

RENDERED: February 4, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2002-CA-002275-MR

JAMES FRANK DUNAWAY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 98-CR-002133

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, MINTON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: James Frank Dunaway brings this pro se appeal from an October 11, 2002, order of the Jefferson Circuit Court denying Dunaway's Ky. R. Civ. P. (CR) 60.02 motion requesting a new trial. We affirm.

In August 1998, Dunaway was indicted by the Jefferson County Grand Jury upon three counts of robbery in the first degree and with being a persistent felony offender in the first degree. The indictment also charged two co-defendants (Terrance Lee Tabb and Russell Otis Riggs) with, *inter alia*, three counts

of robbery in the first degree. The two co-defendants ultimately entered guilty pleas. Dunaway was tried before a jury, and the jury convicted him of two counts of robbery in the first degree. Before sentencing, Dunaway accepted a plea bargain offered by the Commonwealth; whereby, he would plead guilty in exchange for a twenty-year sentence. Thereafter, appellant entered a conditional plea of guilty reserving the right to appeal the issue of whether he received a speedy trial. On August 26, 1999, Dunaway was sentenced to a total of twenty years' imprisonment. Dunaway's direct appeal was affirmed by the Kentucky Supreme Court in Appeal No. 1999-SC-0886-MR.

On February 2002, Dunaway filed a CR 60.02 motion requesting a new trial. Therein, he alleged that a fellow inmate, Michael Ford, had confessed to one of the robberies for which he was convicted and had signed an affidavit to that effect. The circuit court held an evidentiary hearing and several witnesses testified. By order entered October 11, 2002, the Jefferson Circuit Court denied Dunaway's CR 60.02 motion. This appeal follows.

Dunaway contends the circuit court abused its discretion in denying his CR 60.02 motion. Specifically, Dunaway claims the circuit court committed error by holding that Michael Ford's confession lacked credibility and by determining

that such confession would not have changed the result of the jury's determination of appellant's guilt. We disagree.

It is well established that the circuit court is vested with broad discretion in determining the validity of a CR 60.02 motion and that such discretion will not be disturbed on appeal except for a clear abuse thereof. Brown v. Commonwealth, 932 S.W.2d 359 (Ky. 1996). The Supreme Court has held that "relief should not be granted, pursuant to Rule 60.02(f), unless the new evidence, if presented originally, would have, with reasonable certainty, changed the result." Id. at 362.

At the evidentiary hearing upon the CR 60.02 motion, Detective Duane Colebank was called to testify on behalf of the Commonwealth. He stated that Dunaway's ex-girlfriend called him and stated that Dunaway had persuaded someone at the prison to confess to the robbery. Detective Colebank further testified that he requested prison officials to search Michael Ford's cell. Additionally, the detective testified that the cash counter at the robbed premises was not straight but was circular, like a horse shoe. From the video of the robbery, Detective Colebank stated it was clear that the robber entered from one direction and left in the other direction.

Upon searching Ford's cell, discovery from appellant's case was found. Specifically, a picture of the weapon used in

the robbery, an interview with Terrance Tabb about the robbery and pictures of Russell Riggs were found within Ford's cell.

Michael Ford also testified at the evidentiary hearing. He stated that he was serving a life sentence without parole. He had entered a guilty plea to two counts of complicity to murder and two counts of kidnapping. As to the robbery, Ford testified that he entered and left the premises in the same direction. He also testified that the cashier counter at the premises was straight, not round.

It is clear that Ford's testimony concerning his alleged involvement in the robbery contained a multitude of inaccuracies. For example, he testified that the counter was straight, when in fact it was not, and he testified that when committing the robbery he walked into the premises and left the premises from the same direction. This testimony contradicted the video taken at the time of the robbery. Also, Ford is currently serving a life sentence without parole and a conviction for this robbery would add no additional prison time to his sentence. We are particularly impressed by the fact that discovery from Dunaway's case was found in Ford's cell at the prison. Ford gave no explanation for this discovery to the circuit court. Taken together, we must conclude, as did the circuit court, that the new evidence of Ford's confession would not within a reasonable degree of certainty have changed the

jury's finding of guilt. See id. Accordingly, we are of the opinion the circuit court did not err by denying Dunaway's CR 60.02 motion.

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

ALL CONCUR.

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