were experiencing financial difficulties and that TransAmerica was nearly bankrupt. Based upon Thomas's representations, Judith entered into a property settlement agreement, whereby she agreed to accept unencumbered stock equaling 10% of the value of the companies owned by the couple. Thomas valued this 10% interest at $11,000.00. Thomas was to receive stock equaling 90% of the value of the companies owned by the couple, which he valued at $100,000.00. Thomas also assumed the corporate debt. The final decree of dissolution, which incorporated the marital settlement agreement by reference, was entered on January 6, 1994. Less than one month after the divorce decree was entered, Thomas entered into an agreement to sell TransAmerica for approximately $1,600,000.00. Consequently, on December 8, 1994, Judith moved to reopen the decree of dissolution pursuant to CR 60.02(d), arguing that the settlement agreement had been procured through "fraud,

[10] The settlement agreement also sought to provide for custody, visitation, and support of the couple's two minor children. Id. at 817.

misrepresentation, lack of full disclosure, and overreaching on the part of Mr. Terwilliger."[11]

The family court granted Judith's CR 60.02 motion and modified the property division, awarding Judith $384,166.50. Thomas appealed the modification to this Court, arguing, inter alia, that his actions did not amount to "fraud affecting the proceedings" as contemplated by CR 60.02(d).[12] This Court reversed the family court's order modifying the property settlement, holding that Thomas's "conduct did not constitute 'fraud affecting the proceeding[s]' within the meaning of CR 60.02(d), and therefore, the reopening was improper."[13] This Court cited Rasnick v. Rasnick,[14] in primary support of its holding.

The Supreme Court reversed, holding that "the definition of 'fraud affecting the proceedings' utilized by the Court in Rasnick is an overly restrictive conception of CR 60.02(d)."[15] The Court went on to conclude that "by filing a settlement agreement with knowingly undervalued marital assets, Mr. Terwilliger used the proceedings as a tool to defraud his

[11] Id.

[12] Id.

[13] Id. at 818.

[14] Ky.App., 982 S.W.2d 218 (1998) (holding that CR 60.02(d) applies only to extrinsic fraud, i.e., fraud committed outside the court proceedings).

[15] Terwilliger, 64 S.W.3d at 818.

wife."[16] In discussing the distinction between CR 60.02(c) and (d), the Supreme Court made the following observation, which is particularly relevant here:

> [CR 60.02], however, does distinguish between fraud affecting the proceedings . . . and the presentation of perjury or falsified evidence, which is clearly a fraud upon the court. This distinction is important because the latter can be raised only "not more than one year after the [judgment]," [ ], while the former must be "made within a reasonable time." Thus, it appears that fraud perpetrated in the courtroom or through testimony under oath is subject to a one-year limitation while fraud occurring outside the courtroom that interferes with presentation of the losing party's evidence to the extent that he or she is "prevented from appearing or presenting fully and fairly his side of the case" is not subject to that limitation [emphasis added].[17]

While we agree with Barker that Terwilliger expanded the grounds for relief contained in CR 60.02(d) by construing the phrase "fraud affecting the proceedings" to include "fraud on a party," we agree with the Commonwealth that the gist of Barker's CR 60.02 motion concerns allegations of "fraud perpetrated in the courtroom or through testimony under

[16] Id.

[17] Id. at 818-19 (citing 7 Kurt A. Philipps, Jr., Kentucky Practice, CR 60.02, cmt. 6, (5th ed. 1995)). In the same comment, however, Philipps notes that "[i]t may be said the language specifying this ground is quite broad and allows for flexibility in the determination of what constitutes fraud affecting the proceedings." Id. Nevertheless, we are of the opinion that certain outer limits, however broad they may be, must be said to exist; otherwise the distinction between CR 60.02(c) and (d) would cease to have any practical application whatsoever.

oath[.]"[18] Thus, Terwilliger provides little analytical support for the contentions raised by Barker on appeal. The allegations raised by Barker in his CR 60.02 motion are procedurally barred as they are subject to the one-year time limitation applicable to motions brought pursuant to CR 60.02(a),(b), and (c).

Even if we were to construe the allegations raised by Barker in his CR 60.02 motion as falling within the definition of "fraud affecting the proceedings," his motion is still procedurally barred as he has failed to establish precisely why this issue could not have been raised on direct appeal. As the Supreme Court explained in McQueen v. Commonwealth,[19] "CR 60.02 is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings."[20] Stated otherwise, "CR 60.02 is not an appellate vehicle."[21] CR 60.02 is limited to relief that is not available by direct appeal.[22]

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[18] Id. Barker attempts to place himself within the ambit of CR 60.02(d) by claiming that "[t]he gravamen of his motion is that the trial court, acting sua sponte to what it perceived as problems with the victim's demeanor under examination, was misled as to the child victim's relationship with a courtroom spectator." We fail to see the relevancy of this contention; however, as we do not believe the identity of the individual who allegedly influenced P.B. while she was on the witness stand is critical.

[19] Ky., 948 S.W.2d 415 (1997).

[20] Id. at 416.

[21] Faris v. Stone, 103 S.W.3d 1, 4 (2003)(citing McQueen, supra at 416).

[22] See, e.g., Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856 (1983).

Barker seeks to bypass this procedural impediment by claiming that he "was only made aware of the issue upon viewing the videotape [of his trial]," which was obtained by his CR 60.02 counsel prior to the filing of his CR 60.02 motion.[23] Underlying this contention is the implicit assumption that the videotape of Barker's trial was not "available to him" until it is was obtained by his CR 60.02 counsel. However, we cannot accept this assumption, since Barker has failed to explain precisely why the videotape of his trial was made "available to him" only upon the directive of his CR 60.02 counsel. Barker clearly could have obtained a copy of the proceedings for the purpose of filing a timely direct appeal had he so desired. There is nothing to indicate that Barker was precluded from raising this issue on direct appeal, other than through his own inaction.[24]

Based upon the foregoing reasons, the order of the McCracken Circuit Court denying Barker's CR 60.02 motion is affirmed.

ALL CONCUR.

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[23] As previously discussed, Barker chose not be present in the courtroom during any portion of P.B.'s testimony based on the advice of his counsel.

[24] While Barker may also seek to allege that his trial counsel was ineffective by failing to file a motion for a new trial or a direct appeal, under Kentucky Rules of Criminal Procedure 11.42(10) such a motion would also be time-barred.

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