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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001180-MR

JAMES ALLEN LAGRAND — APPELLANT

v.

APPEAL FROM MUHLENBURG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 01-CR-00178

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, NICKELL AND TAYLOR, JUDGES.

NICKELL, JUDGE: James Allen LaGrand ("LaGrand") appeals from the Muhlenburg Circuit Court's denial of his CR[1] 60.02 motion seeking post-conviction relief due to recanted testimony. We affirm.

[1] Kentucky Rules of Civil Procedure.

On October 23, 2001, LaGrand was indicted by a Muhlenburg County Grand Jury and charged with sodomy in the first degree[2] by engaging in deviant sexual intercourse with E.L.,[3] a female under twelve years of age. On January 10, 2002, LaGrand was tried before a jury. The main evidence of LaGrand's guilt presented to the jury was testimony from E.L. regarding five instances in which LaGrand sexually abused her. E.L.'s testimony was consistent with a medical evaluation performed by pediatrician Dr. Susan Hawkins on September 18, 2001.

After hearing all the evidence, the jury found LaGrand guilty and recommended a sentence of twenty years imprisonment. On February 12, 2002, the circuit court entered a final judgment consistent with the jury's verdict. A notice of appeal was filed in the Supreme Court of Kentucky on March 6, 2002. An appeal bond was set at $20,000.00 and posted on May 5, 2002. On January 31, 2003, while his direct appeal was pending, LaGrand filed a motion for a new trial accompanied by an affidavit signed by E.L. recanting her trial testimony. By agreement of the parties, the new trial motion was held in abeyance until the Supreme Court rendered its opinion in the direct appeal. Thereafter, the judgment was unanimously affirmed by the Supreme Court in an unpublished opinion.[4] When the motion for a new trial was finally heard on July 6, 2003, LaGrand was not present and his counsel could offer no excuse for his absence. After

[2] Kentucky Revised Statutes (KRS) 510.070.

[3] Pursuant to Court policy, victims of child sexual abuse are identified only by initials.

[4] 2003 WL 21258450, not to be published (May 22, 2003).

considering all the evidence the trial court found E.L.'s recantation unreliable. On July 8, 2003, the circuit court entered orders denying LaGrand's motion for a new trial and revoking his bail.

LaGrand remained a fugitive for nearly four years. On April 18, 2007, following his apprehension, LaGrand filed a motion to vacate under CR 60.02(e) and (f), or alternatively, sought a new trial under RCr[5] 10.02(1) and 10.06. After holding an evidentiary hearing, the trial court denied the motion on procedural grounds finding a three-year delay in filing was unreasonable. The court also denied the motion on substantive grounds, again finding there was not a reasonable certainty E.L.'s original testimony was false. LaGrand claims this is error. We disagree.

We review the lower court's denial of LaGrand's CR 60.02 motion for an abuse of discretion. *See Barnett v. Commonwealth*, 979 S.W.2d 98, 102 (Ky. 1998); *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996); *White v. Commonwealth*, 325 S.W.3d 83 (Ky.App. 2000). To justify reversal the trial court's denial must have been arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007). We will affirm the lower court's decision unless there is a showing of some "flagrant miscarriage of justice." *Gross v. Commonwealth*, 684 S.W.2d 853, 858 (Ky. 1983).

[5] Kentucky Rules of Criminal Procedure.

LaGrand argues he would not have been convicted but for E.L.'s testimony. Since she has recanted her story, LaGrand contends the extraordinary relief afforded by CR 60.02 is now justified.

CR 60.02 is a mistake correcting rule to be applied at the broad discretion of the trial court. *Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454, 456 (Ky. 2002). CR 60.02 is not intended to afford individuals another opportunity to relitigate issues presented in an earlier direct appeal or collateral attack or to present new issues that could have been raised in those proceedings. *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). Because of the desirability of according finality to judgments, CR 60.02(f) must be invoked with extreme caution, and only under most unusual circumstances." *Wine v. Commonwealth*, 699 S.W.2d 752, 754 (Ky.App. 1985) (citing *Cawood v. Cawood,* 329 S.W.2d 569, 571 (Ky. 1959)). Although a criminal conviction based on perjured testimony can be so extraordinary as to justify relief under 60.02(f), the defendant must still show a reasonable certainty exists as to the falsity of the original testimony and must bring the claim within a reasonable time. *Commonwealth v. Spaulding*, 991 S.W.2d 651, 657 (Ky. 1999).

In *Thacker v. Commonwealth*, 453 S.W.2d 566, 568 (Ky. 1970), our Supreme Court set forth special rules for evaluating recanted testimony:

> The general rules are that recanting testimony is viewed with suspicion; mere 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; such

> statements will form the basis for a new trial only when the court is satisfied of their truth; the trial judge is in the best position to make the determination because he has observed the witnesses and can often discern and assay the incidents, the influences and the motives that prompted the recantation; and his rejection of the recanting testimony will not lightly be set aside by an appellate court.

The trial court considered all available evidence when hearing LaGrand's first collateral attack on the judgment, including the affidavit by E.L. recanting her trial testimony. Like the appellant in *Alvey v. Commonwealth*, 648 S.W.2d 858, 859 (Ky. 1983), LaGrand's second collateral attack on the judgment is based on an issue presented to the trial court on a previous appeal. Under the doctrine of *res judicata*, LaGrand is precluded from relitigating an issue already decided by the court. *Gregory v. Commonwealth*, 610 S.W.2d 598, 600 (Ky. 1980). We decline to give him a "second bite at the apple." *Alvey, supra*, 648 S.W.2d at 859. This Court could have considered the merits of LaGrand's claim had he appealed the trial court's denial of his first new trial motion, but it is evident he was preoccupied with avoiding enforcement of his judgment of conviction.

Further, suspicious of the truth of E.L.'s recantation after the evidentiary hearing, the trial court was well within its discretion to deny the motion to vacate. In supporting its decision, the court noted that even after cross-examination the jury was convinced E.L.'s trial testimony was authentic and LaGrand had committed the act of sodomy in the first degree. Moreover, after observing E.L. testify at both the trial and the hearing, the circuit court found her

trial testimony more convincing and believable. In its evaluation, the court relied on the affidavit of Leslie Tinsley, a social worker who met with E.L. on April 1, 2003, shortly after the original affidavit was filed. Tinsley stated E.L. avowed her trial testimony was truthful and her recantation was false. Tinsley also stated in her affidavit, and E.L. later confirmed at the evidentiary hearing, that E.L. never recanted to the prosecutor prior to trial, as claimed in two affidavits supporting LaGrand's first CR 60.02 motion. Ultimately, the trial court found E.L. disavowed her trial testimony when in the presence of her father or members of LaGrand's family, but confirmed her trial testimony when outside LaGrand's control.

Likewise, finding a delay of over three years unreasonable was not an abuse of discretion. "What constitutes a reasonable time in which to move to vacate a judgment under CR 60.02 is a matter that addresses itself to the discretion of the trial court." *Gross, supra*, 648 S.W.2d at 858. Five years was determined to be unreasonable in *Gross*; twelve years was deemed unreasonable in *Ray v. Commonwealth*, 633 S.W.2d 71, 73 (Ky.App. 1982). Intentionally eluding enforcement of a judgment by jumping bail weighs heavily against compelling equitable relief. Under the circumstances of this case we cannot say either of the circuit court's grounds for denying LaGrand's motion was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Thus, there was no abuse of discretion.

In sum, the opinion of the Muhlenburg Circuit Court was well reasoned and supported by both facts and law, and is therefore affirmed.

ALL CONCUR.

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