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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000804-MR
AND
NO. 2007-CA-001254-MR

JAMES RICHARD TURLEY — APPELLANT

v.

APPEALS FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 04-CR-01509

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND VANMETER, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

CAPERTON, JUDGE: James R. Turley (Turley) appeals the judgment of the Fayette Circuit Court, the Honorable Pamela Goodwine, presiding, denying his CR 60.02 Motion for Relief From Final Judgment. Turley also appeals the denial of

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

his Motion for Reconsideration of the denial of the CR 60.02 motion. Turley was convicted of two counts of Sodomy First Degree, and one count of Sexual Abuse First Degree. After careful review of the record, we affirm on all counts.

In the Fall of 2004, Turley resided in Fayette County with his wife LeeAnn, his natural daughter, R.T. (then age eleven), his wife's niece, Serena Hill (then age fourteen), and an infant daughter. During the course of the weekend prior to R.T.'s birthday, which was on September 28, 2004, R.T. had a friend, Vanity Cooper, stay with her on Friday night. R.T. reported that on that evening, while she was asleep in her room, her father entered the room and sat on her bed. R.T. awakened, but did not act as if she were awake. R.T. testified that as Turley sat on the bed, he touched her vaginal area with his hand and mouth.

Cooper confirmed that she was staying with R.T. at her house on the Friday night before her birthday. Cooper testified that on that evening, R.T. told her that Turley had been touching her "for awhile." As Cooper was staying in the same room as R.T., she remained awake throughout the night. Cooper testified that at one point in the evening, she heard Turley come into the bedroom, and at that time, he asked her if she wanted him to wash some of her clothes.

In addition to the events which allegedly took place on that particular weekend, Hill also testified that she was uncomfortable around Turley because of his actions. Specifically, Hill testified that on one occasion, she was asleep on the couch and awoke because she believed she felt someone playing with the zipper of

her jeans. Hill testified that upon awakening, she jumped up and noticed Turley standing over her.

Further, both R.T. and Hill testified that on at least one occasion, they had been using Turley's computer, looking for music, when they encountered a video of young girls and an older man involved in sexual activity.

After staying the night with R.T. in late September 2004, Cooper told her grandmother what R.T. had said. School counselors were notified the following Monday, and shortly thereafter, the police and social service agencies became involved. After the school counselor was advised of R.T.'s report, the police commenced an investigation on or about October 4, 2004. At that time, Detective David Hestor (Hestor), of the Lexington Metro Police Department Crimes Against Children Unit responded to the counselor's request.

After interviewing Hill and R.T., Hestor obtained a search warrant for Turley's home and computers. There is some dispute as to precisely what occurred immediately prior to the execution of the search warrant. While the Commonwealth asserts that Turley was given his Miranda rights, Turley asserts that he was simply advised that he did not have to talk to the officers. Regardless, during the execution of that warrant, Turley stated that he might have looked at some questionable videos on the internet, but "only out of curiosity." In addition, while the search was in progress, Turley showed the officers a small amount of marijuana that was in the home, which Turley claims was his son's.

Turley was then taken to the police station, and was again advised of his rights. Turley now asserts that the warnings, both at his home and at the police station, were less than adequate. A recorded statement was then taken. During the course of the interview, Turley admitted having sexual contact with his daughter both by touching her and by placing his mouth on her vagina. Turley further admitted that such acts had taken place twice. Turley claims that these confessions were coerced, and alleges that he was told he would receive a stiffer punishment if he did not cooperate by confessing.

Trial in this matter was held on November 15 and 16, 2005. Testimony was given by R.T, Hill, and Cooper. R.T.'s examining physician also testified, as well as a computer forensics police officer, and Turley's wife. Turley also testified, at which time he again expressed his claim that the sexual contact occurred as a result of his concerns that his daughter was sexually active. At the conclusion of trial, Turley was convicted of two counts of sodomy in the first degree, and one count of sexual abuse in the first degree, the sentences to run concurrently for a total of twenty years of incarceration.

Thereafter, a direct appeal was filed with the Kentucky Supreme Court on Turley's behalf as a matter of right. In that appeal, Turley raised issues concerning the admissibility of a letter written to him by R.T., as well as with respect to the aforementioned incident occurring between Turley and Hill, which he asserted was not admissible under KRE 404(b). Turley's conviction was ultimately affirmed in an unpublished opinion rendered January 25, 2007.

In affirming that conviction, the Supreme Court held that the evidence contradicted Turley's contention that he had touched his daughter as an examination to attest her virginity and not for sexual gratification. Thus, the Court found the evidence, particularly the encounter between Turley and Hill, to be relevant and probative to the issue of Turley's knowledge, motive, intent, or common plan.

On July 21, 2006, Turley filed a pro se motion for relief from final judgment pursuant to CR 60.02(e) and (f). In that motion, Turley raised essentially the same claims as he does in the instant appeal, namely: (1) that the Commonwealth improperly used the statement that he made to the police, (2) that R.T. was coerced by her mother to make a false claim, (3) that the jury was racially biased, (4) that Turley was entitled to an instruction on attempted incest, (5) that the trial judge should have recused herself because she was alleged to be a victim of sexual abuse, (6) that R.T. committed perjury and grounds for a new trial.

The Commonwealth filed a response to Turley's motion, asserting that the arguments raised in the motion were legal trial issues which should have been raised on direct appeal. After reviewing the matter, the trial court entered an order dated April 9, 2007 denying Turley's request for CR 60.02 relief. This appeal followed. In the instant appeal, Turley asserts that the trial court committed error in denying his request for CR 60.02 relief on the grounds listed above. After reviewing this matter thoroughly, we agree with the trial court that these issues

could have, and should have, been raised in the context of a direct appeal, and will address the issues raised by Turley and the Court's response respectively.

As noted, in addition to appealing the denial of his CR 60.02 motion, Turley also appeals the denial of his May 21, 2007, Motion for Reconsideration. Turley filed that motion on the basis of an affidavit submitted by R.T., claiming to no longer know what had happened. That motion was denied by the trial court on May 24, 2007. In so ruling, the trial court again noted that Turley was not entitled to CR 60.02 relief in large part because of his own very incriminating statement to the police. For the reasons set forth below, we affirm the trial court in this regard.

The trial court's exercise of discretion will not be disturbed on appeal except in cases of abuse. *Fortney v. Mahan*, 302 S.W.2d 842 (Ky. 1957), and *Richardson v. Bruner*, 327 S.W.2d 572 (Ky. 1959). Absent a showing of abuse of discretion, the trial court's decision in this matter should stand. *Bethlehem Minerals Co. v. Church and Mullins Corp.*, 887 S.W.2d 327, 329 (Ky. 1994), *Wittington v. Cunnagin*, 925 S.W.2d 455 (Ky. 1996), *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996).

At the outset, we note that Kentucky courts have made clear that CR 60.02 is not a separate avenue of appeal to be pursued in addition to other remedies. It is available to raise issues which cannot be raised in other proceedings, not to relitigate issues which could reasonably have been presented by direct appeal or CR 11.42 proceedings. *McQueen v. Commonwealth*, 948 S.W.2d 415, 426 (Ky. 1997).

It is in fact an extraordinary remedy only to be used when a substantial miscarriage of justice will result from the effect of the final judgment. *Wilson v. Commonwealth*, 403 S.W.2d 710, 712 (Ky. 1966). The burden of proof in that regard lies squarely on the movant. *McQueen* at 426. Although the rule does permit a direct attack by motion where the judgment is voidable – as distinguished from a void judgment – this direct attack is limited to the specific subsection set out in said rule. *Howard v. Commonwealth*, 364 S.W.2d 809 (Ky. 1963). Indeed, even claims with a constitutional basis have been denied when such claims could have been raised in an earlier proceeding. *Copeland v. Commonwealth*, 415 S.W.2d 842 (Ky. 1967).

With respect to Turley's first assertion that the court should have suppressed the statement he made to the police, Turley asserts that he was not properly Mirandized, and that his confession was both coerced and made under duress. Accordingly, Turley argues that the statements which he made to the police should have been suppressed. However, as the Court stated in its Order, this issue had been raised prior to trial, and an evidentiary hearing was held on March 10, 2005. During the course of the evidentiary hearing on suppression, Turley waived his 5th Amendment rights and testified, where he again admitted to inappropriately touching his daughter in what he asserted was an attempt to confirm her virginity. At the conclusion of the hearing, Turley's suppression motion was overruled. Accordingly, the court reasoned that because the ruling was

not taken forward on direct appeal, Turley could not raise the suppression issue in the CR 60.02 context.

We have reviewed the record and applicable law, and concur with the trial court that any claimed constitutional invalidity in the use of Turley's statement should have been decided before trial. Accordingly, any asserted errors should have been raised on direct appeal. *Commonwealth v. Gadd*, 665 S.W.2d 915 (Ky. 1984). As Turley did not do so then, he cannot do so now in the context of a CR 60.02 motion. As such, we decline to reverse the trial court on this ground.

Secondly, Turley asserts, as he did before the trial court, that his daughter's testimony was coerced by her biological mother. The trial court held that the allegedly coerced nature of R.T.'s testimony was not preserved by objection at trial, nor addressed on direct appeal, and so was improperly raised in the motion. There were no objections made to the testimony of R.T. at trial. The trial court correctly noted that the weight to be given testimony is solely the province of the jury.

Indeed, case law is clear that only the jury has the responsibility and duty to weigh the probative value of the evidence and to choose which testimony it finds most convincing. *Commonwealth, Dep't of Highways v. Dehart,* 465 S.W.2d 720, 722 (Ky.1971). The jury is not bound to accept the testimony of any witness as true. *Dunn v. Commonwealth,* 151 S.W.2d 763, 764-765 (Ky.1941). Thus, the jury may believe all of a witness's testimony, part of a witness's testimony or none

of it. *Gillispie v. Commonwealth,* 279 S.W. 671, 672 (Ky.1926). We will reverse only if the jury verdict was so flagrantly against the evidence that it indicates that the jury reached the verdict as a result of passion or prejudice. *Bierman v. Klapheke*, 967 S.W.2d 16, 19 (Ky. 1998). We do not find that to be the case in this instance, and therefore, affirm.

If Turley was dissatisfied with this testimony and believed it to be objectionable, he should have preserved his objection at trial, and raised the issue on direct appeal. He did not do so, nor did he file an 11.42 motion asserting ineffective assistance of counsel. While a claim of perjured testimony can be a reason of an extraordinary nature justifying relief under 60.02(f), Turley has the burden to show that such information was in fact perjured, and the perjury was not discoverable at an earlier time. We find no support in the record to indicate that Turley has met this burden. Accordingly, we affirm the trial court on this issue.

Turley also alleges that the jury was racially biased. Clearly, any objection Turley had to the composition of the jury or the venire should have been made at the time of trial in order to properly preserve the issue for appellate review. Turley did not do so. Again, we believe direct appeal to have been the method by which Turley should have pursued this issue, as opposed to now raising it in a CR 60.02 motion.

Turley also asserts that the court should have instructed the jury on the offense of incest. Stated simply, this is a legal issue. Case law is clear that alleged errors of this nature should be raised on direct appeal. *Howard v. Commonwealth*,

364 S.W.2d 809, 810 (Ky. 1963). As Turley did not do so, we decline to address this issue in the context of a CR 60.02 motion.

Additionally, Turley asserts that the trial court judge was biased because she had "previously been sexually abused as a child." The court deemed this allegation to be "ludicrous," and without any basis in fact. Further, the court found that the matter was not raised by contemporaneous objection, nor properly preserved, nor addressed on direct appeal. Accordingly, the trial court found that this issue did not serve as a basis for claiming extraordinary relief under a CR 60.02 motion. We agree.

Finally, Turley seems to generally assert that R.T. was "lying," and asserts that the lying was tolerated and overlooked by the judges and attorneys in the matter. Again, this is an issue on which Turley has the burden to show that such information was in fact perjured, and was not discoverable at an earlier time. We find no support in the record to indicate that Turley has met this burden. Further, we find no indication in the record that this issue was either properly preserved, or raised on direct appeal. Accordingly, we decline to reverse the trial court's decision on this issue.

With regard to the trial court's denial of Turley's motion for reconsideration, we note that Turley requests reconsideration of his CR 60.02 motion on the basis of what he asserts was the perjured testimony of R.T. Again, we note that while perjured testimony can qualify as a reason of extraordinary nature justifying relief pursuant to CR 60.02(f), the burden remains on the

defendant to show both that the information was not discoverable at an earlier point in time, and that the testimony is in fact perjured.

In the instant case, having reviewed the affidavit submitted by R.T., we note that R.T. does not expressly recant her trial testimony. A review of the affidavit indicates that in fact, R.T. only indicates that she is "not sure if my father, James Turley, is guilty or not," and that "I'm just not sure of what really happened."

Taken alone, this simply does not contradict R.T.'s testimony at trial, and does not rise to the level of perjury. The crime of false swearing or perjury involves a willful, corrupt misstatement of a fact, which may be either that the witness willfully testifies to a fact as true which he knows to be untrue, or so testifies to a fact as being within his knowledge when he knows that it was not. It is the corrupt purpose of the witness in every instance that is the basis of perjury and an essential element of the crime. Innocent mistakes in evidence are not criminal, and constitute neither perjury nor false swearing. *Johnson v Featherstone*, 133 S.W. 753 (1911). Moreover, to prove perjury it is necessary to prove that the witness knew the falsity of the statement at the time it was made. *Booth v. Commonwealth*, 419 S.W.2d 739 (Ky. 1967). In the instant case, the affidavit of R.T., even if viewed in the light most favorable to Turley, at best can be construed to establish a mis-recollection. Certainly, this does not rise to the level of perjury, and does not constitute a basis for relief pursuant to CR 60.02.

The issue of R.T.'s testimony aside, we find it significant that Turley himself made a statement to police in which he admitted to touching R.T.'s vagina on two occasions, both with his hand and his mouth. Further, he admitted during his actual trial that he touched R.T.'s vagina with his hand. Clearly, it was the trial court's finding that Turley's own confessions, when combined with the testimony and ambiguous affidavit of R.T., do not justify a finding of perjured testimony of such a nature as to qualify Turley for the extraordinary relief of CR 60.02. Finding no abuse of discretion in this determination, we affirm.

After a thorough review, we do not believe that Turley has met his burden of proof in establishing that any of his claims justify relief of an extraordinary nature as required by CR 60.02(e) or (f), nor that the trial court abused its discretion in denying his motion, or in denying his subsequent motion for reconsideration. Accordingly, we affirm the decision of the trial court, the Honorable Pamela Goodwine, Judge, presiding.

ALL CONCUR.

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