

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001003-MR

TRAVIS L. SUGGS

APPELLANT

v.

APPEAL FROM SIMPSON CIRCUIT COURT
HONORABLE JANET J. CROCKER, JUDGE
INDICTMENT NO. 01-CR-00184

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: COMBS, CHIEF JUDGE; DIXON AND TAYLOR, JUDGES.

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

On August 6, 2001, Franklin Police Officer Scott Wade was patrolling in the Breckinridge Street area of Franklin, Kentucky, where drug activity was known to occur. Officer Wade observed Roscoe Clark, a known drug user, approach 528 Breckinridge Street on his bicycle, enter the residence and reappear

shortly thereafter. Clark failed to observe a traffic signal while riding his bike and was stopped by Officer Wade. As Officer Wade approached him, Clark placed a small bag of marijuana in his mouth. When asked about the drugs, Clark stated that he had purchased the marijuana from a black male at the Breckinridge Street residence who was wearing a white t-shirt and a blue or black hat. After arresting Clark, Officer Wade obtained a search warrant for the 528 Breckinridge Street residence.

Around 9:00 p.m. that same evening, Officer Wade and another officer executed the search warrant. Appellant and five other individuals were in the house playing pool. The occupants were informed that the officers had a search warrant and were instructed to lie down on the floor and place both hands in front of them. Appellant refused to lie down and repeatedly placed his right hand behind him. The officers then observed Appellant toss a large bag of marijuana into the corner of the room. At that point, Appellant was arrested and searched. Police recovered from Appellant another small bag of marijuana, \$6,072 in cash, and a vial containing several Viagra pills.

Following a jury trial in August 2002, Appellant was convicted of trafficking in marijuana within a thousand (1,000) yards of a school, and for being a second-degree persistent felony offender. He was sentenced to seven years' imprisonment. In November 2003, a panel of this Court affirmed the convictions and sentence in an unpublished opinion. *Suggs v. Commonwealth*, 2002-CA-

002318 (November 14, 2003). The Kentucky Supreme Court thereafter denied discretionary review on April 13, 2005.

In the interim, on June 2, 2003, Appellant filed a *pro se* motion to vacate judgment pursuant to RCr 11.42. The trial court denied the motion in October 2004. No appeal was taken from that order. On January 8, 2007, Appellant filed the instant motion for relief pursuant to CR 60.02, claiming that Officer Wade made false statements in his affidavit to obtain the search warrant for the residence where Appellant was arrested. In support of his motion, Appellant obtained the videotape of Clark's arrest,¹ which he argued proved that Officer Wade coerced Clark into claiming he purchased the marijuana from Appellant.

The trial court held a hearing on February 14, 2007, during which it addressed the CR 60.02 motion, as well as a separate forfeiture motion. With respect to the CR 60.02 motion, the trial court first ruled that the motion was untimely since Appellant admitted to having obtained the video through an open records request in 2004. Further, the trial court ruled that based upon its review of the video, it found no material discrepancies between Officer Wade's statement in his affidavit and his testimony at the suppression hearing and trial. The trial court commented that it specifically heard Clark state on the video that he had purchased the marijuana at the Breckinridge Street residence. Accordingly, the court concluded that Appellant was not entitled to a full evidentiary hearing or CR 60.02 relief. In a subsequent written order, the trial court further held that Appellant had

¹ The video was actually the surveillance tape taken on the camera in Officer Wade's patrol car.

failed to satisfy the requirements of *Commonwealth v. Spaulding*, 991 S.W.2d 651, 657 (Ky. 1999), to warrant relief. Appellant thereafter appealed to this Court.

Appellant argues that the trial court erred in finding that he did not prove that Officer Wade perjured himself. Appellant contends that the videotape clearly shows Clark stating that he did not know Appellant and did not purchase the drugs from him.

At the outset we note that the videotape of Clark's arrest is not contained in the record and thus, not available for our review. Nevertheless, as the trial court noted, in *Commonwealth v. Spaulding, supra*, the Kentucky Supreme Court held that "a criminal conviction based on perjured testimony can be a reason of an extraordinary nature justifying relief pursuant to CR 60.02 (f) and subject to the reasonable time limitation of the rule." *Id.* at 657. However, the burden is on Appellant to show that both a reasonable certainty exists as to the falsity of the challenged testimony and that the conviction probably would not have resulted had the truth been known. *Id.* We agree that Appellant has failed to meet either prong.

In the absence of the video, we defer to the trial court's determination that it did not reveal any discrepancies between Officer Wade's statement in his affidavit and his testimony at the suppression hearing or trial. In fact, Officer Wade conceded at the suppression hearing that Appellant's clothing did not match the description given by Clark. However, Officer Wade explained that Appellant was not searched incidental to the warrant, but rather incidental to arrest after he was observed removing a large quantity of marijuana from his person. Clearly, in

light of the fact that both marijuana and a large sum of cash were found during the search, we cannot conclude that the convictions would not have otherwise resulted.

Nor do we agree with Appellant's claim that the Commonwealth withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). As the trial court noted, the video tape of Clark's arrest was not produced because the Commonwealth was not aware of its existence. Notwithstanding, we fail to perceive how the tape would have exonerated Appellant. Officer Wade acknowledged that Appellant did not fit the description given by Clark. And Clark testified at trial that he did not know Appellant. Certainly, the jury had the opportunity to observe both Officer Wade's and Clark's testimony and assess their credibility. See *Commonwealth v. Smith*, 5 S.W.3d 126, 129 (Ky. 1999).

Without the opportunity to view the video in question, we are bound by the trial court's findings that it did not contain any discrepancies and did not show that Officer Wade committed perjury in obtaining the search warrant. As such, Appellant was not entitled to the extraordinary relief of CR 60.02. *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983).

Finally, Appellant alleges that the trial court abused its discretion by denying him the opportunity to introduce evidence that the search warrant had been erroneously signed by a trial commissioner in another county. However, the law is clear that CR 60.02 is not a separate avenue of appeal, but is only available to raise issues which cannot be raised in other proceedings. *McQueen v.*

Commonwealth, 948 S.W.2d 415 (Ky. 1997), *cert. denied*, 521 U.S. 1130 (1997).

Because this claim could have and should have been raised on direct appeal, it is not appropriate for review at this juncture.

The order of the Simpson Circuit Court denying Appellant's motion for relief pursuant to CR 60.02 is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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