RENDERED: OCTOBER 15, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001252-MR

B.W.[1] APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 89-CR-00829

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, JOHNSON, AND MINTON, JUDGES.

JOHNSON, JUDGE: B.W. appeals pro se from an order of the Warren Circuit Court entered on May 19, 2003, denying his motion to vacate judgment or for reduction of sentence filed pursuant to CR[2] 60.02(f), and his motion for a new trial filed pursuant to

[1] The parties will be referred to by initials to protect the interests of the minor children.

[2] Kentucky Rules of Civil Procedure.

RCr[3] 10.06 and RCr 10.26. Having concluded that the trial court did not err in denying the motions, we affirm.

In November 1989 B.W. was indicted on three counts of sodomy in the first degree,[4] two counts of sexual abuse in the first degree,[5] one count of rape in the first degree,[6] two counts of criminal abuse in the first degree,[7] one count of incest,[8] and being a persistent felony offender in the first degree (PFO I).[9] The charges arose from alleged sexual activity with B.W.'s five-year-old daughter, M.W., and his four-year-old son, J.W., and the infliction of burns on the two children. Following a trial held on January 23-24, 1990, a jury found B.W. guilty of one count of sodomy in the first degree, rape in the first degree, two counts of sexual abuse in the first degree, and two counts of criminal abuse in the first degree.[10] The jury recommended sentences of 40 years on each the sodomy and rape convictions,

[3] Kentucky Rules of Criminal Procedure.

[4] Kentucky Revised Statutes (KRS) 510.070.

[5] KRS 510.110.

[6] KRS 510.040.

[7] KRS 508.100.

[8] KRS 530.020.

[9] KRS 532.080(2).

[10] At the close of the Commonwealth's case, the trial court directed a verdict of acquittal on two counts of sodomy in the first degree. At the close of the guilt phase and prior to the sentencing phase, the trial court granted the Commonwealth's motion to dismiss the PFO I count. The trial court instructed the jury that the incest count was an alternative to the rape offense.

and five years on each of the remaining convictions to run concurrently with each other for a total sentence of 40 years. On March 3, 1990, the trial court sentenced B.W. to serve 40 years in prison consistent with the jury's recommendation. On direct appeal, the Supreme Court of Kentucky reversed the two convictions for sexual abuse in the first degree but affirmed all of the other convictions.[11]

On July 18, 1994, B.W. filed a pro se motion to vacate judgment pursuant to RCr 11.42 alleging ineffective assistance of counsel due to counsel's alleged failure to move for severance of the charges and a separate trial on each of the offenses, counsel's allegedly providing incorrect parole eligibility information in connection with explaining the Commonwealth's offer on a plea of guilty, and counsel's alleged failure to procure a medical expert witness for the defense to examine the children in order to provide possible testimony to rebut the Commonwealth's medical expert witness. On January 3, 1995, private counsel filed a supplemental motion to B.W.'s original pro se RCr 11.42 motion raising several other claims of ineffective assistance of counsel such as counsel's alleged failure to effectively cross-examine the Commonwealth's witnesses, to subpoena witnesses requested by B.W., to

[11] B.W. v. Commonwealth, 90-SC-0237-MR, rendered June 6, 1991 (not-to-be-published opinion).

sufficiently discuss the case with B.W., to prepare for trial, and to file a motion for change of venue. Following a response by the Commonwealth, the trial court conducted evidentiary hearings on the motion on March 15, March 21, and April 12, 1995. On May 17, 1995, B.W.'s attorney filed a combined memorandum in support of the RCr 11.42 motion and motion for a new trial pursuant to CR 10.06 based on newly discovered evidence, which involved witnesses and information concerning alleged sexual contact between M.W. and other persons associated with and romantically linked to B.W.'s wife. The Commonwealth filed a response and B.W. filed a reply to the response. On April 10, 1996, the trial court entered an order denying both the RCr 11.42 and RCr 10.06 motions, which was appealed.

On May 10, 1996, while the order denying the RCr 11.42 and RCr 10.06 motions was pending on appeal, B.W. filed a pro se motion to vacate or correct sentence pursuant to CR 60.02(f) and RCr 10.26 concerning testimony in the penalty phase of his trial dealing with his parole eligibility. On July 11, 1996, the trial court denied the CR 60.02/RCr 10.26 motion to vacate based on an absence of prejudice, which was appealed. On July 1, 1998, B.W. filed a second CR 60.02(f)/RCr 10.26 motion to vacate based on a lack of evidence to support venue in Warren County. On November 5, 1998, the trial court denied this second CR 60.02 motion, which was appealed.

On July 31, 1998, this Court rendered an Opinion affirming the trial court's denial of B.W.'s RCr 11.42 motion and first CR 60.02 motion.[12] This Court held that B.W. failed to establish ineffective assistance of counsel or prejudice from the parole eligibility testimony. On January 28, 2000, this Court issued another opinion affirming the trial court's denial of the second CR 60.02 motion because a conviction is not subject to post-conviction attack on the ground of insufficiency of proof of venue and the issue could have been raised in the RCr 11.42 motion.[13]

On January 28, 2003, B.W. filed the pro se motion to vacate or reduce sentence pursuant to CR 60.02(f) and motion for a new trial pursuant to RCr 10.06 and RCr 10.26 involved in the current appeal. B.W. challenged his rape conviction based on alleged newly-discovered evidence consisting of statements in a four-page letter dated May 13, 2002, written by M.W. to B.W., in which she said, "[a]nd no you didn't rape me but you did malist [sic] me which is the same. There is physical evidence of what happened because I have scares [sic]." On May 19, 2003, the trial court denied the motion noting the numerous previous post-judgment motions B.W. had already filed. B.W. filed a motion

[12] B.W. v. Commonwealth, 1996-CA-000167-MR and 1996-CA-002076-MR (not-to-be-published opinion).

[13] B.W. v. Commonwealth, 1998-CA-002877-MR (not-to-be-published opinion).

for rehearing, which the trial court summarily denied on May 6, 2003. This appeal followed.

As an initial matter, the trial court implied, and the Commonwealth argues, that B.W.'s motions were subject to dismissal as repetitive. The Commonwealth cites Lycans v. Commonwealth,[14] which is distinguishable because it deals with multiple RCr 11.42 motions. The Supreme Court of Kentucky has indicated that a CR 60.02 motion is not available under waiver principles for issues that could or should have been raised on direct appeal or by way of an RCr 11.42 motion.[15] However, B.W.'s current motions are predicated on statements made by the victim, M.W., in a May 2002 letter that she wrote to B.W. The Commonwealth has not shown and the record does not reveal that the existence and ramifications of these statements have been or could have been raised in the earlier motions. We conclude that B.W.'s request for relief is more appropriately subject to treatment as newly-discovered evidence and is not barred as a successive motion.[16] Accordingly, although B.W.'s CR 60.02 motion refers to subsection (f), his motion actually falls under

[14] Ky., 511 S.W.2d 232 (1974).

[15] See Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856 (1983); McQueen v. Commonwealth, Ky., 948 S.W.2d 415, 418 (1997); and Barnett v. Commonwealth, Ky., 979 S.W.2d 98, 101 (1998).

[16] See also Commonwealth v. Spalding, Ky., 991 S.W.2d 651, 654-55 (1999) (holding second CR 60.02 motion not barred by issue preclusion aspect of res judicata where issue was not determined in prior proceeding).

subsection (b) because subsection (f), the catchall provision, can apply only if none of the specific provisions apply to the situation.[17] This approach is underscored by the fact that B.W. also cited RCr 10.06 and stated his grounds for relief as newly-discovered evidence.

Generally, a motion for relief under CR 60.02(b) or RCr 10.06(1) must be made within one year after entry of the judgment. While the time limit in CR 60.02(b) is absolute,[18] RCr 10.06 allows the trial court to extend the period for filing a new trial motion based on newly-discovered evidence "if the court for good cause so permits." B.W. did not ask the trial court to make such a ruling despite the nearly 13-year period since the trial and the trial court did not sua sponte address the issue. The movant has the burden of showing that the motion for a new trial was filed timely.[19] Thus, B.W.'s motions arguably are procedurally barred as untimely.

In addition to the timeliness question, B.W.'s claim is unpersuasive on the merits. Whether to grant a new trial is within the discretion of the trial court and the standard of review on appeal is whether the trial court abused its

[17] See Alliant Hospitals, Inc. v. Benham, Ky.App., 105 S.W.3d 473, 478 (2003) (applying subsection (b) rather than subsection (f))(citing Spalding, 991 S.W.2d at 651).

[18] See Meredith v. Commonwealth, Ky., 312 S.W.2d 460 (1958).

[19] See Perkins v. Commonwealth, Ky., 442 S.W.2d 310, 311 (1969).

discretion.[20] In order to justify a new trial the defendant must rebut the presumption that the verdict is correct and also show that based on newly-discovered evidence, the new or additional evidence "is of such decisive or conclusive nature 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."[21] The granting of a new trial is disfavored when the newly-discovered evidence is merely cumulative or impeaching unless it impeaches the only material witness in the case.[22] Hearsay evidence that a trial witness made a statement following trial that was inconsistent with his trial testimony usually is insufficient.[23] Even statements by witnesses recanting their trial testimony are viewed with suspicion and rarely will justify a new trial.[24]

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[20] See Caldwell v. Commonwealth, Ky., 133 S.W.3d 445, 454 (2004); and Carwile v. Commonwealth, Ky.App., 694 S.W.2d 469, 470 (1985).

[21] Gilbert v. Commonwealth, Ky., 317 S.W.2d 175, 176 (1958); Commonwealth v. Tamme, Ky., 83 S.W.3d 465, 468 (2002) (citing Collins v. Commonwealth, Ky., 951 S.W.2d 569, 576 (1997)); Caldwell, 133 S.W.3d at 454.

[22] Foley v. Commonwealth, Ky., 55 S.W.3d 809, 814 (2000). See also Epperson v. Commonwealth, Ky., 809 S.W.2d 835, 841 (1991); and Collins, supra.

[23] See Caldwell, 133 S.W.3d at 455; Coots v. Commonwealth, Ky., 418 S.W.2d 752, 754 (1967) (stating that a post-trial statement by the prosecutrix to a police officer that defendant had not molested her, which contradicted her trial testimony of forcible sexual intercourse, was insufficient for new trial because it was merely impeaching); and Alford v. Commonwealth, 244 Ky. 27, 50 S.W.2d 1, 2 (1932) (stating that alleged post-trial statements of prosecution witnesses contradicting trial testimony that deceased victim was not armed was insufficient for new trial as merely impeaching).

[24] See Carwile, 694 S.W.2d at 470 (citing Hensley v. Commonwealth, Ky., 488 S.W.2d 338 (1972)).

In this case M.W. testified at trial that B.W. “played nasty with her.” She described and demonstrated with anatomically correct dolls one specific incident where B.W. placed her on his lap as he was sitting on the toilet, held her around the waist, and lifted her up and down. At the time, both M.W. and B.W. were naked and facing each other. When asked by the prosecutor if this act hurt her, M.W. said no and “it wouldn’t fit,” pointing to the penis on the male doll. In response to the prosecutor’s question what she meant by “it wouldn’t fit,” M.W. indicated that her father’s penis “couldn’t stay” in her “private part.” During the trial, a videotaped interview of M.W. with a social worker in which M.W. stated that her father put his “weenie” in her “booty,” pointing to her vagina, was also introduced. She further demonstrated the act with two anatomically correct dolls.

In addition, Dr. Sowell testified that M.W.’s hymen or vaginal opening was abnormally enlarged, and that she had a small tear of her posterior fourchette, which is discrete skin tissue just inside the vagina. Dr. Sowell also testified that when she asked M.W. about this condition, M.W. stated that her “daddy” did it with his “weenie.” Dr. Sowell stated that the vaginal injuries to M.W. were consistent with penetration by a penis.

B.W. contends that the newly-discovered evidence consisting of M.W.'s statement in her May 2002 letter that B.W. did not rape her undermines the validity of his rape conviction. He also maintains that M.W.'s trial statements that "it wouldn't fit" and that it did not hurt in describing the bathroom incident are inconsistent with his having raped her.

While M.W.'s trial testimony may have been somewhat oblique, her statements "it wouldn't fit" and it "could not stay" in her "private part" imply an attempt at sexual intercourse and are not inconsistent with some penetration. Moreover, in the videotaped interview with the social worker, M.W. clearly stated and demonstrated with the dolls that B.W. inserted his penis into her vagina. The offense of rape requires only "slight" penetration,[25] which is often not understood by the layperson. M.W.'s description of the bathroom incident more clearly demonstrates an act of sexual contact consistent with rape. Indeed, M.W. did not recant her trial testimony in her recent letter and restated that B.W. had molested her. M.W.'s statement that B.W. did not rape her was at best useful for impeachment, and she was not the sole material witness. Dr. Sowell provided unrefuted testimony of the existence of vaginal trauma, which M.W. identified was

[25] See KRS 510.040 and KRS 510.010(8) (stating "sexual intercourse occurs upon any penetration, however slight. . .").

caused by B.W., that the doctor opined was consistent with penile penetration. The jury obviously relied heavily on Dr. Sowell's testimony. Viewing the record as a whole, we conclude that B.W. has not shown that the newly-discovered evidence was so decisive or so forceful that it would, with reasonable certainty, have changed the original verdict or probably would change the result if a new trial were granted. B.W. has failed in his attempt to gain a new trial to satisfy his burden of overcoming the policy favoring finality of judgments.[26] As a result, although for different reasons, we hold that the trial court did not err in denying B.W.'s motion to vacate and motion for a new trial.

For the foregoing reasons, the order of the Warren Circuit Court is affirmed.

ALL CONCUR.

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[26] B.W. also cites RCr 10.26, the palpable or substantial error rule, as a part of his motion for a new trial. It would appear that the rule may not be applicable because B.W.'s claim concerns newly-discovered evidence not available at the time of trial. He has not identified any alleged error that occurred during the trial but merely claims the original verdict is unreliable given the new evidence. Nevertheless, for the same reasons discussed with reference to RCr 10.06, B.W. has not shown manifest injustice affecting his substantial rights as required by RCr 10.26.