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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000826-MR

ROBERT HATTON — APPELLANT

v.

APPEAL FROM BATH CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 02-CR-00043

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, LAMBERT, AND STUMBO, JUDGES.

DIXON, JUDGE: Robert Hatton appeals *pro se* from an order of the Bath Circuit Court denying his motion for post-conviction relief pursuant to CR 60.02. Finding no error, we affirm.

Appellant was convicted in the Bath Circuit Court of second-degree manslaughter and four counts of first-degree wanton endangerment. He was sentenced to twenty years imprisonment and fined $1,000. The Kentucky Supreme

Court affirmed the convictions and sentence. *Hatton v. Commonwealth*, 2003-0722-MR (August 26, 2004). The appellate record herein only consists of one transcript of pleadings filed in Appellant's post-conviction challenge. However, the facts underlying Appellant's convictions were set out by the Supreme Court in its unpublished opinion:

> Appellant's convictions stem from a vehicular accident involving Appellant and another vehicle. The individual driving the other vehicle was killed, and the passengers were injured. Evidence presented at trial established two very different versions of events leading up to the crash. Appellant stated that during the early evening hours of October 6, 2002, he returned home with his nine-year-old daughter, Jessica. Appellant stated that they had intended to pick up his wife, Laura, and go out for a family dinner. As Jessica exited Appellant's van, he noticed that the door of his jeep, which was also parked in the driveway, was open. Appellant then saw a man duck down, run around the side of the jeep, get in it and speed away. Appellant claimed that he thought Jessica had been abducted and he yelled to his wife, whom he believed was in their house, to call 911. Appellant got back into his van and sped off in pursuit of the jeep. He stated that when he caught up to the jeep at a curve in the road, the driver hit the brakes, causing Appellant to run into the back of it. After crossing over a bridge, both drivers lost control of the vehicles. Appellant testified that he realized he was not going to make the curve in the road, locked his brakes, and his van hit an embankment and pine tree. The jeep went over the embankment.
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> The Commonwealth, on the other hand, presented evidence that on the day of the accident, Laura had sought an EPO against Appellant due to repeated physical abuse. Laura was waiting for Appellant to return home so she could get Jessica and leave the premises before he learned of the EPO. Laura testified that when Appellant drove in the driveway, she exited the house, followed by her sister, Christine, as well as

> friends, Patty and Joe Wills. Laura met Jessica in the driveway and led her to the jeep. Laura stated that once everyone was in the jeep, Joe drove away at a normal rate of speed. The surviving passengers testified that they all knew Appellant, and that, contrary to Appellant's story, he clearly saw them exit the house and get into the jeep.
>
> Laura further testified that shortly after they drove away, Appellant's van appeared behind them and repeatedly began rear-ending the jeep. Laura stated that Patty Wills was able to call 911 from her cell phone to report that Appellant was trying to kill them. The jeep was then forced off the road and over the embankment. Joe Wills died at the scene from injuries he sustained during the accident. The Commonwealth presented further evidence that immediately after the accident, a test revealed that Appellant's blood-alcohol level was .19 percent.
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> On October 18, 2002, the Bath County Grand Jury indicted Appellant for one count of murder, four counts of first-degree wanton endangerment, and one count of operating a motor vehicle while under the influence. The case proceeded to trial in July 2003. The jury found Appellant guilty of second-degree manslaughter and four counts of first-degree wanton endangerment, and recommended a total of thirty years imprisonment. Pursuant to KRS 532.110(1)(c), the trial court reduced the recommended sentence to the maximum aggregate of twenty years, and fined Appellant $1,000.

Id.

Following his direct appeal, Appellant filed a motion for RCr 11.42 relief that was denied by the trial court. A panel of this Court affirmed the trial court in an unpublished opinion. *Hatton v. Commonwealth*, 2006-CA-002134 (January 25, 2008).

In the instant appeal, Appellant argues that the trial court erred in denying his CR 60.02 motion without an evidentiary hearing and ruling that his motion failed to allege any newly discovered evidence. Appellant further raises claims of judicial bias and sufficiency of the evidence supporting the convictions.

On appeal, we review the denial of a CR 60.02 motion for an abuse of discretion. "Civil Rule 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could 'reasonably have been presented' by direct appeal or RCr 11.42 proceedings." *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997), *cert. denied*, 521 U.S. 1130 (1997) (quoting RCr 11.42(3)). Likewise, 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." *Id.*

Before a 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." *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). In *Land v. Commonwealth*, 986 S.W.2d 440, 442 (Ky. 1999), our Supreme Court held that, "[t]he decision to hold an evidentiary hearing is within the trial court's discretion and we will not disturb such absent an abuse of that discretion."

Appellant claims that he presented newly discovered evidence indicating that false or perjured testimony was used against him at trial and that the prosecutor engaged in misconduct by allowing such perjury. Specifically,

Appellant focuses on the fact that a detective testified that at the time of the incident, Appellant was driving a blue van, when in fact the vehicle was actually a gray over silver colored van. He also alleges that police falsified the incident report, as well as the evidence sent to the Kentucky State Police Crime Lab. We find such claims to be entirely without merit.

None of Appellant's allegations constitute newly discovered evidence as all of the evidence he relies upon was available prior to trial and certainly at the time of his direct appeal. Further, as the trial court held:

> Pursuant to *Commonwealth v. Spaulding*, 991 S.W.2d 651 (Ky. 1999), to allege prosecutorial misconduct for failure to correct perjured testimony at trial, the Defendant must show: (1) the statement was actually false; (2) the statement was material; and (3) the prosecution knew it was false. Further, in order to be entitled to relief the Defendant has the burden of showing within a reasonable certainty that perjured testimony was in fact introduced against him at trial. The Defendant's motion contains only statements by him without an independent verification and such has failed to show within a reasonable certainty that any perjured testimony was in fact used against him at trial.

We would note that *Spaulding, supra,* further requires a defendant to show that "the conviction probably would not have resulted had the truth been known before he can be entitled to such relief." *Id.* at 657. Appellant clearly cannot meet his heavy burden. We find it immaterial that the detective may have misidentified the type of van Appellant was driving since it is uncontroverted that he was operating the van that pursued the vehicle driven by the victim, and that the two vehicles came into contact with each other. Quite simply, the evidence against

Appellant was overwhelming. Appellant has not produced any proof, other than his own statements, demonstrating that perjury occurred and, if so, that it affected the outcome of his trial. Thus, we conclude that the trial court properly denied CR 60.02 relief.

Nor do we find any merit in Appellant's allegation of judicial bias. On March 27, 2007, Appellant filed with our Supreme Court a request/affidavit for the disqualification of the trial judge. The Court, on the same day, issued an order finding that "the scurrilous allegations against Judge Maze are not credible, and the affidavit is insufficient to demonstrate any disqualifying circumstance . . . ." As this issue has been considered and resolved, we need not address it herein.

Finally, Appellant again attempts to challenge the sufficiency of the evidence presented against him at trial. As previously noted, CR 60.02 may not be used to relitigate issues which were or could have been raised on direct appeal. *McQueen, supra*. It is apparent from the Kentucky Supreme Court's opinion that the evidence supported Appellant's conviction and sentence.

The order of the Bath Circuit Court denying CR 60.02 relief is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert Hatton, pro se
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Wm. Robert Long, Jr.
Assistant Attorney General
Frankfort, Kentucky