

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002080-MR

OTHANIEL CANTRELL NOURSE

APPELLANT

v. APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NOS. 02-CR-00203 AND 02-CR-00220

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: ABRAMSON AND SCHRODER, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.
SCHRODER, JUDGE: Othaniel Cantrell Nourse appeals from an order of the Logan Circuit Court denying his motion filed pursuant to CR 60.02(f). We conclude the circuit court ruled correctly and hence, affirm.²

¹ Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² The Court notes that the record filed in this Court is limited to the proceedings related to the CR 60.02 motion. However, appellee has attached to its brief appellant's petition for rehearing filed in the Supreme Court and the Commonwealth's response. Appellant did not request supplementation of the record and has raised no objection or argument that the pleadings are

This case is inextricably linked to that of Denarrius Terry. The charges against Nourse stemmed from the murder and robbery of Theodore Suggs early on December 25, 2001. Terry was initially charged with the murder and robbery, and a jury found him guilty. At Terry's trial, Nourse invoked his Fifth Amendment right not to testify. On appeal to the Kentucky Supreme Court, Terry's conviction was reversed based on the erroneous admission into evidence of out-of-court statements of Nourse which inculpated Terry.

On February 6, 2003, a jury found Nourse guilty of tampering with physical evidence, possession of a handgun by a convicted felon, being a second-degree persistent felony offender and complicity to murder. The trial court subsequently granted Nourse's motion for judgment notwithstanding the verdict on the complicity conviction. Nourse was ultimately sentenced to a maximum of twenty years in prison.

The evidence presented at Nourse's trial showed that he lent a handgun to Terry, that Terry returned the handgun thirty minutes later and that Nourse admitted to police that he threw the spent bullet casings down a storm drain shortly thereafter. The weapon was recovered under a mattress in the bedroom of Nourse's residence.

not those filed in the Supreme Court. The factual and procedural history is gleaned from the Supreme Court docket, the Circuit Court docket and the opinions rendered in Commonwealth v. Nourse, 177 S.W.3d 691 (Ky. 2005) and Terry v. Commonwealth, 153 S.W.3d 794 (Ky. 2005).

Nourse appealed his conviction to the Kentucky Supreme Court. On September 2, 2005, before the Supreme Court rendered an opinion in Nourse's direct appeal, a second jury acquitted Terry of all charges. On September 15, 2005, Nourse filed the CR 60.02 motion which is the subject of this appeal. At the same time, Nourse filed a motion pursuant to CR 60.04 to hold the direct appeal in abeyance until the circuit court ruled on the CR 60.02 motion. The Kentucky Supreme Court rendered an opinion affirming Nourse's conviction on September 22, 2005. On September 26, 2005, Nourse filed a motion to withdraw the opinion affirming, or, in the alternative, for additional time to file a petition for rehearing. On September 29, 2005, the circuit court denied appellant's CR 60.02 motion. On October 6, 2005, the Supreme Court denied the motion to hold the appeal in abeyance and the motion to withdraw the opinion, but granted the motion for additional time to file a petition for rehearing. Nourse then filed a petition for rehearing on October 10, 2005, wherein he argued that it was error for the Supreme Court not to hold the appeal in abeyance in order to allow the circuit court to rule on the CR 60.02 motion, and that Nourse's conviction could not stand in light of the acquittal of Terry because the conviction was now unsupported by the evidence. On December 22, 2005, the Supreme Court denied the petition for rehearing.

We only have before us Nourse's appeal of the circuit court's denial of the CR 60.02 motion. The issue raised on appeal can be summarized as whether Nourse can be guilty of tampering with physical evidence in disposing of casings in a gun used by Dennarius Terry in a murder, if Terry has since been acquitted of the murder charge.

Having reviewed the record of the hearing, we believe that the trial court's analysis was correct - that Terry's conviction or acquittal simply did not matter. As held by the Supreme Court in Nourse's direct appeal, the evidence was sufficient to convict Nourse of tampering with physical evidence when he disposed of the spent casings at 2:30 a.m., after lending his gun to Terry just thirty minutes earlier.

KRS 524.100 states:

- (1) A person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, he:
 - (a) Destroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or used in the official proceeding with intent to impair its verity or availability in the official proceeding; or
 - (b) Fabricates any physical evidence with intent that it be introduced in the official proceeding or offers any physical evidence, knowing it to be fabricated or altered.

It was not necessary for the Commonwealth to prove that Terry committed the murder and robbery. All that was necessary was sufficient proof that Nourse **believed** that an official proceeding may be instituted and thus believing, attempted to destroy, mutilate or conceal evidence. Neither was it necessary for the Commonwealth to present an alternative theory for Suggs' murder, as urged by appellant. The evidence showed that Suggs was murdered with Nourse's gun just shortly after he lent it to Terry. When the weapon was returned, Nourse attempted to conceal or destroy the shell casings.

For the aforementioned reasons, the order of the Logan Circuit Court is affirmed.

ALL CONCUR.

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