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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000632-MR

MICHAEL ADAMS — APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE WILLIAM ENGLE III, JUDGE
ACTION NO. 03-CR-00180

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND THOMPSON, JUDGES; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: Michael Adams appeals from the Perry Circuit Court's denial of his motion, made under the provisions of Kentucky Rules of Civil Procedure (CR) 60.02, for relief from that court's judgment and sentence on Adams' plea of guilty to the rape and sodomy of his nine-year-old niece. We are not persuaded that the circuit

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

court abused its discretion when it denied the motion without an evidentiary hearing. Thus, we affirm.

On the night of June 20, 2003, Adams and his niece and nephew were staying with Janice Caudill, who is Adams' mother and the children's maternal grandmother. The next day, the girl told her brother that their uncle had sexually molested her the previous night. He related his sister's statement to their grandmother. Ms. Caudill took the child to the emergency room at the local hospital. Appropriate authorities were contacted, and a videotaped interview was conducted in which the child gave a detailed statement about what had occurred. The results of the child's medical examination, while consistent with her version of the events, did not yield conclusive proof of either a crime or of Adams' guilt. But when Adams was interviewed by the Kentucky State Police, he made an audiotaped statement in which he admitted committing the acts with which he was charged.

In August 2003, the Perry County Grand Jury indicted Adams on one count of first degree rape and one count of first degree sodomy. Adams' appointed counsel filed several discovery motions, obtained an order approving funds for an investigator, and obtained Adams' school records and all social services records pertaining to the child victim. After reviewing the child victim's social services records, defense counsel made a motion to introduce evidence of prior sexual conduct by the child, which was overruled. Adams' counsel obtained a court order to have him evaluated

by a psychologist to determine his competency to stand trial. The competency evaluation was conducted on January 13, 2004, with the result that Adams was found to be competent. In anticipation of receiving the original audiotape of Adams' statement to the police, counsel also requested, and obtained, funds for an expert to evaluate the integrity of the tape. The original tape was given to Adams' counsel on July 12, 2004. After reviewing the tape, on July 14, 2004, Adams' counsel abruptly filed a motion to enter a guilty plea, and the plea was entered on July 22, 2004. On September 25, 2004, a judgment and sentence was entered sentencing Adams to twelve years' imprisonment on each count of the indictment, to run concurrently, with the last two years on each count to be served on supervised probation, for a total of ten years to serve in prison.

One year later, in September 2005, an attorney with the Department of Public Advocacy in Hazard filed a "Motion for Relief from Order Pursuant to CR 60.02" on Adams' behalf. The stated basis for this one-paragraph motion was that the complaining witness had recanted her statement. The motion specified only subparts (c), (d) and (f) of CR 60.02, which pertain to "(c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence," and to "(f) any other reason of an extraordinary nature justifying relief." In November 2005, the Post-Conviction Branch of the Department of Public Advocacy (DPA) filed a Notice of Entry of Appearance. Soon after that, the Commonwealth filed a response to the motion in which it was alleged that orders had been entered in a divorce proceeding in Clay County

which permitted Adams' family to have visitation with the child, suggesting that family members may have pressured the child to recant her statement. In December 2005, affidavits were obtained from the girl's biological father,[2] his wife, an aunt, and Janice Caudill. All four affidavits alleged that the child had told them that the allegations she made against Adams were not true, and that she made up the entire story. A DPA investigator made an affidavit in March 2006, in which he stated that he had interviewed the other affiants as well as the child victim, and the victim told him that she fabricated the story. However, the record contains no recanting affidavit from the victim herself.

On appeal, Adams argues that the trial court abused its discretion when it denied his CR 60.02 motion without an evidentiary hearing, that Adams' conviction must be vacated because the child has recanted her story, and that Adams' statement was obtained in violation of the Fourth Amendment to the United States Constitution, is unreliable, and should have been suppressed. We have examined the record and have reviewed each argument on appeal, and we find no reversible error.

When Adams' CR 60.02 motion was filed, the trial court set a status conference for February 16, 2006, and designated February 23, 2006, as the date for the hearing on the motion. The court entered an order to have Adams transported to the Perry Circuit Court on the hearing date. Although the court indicated at the status conference that evidence would be heard at the February 23 hearing, and counsel for Adams had

[2] The child was removed from her biological parents' home when she was an infant due to neglect, and has spent much of her childhood in foster homes.

witnesses present, the court declined to hear testimony at the hearing. Instead, the court heard lengthy arguments of counsel and permitted Adams' counsel to read aloud from the affidavits during the hearing. At the conclusion of the hearing the court reviewed CR 60.02 and denied the motion, stating that other evidence, including Adams' statement and guilty plea, supported the finding of guilt.

As a departure point for our discussion of this case we must note that it is not entirely clear why counsel chose to pursue the avenue of CR 60.02 at this stage of the proceedings. We note that although Adams' brief refers to "appellant's *pro se* case", we could find no *pro se* filing in the record. The original CR 60.02 motion was filed by counsel and was thereafter supplemented and expanded by counsel from DPA's Post-Conviction Branch. The Kentucky Supreme Court has made it clear that appellate review of criminal convictions follows a coherent sequential pattern intended to accomplish complete and orderly review. A direct appeal of the conviction must first be taken. Any issues not reviewable in the direct appeal may then be reviewed by means of Kentucky Rules of Criminal Procedure (RCr) 11.42. Finally, any matters which could not have been reviewed by direct appeal or by RCr 11.42 because they were unknown or undiscovered at the time the earlier appellate reviews were conducted, or are of an extraordinary nature otherwise unspecified in the rule, may be reviewed by means of CR 60.02. That rule, derived from the common-law writ of coram nobis, is not intended to simply provide an additional bite at the appellate apple, but is an extraordinary remedy,

reserved for "relief that is not available by direct appeal and not available under RCr 11.42." *Gross v. Commonwealth,* 648 S.W.2d 853, 856 (Ky. 1983). This is itself a sufficient justification to affirm the trial court's ruling. But because the facts of the case are somewhat unusual, we will briefly address Adams' arguments.

Any motion or action under CR 60.02 addresses itself to the sound discretion of the trial court, and for that reason the trial court's denial of a CR 60.02 motion will not be disturbed unless there has been an abuse of that discretion. CR 60.02; *Berry v. Cabinet for Families & Children,* 998 S.W.2d 464, 467 (Ky.1999); *see also Gross* at 856. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire & Rubber Co. v. Thompson,* 11 S.W.3d 575, 581 (Ky.2000).

Adams first contends that the circuit court abused its discretion when it denied his CR 60.02 motion without conducting an evidentiary hearing. We disagree.

Adams relies on the following sentence in *Gross,* at page 856, as authority for his contention that he was entitled to an evidentiary hearing on his CR 60.02 motion: "[b]efore the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief." Much of the argument in this section of Adams' brief is devoted to a discussion of allegations of ineffective assistance of counsel, which he admits "would normally and more appropriately be raised in an RCr 11.42 motion." On

the contrary, our reading of *Gross* and its progeny convinces us that such arguments *must* be raised in an RCr 11.42 motion before resort may be had to CR 60.02. *See Gross* at 856-857; *McQueen v. Commonwealth,* 948 S.W.2d 415, 416 (Ky. 1997).

It is important to note that this is not a situation in which the court refused to conduct any hearing at all. The court held a lengthy hearing during the course of which, although witnesses were not permitted to testify, the factual basis for Adams' motion was discussed and considered. Our review of the record of the trial court's ruling on the motion shows that the court was fully aware of the contents of the affidavits alleging that the child had recanted her story, but felt that in light of Adams' taped admission of guilt and his entry of an unconditional plea of guilty, the conviction was nevertheless valid. As we will discuss below, a recanted statement does not of itself "justify vacating the judgment" or constitute "special circumstances that justify CR 60.02 relief." We find no abuse of discretion in the court's refusal to hear sworn testimony.

Adams contends that CR 60.02 relief is mandated because the victim, the sole witness to the incident, is alleged to have recanted her story. Although we agree that such cases demand careful scrutiny, we must disagree that every recanted statement requires that a conviction should be set aside, especially where the conviction was obtained as the result of a plea of guilty.

This is not a case involving recanted *testimony* as such, because the child never testified either in person or by deposition, nor did she make an affidavit. She

simply told her story to investigators, who then interviewed Adams, who admitted the crimes and pleaded guilty. Although the leading cases primarily refer to testimony, the principles involved are the same for purposes of our review in this case. "[M]ere 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." *Thacker v. Commonwealth,* 453 S.W.2d 566, 568 (Ky. 1970). Recanting testimony "is viewed with suspicion." *Id.* Indeed, such testimony is "quite naturally regarded with great distrust and usually given very little weight." *Hensley v. Commonwealth,* 488 S.W.2d 338, 339 (Ky. 1972). Far from mandating post-conviction relief, such relief is in fact rare where other evidence supports the conviction. *See Thacker* at 568. Again we find no abuse of discretion.

Adams' final contention is that his statement to the police was involuntary, unreliable and inadmissible, and that an evidentiary hearing should be conducted as a result. Such matters must be raised on direct appeal or in an RCr 11.42 motion and not by way of CR 60.02. *McQueen,* 948 S.W.2d at 416. The record of Adams' guilty plea proceeding is not included in the record on appeal. "It has long been held that, when the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court." *Commonwealth v. Thompson,* 697 S.W.2d 143, 145 (Ky. 1985). Thus, we must assume the regularity of Adams' guilty plea. It is also familiar law that an unconditional guilty plea waives all defenses except that the

indictment charged no offense. *Quarles v. Commonwealth*, 456 S.W.2d 693, 694 (Ky. 1970); *Centers v. Commonwealth*, 799 S.W.2d 51, 55 (Ky.App. 1990). The validity of the plea having been thus established, the trial court's denial of CR 60.02 relief upon these grounds cannot be said to have been an abuse of discretion.

Finally, prompted by statements in Adams' brief regarding his "compelling argument for actual innocence," and in the interest of thoroughness, we will briefly delve a bit more deeply into the factual background of this case. Adams' taped statement to the police was not included in the record for our review. The record does, however, contain a transcript of the child's statements to a forensic interviewer and to the physician who examined her. These statements are consistent with each other, and they contain a significant amount of information which lends credence to the conclusion that the child was indeed subjected to inappropriate sexual activity. The time that the incident allegedly occurred was apparently consistent with Janice Caudill's memory of the events of that night. The child stated that the name of the pornographic video she claimed her uncle forced her to watch was "69 Hours." Her description of the activity on the video, as well as the conduct of her uncle, evinces a degree of knowledge of adult sexual function and activity that is unusual for a child of her age. Contrary to suggestions in Adams' brief that the child had made several other accusations of sexual activity against others, the record discloses that the child had made only one such accusation concerning an incident five years earlier. That incident involved other children in a foster home, and the child's

statements concerning that incident were consistent. When asked by interviewers how many times she had been subjected to sexual acts, she stated that it had happened once before Uncle Mike did it, referring to the foster care incident. It is true that the record on appeal does not support statements in the Commonwealth's brief that there were physical findings of trauma and tearing to the victim's genital area. This misstatement arises from an erroneous statement by counsel for the Commonwealth at the February 23 hearing. But neither does the record support an insinuation that the child has a significant history of making false accusations of sexual crimes.

The Order of the Perry Circuit Court denying CR 60.02 relief is affirmed.

ALL CONCUR.

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