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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002477-MR

DAVID LEE BLAIR — APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 01-CR-00194

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, KELLER, AND NICKELL, JUDGES.

KELLER, JUDGE: David Lee Blair, proceeding *pro se*, has appealed from the Boyd Circuit Court's November 19, 2007, order denying his motion for post-conviction relief pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. Blair was sentenced to seventy years' imprisonment for his convictions on eleven counts of rape, one count of sexual abuse, and for being a Second-Degree Persistent Felony Offender. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Supreme Court of Kentucky reviewed Blair's conviction on direct appeal, and we adopt that Court's recitation of the facts from its opinion affirming the conviction:

> Appellant was married to Vicky Lynn Blair and resided with her and her two daughters from a previous marriage, A.F., born November 30, 1988, and C.F., born May 12, 1993. In February 2000, the family moved from an apartment to a home in Boyd County. In April 2000, Vicky obtained employment as a bus monitor for the Boyd County Schools. That date corresponds with the date when, according to A.F., Appellant began subjecting her to sexual intercourse. A.F. testified that Appellant had sexual intercourse with her more than twenty times between April 2000 and August 2001 without specifying which incidents of sexual intercourse occurred prior to November 30, 2000, A.F.'s twelfth birthday, and which occurred thereafter. Six of Appellant's eleven rape convictions were premised upon his having sexual intercourse with A.F. when she was under the age of twelve, and Appellant does not claim that the evidence was insufficient to support those convictions. C.F. testified that Appellant had sexual intercourse with her on more than ten occasions. The remaining five rape convictions were premised on those incidents. The dates of those incidents are not crucial because C.F. was still under the age of twelve at the time of her testimony. *Stringer v. Commonwealth*, 956 S.W.2d 883, 885-86 (1997). A.F. and C.F. both testified that Appellant threatened to harm them and other family members if they told anyone about the intercourse.
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> In August 2001, A.F. began suffering from nausea and vomiting. After A.F. vomited while riding the school bus, Appellant and Vicky took A.F. to the Catlettsburg Outreach Center, where Dr. Cynthia Pinson examined her and found her to be pregnant. Appellant and Vicky remained in the waiting room during the examination. Dr. Pinson subsequently summoned Vicky

> to the examination room but asked Appellant to remain in the waiting room. Instead, Appellant left the Center without explanation and subsequently departed Kentucky for Ohio. A.F. told Dr. Pinson and Vicky that Appellant was the father of the fetus. The result of a subsequent paternity test confirmed that fact to a 99.99% probability.
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> On September 19, 2001, a physical examination of C.F. at Hope's Place, a child advocacy center for sexually abused children, revealed that her hymen was worn in a manner inconsistent with a pre-pubescent eight-year-old child. The examining physician opined that C.F. had experienced recurring digital or penile penetration.

Blair v. Commonwealth, 2005 WL 387274, *1-2 (Ky. 2005). Following a trial, the jury convicted Blair on all charges, including six counts of rape related to A.F., as well as five counts of rape and one count of sexual abuse related to C.F. After finding him guilty of the status offense of being a persistent felony offender, the jury recommended fifty-year sentences on each rape conviction and a ten-year sentence on the sexual abuse conviction, all to be served consecutively for a total of 560 years. The trial court reduced Blair's penalty to the maximum aggregate sentence of seventy years pursuant to Kentucky Revised Statute (KRS) 532.110(1)(c).

On direct appeal, Blair raised five issues: 1) that his constitutional rights were violated when the trial court allowed the child victims to testify outside of his presence; 2) that the trial judge abandoned his role as a neutral arbiter during *in camera* interviews with the child victims; 3) that a witness for the Commonwealth improperly commented on his right to remain silent; 4) that the chain of custody related to A.C.'s blood sample was violated; and 5) that the

Commonwealth improperly informed the jury of the details of his prior conviction for child sexual abuse during the penalty phase.[1] The Supreme Court of Kentucky affirmed Blair's conviction. Regarding the fourth argument, the Supreme Court noted that the laboratory results were admitted without objection and that Blair did not challenge the integrity of the fetal sample or his own blood sample, which were the samples used to prove paternity.

While his direct appeal was pending, Blair filed a *pro se* motion for relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. In his motion, Blair argued that the trial judge should have recused himself, as he had prosecuted Blair when he was the Commonwealth's Attorney; that a police detective violated the chain of custody for two vials of his blood; and that certain misconduct took place during his trial. The trial court denied Blair's motion without an evidentiary hearing on January 10, 2005, noting that his motion did not conform to the requirements of RCr 11.42. In an opinion rendered November 22, 2006, this Court affirmed Blair's appeal from the order denying relief. *See Blair v. Commonwealth*, No. 2005-CA-000229-MR. The Court held that Blair should have raised the recusal issue as soon as the facts necessitating disqualification were discovered; that the chain of custody evidentiary issue would not be reconsidered, as it was unsuccessfully argued on direct appeal; and that the misconduct issues should have been raised on direct appeal, not in a post-conviction proceeding.

[1] Blair was convicted in 1988 of two counts each of Second-Degree Rape and Second-Degree Sodomy, and he was sentenced to fifteen years' imprisonment. He was released in 1998. The victims in that case were Blair's biological daughters.

Furthermore, the Court held that Blair failed to demonstrate that he had suffered any prejudice due to the alleged errors.

On June 5, 2007, Blair filed a *pro se* CR 60.02 motion for relief that was neither signed nor verified. In support of his motion, Blair included an unsworn statement of Timothy Enyart dated October 24, 2003, which named Blair's cousin, Keith Blair, as the perpetrator of the crimes against A.F. and C.F. While his motion is somewhat difficult to understand, Blair appeared to be again raising the chain of custody issue, this time stating that the laboratory analyst refused to testify about the chain of custody and asserted her Fifth Amendment privilege against self-incrimination. Our review of this witness's trial testimony does not support Blair's assertion. Blair also made brief arguments asserting that he was prejudiced by the "Duplicitous Indictment" and by the trial court's failure to ask the potential jurors about any racial prejudice. However, the basis for Blair's motion is Enyart's unsworn statement, with which Blair was attempting to prove his innocence. In its response, the Commonwealth objected to Blair's motion as time-barred, in that the motion, which sought relief solely on the basis of newly discovered evidence, was not filed within one year of the entry of the final judgment of conviction.

On November 19, 2007, the trial court entered an order denying Blair's requested relief, without an evidentiary hearing. Because of the nature of this case, we shall set out the trial court's ruling in its entirety:

The Movant, David Lee Blair, seeks a new trial pursuant to CR 60.02 claiming that he is entitled to relief as a result of newly discovered evidence. The motion is not well taken for several reasons.

On June 5, 2002 the Movant was convicted by a jury following a trial on eleven counts of First Degree Rape, one count of First Degree Sexual Abuse, and of being a Persistent Felony Offender in the Second Degree. The jury recommended a sentence of 560 years which was reduced to a term of 70 years by operation of law pursuant to KRS 532.110(1)(c). Movant impregnated his stepdaughter, and after the pregnancy was terminated DNA analysis conducted on the tissue established conclusively that the Movant had in fact been the person who impregnated the child. The testimony of the witnesses called, including that of the child, was overwhelming as to the Movant's guilt. Movant had been convicted approximately 14 years earlier of raping his own biological daughters and had only been out of prison a relatively short period of time when the aforementioned rapes against a stepdaughter began.

CR 60.02 states that a motion made under subsections (a)[,] (b) and (c) are to be filed within one year after the date of judgment. The motion before the court at this time was filed slightly more than five years after the judgment. Moreover, the affidavit submitted in support of the motion was executed on October 29, 2003 and therefore didn't even exist at the time the case was tried. The affidavit bears no notary seal. The affidavit consists of a handwritten statement in which the Affiant claims that Movant's cousin supposedly told him one time that it was he that actually raped the child. The motion does not address the question of why the aborted fetal tissue was conclusively linked to Movant by DNA analysis.

Possibly the most disturbing aspect of the affidavit is the identity of the Affiant, one Timothy Lee Enyart. Mr. Enyart is a person well known to the criminal justice system in Boyd County, Kentucky. In 1979 Mr. Enyart was convicted of three counts of Burglary in the Third

Degree and two counts of felony Theft in the Boyd Circuit Court. The following year in 1980, he was convicted of Second Degree Escape in the Fayette County Circuit Court. In 1982 he was convicted of two counts of felony Receiving Stolen Property in the Allen Circuit Court and shortly thereafter convicted of Escape in the Second Degree in the Elliott Circuit Court. After a Third Degree Burglary charge was dismissed in 1984 he was convicted the following year in the Boyd Circuit Court of felony Receiving Stolen Property. In 1988 he was convicted in the Boyd Circuit Court of Receiving Stolen Property and being a Persistent Felony Offender in the Second Degree. In 1992 he was convicted of felony Theft in the Daviess Circuit Court and the following year convicted in the Daviess Circuit Court of felony Theft by Unlawful Taking and Burglary in the Third Degree. As part of his plea agreement a count of First Degree Persistent Felony Offender was dismissed. One must keep in mind that all of these felony convictions are resulting in parole revocations for the multitude of previous felonies. In 1997 he was again convicted of Receiving Stolen Property in the Daviess Circuit Court. In 2002 Enyart was once again convicted of felony Receiving Stolen Property in the Boyd Circuit Court and to the beset of the knowledge of the undersigned Mr. Enyart currently resides at the Eastern Kentucky Correctional Complex in West Liberty, Kentucky.

Mr. Enyart has a long and well established history of filing pro se civil suits which are frivolous and usually fail to even state a cause of action under CR 12.

The undersigned has served the court system as a Public Defender, Commonwealth Attorney, and Circuit Judge for almost thirty years and is well acquainted with Timothy Lee Enyart. In fact, of the thousands of defendants encountered by the undersigned down through the years, Mr. Enyart is probably the most inherently dishonest person ever dealt with. One cannot even believe the date on the affidavit as to it's [sic] time of execution since it was not signed before a notary. The notion that such a dubious document executed by a

> pathological liar who is a career felon would entitle Movant to a new trial after he was buried beneath an avalanche of very compelling evidence is ridiculous. And, as stated above, the motion was filed over five years after the final judgment rather than within one year as mandated by CR 60.02.
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> For the reasons stated above, the motion for relief pursuant to CR 60.02 is denied.

This appeal followed.

In his brief, Blair accuses the trial judge of having a personal bias against him, based upon the language contained in the order denying CR 60.02 relief and the trial judge's previous prosecution of him.[2] Blair also argues that he should have been permitted to have the DNA samples used by the Commonwealth at trial, as well as a sample from himself, tested by an independent laboratory to establish that he was not the perpetrator. Blair asserts that the statement he attached to his motion as well as the chain of custody problems support this request. In its brief, the Commonwealth asserts that Blair should not prevail on appeal for three reasons: 1) the CR 60.02 motion represents a successive post-conviction motion for relief; 2) the recusal issue was raised, and rejected, in Blair's RCr 11.42 proceeding; and 3) Blair's entitlement to an independent DNA test should have been raised on direct appeal. We agree with the Commonwealth; hence, we affirm.

[2] The record contains the transcript from the October 31, 2001, court appearance, at which time the trial judge, Judge Hagerman, reminded Blair that he had prosecuted him on similar charges several years earlier. Judge Hagerman indicated that although he did not have a problem sitting on the case, he would recuse if Blair wanted another judge to sit on his case. Blair responded that he had no problem with Judge Hagerman staying on his case.

In *Gross v. Commonwealth*, 648 S.W.2d 853, 856-57 (Ky. 1983), the Supreme Court of Kentucky addressed the proper method for conducting post-conviction proceedings in Kentucky:

> The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete. That structure is set out in the rules related to direct appeals, in RCr 11.42, and *thereafter* in CR 60.02. CR 60.02 is not intended merely as an additional opportunity to raise *Boykin* defenses. It is for relief that is not available by direct appeal and not available under RCr 11.42. The movant must demonstrate why he is entitled to this special, extraordinary relief. Before 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.
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> CR 60.02 was enacted as a substitute for the common law writ of coram nobis. The purpose of such a writ was to bring before the court that pronounced judgment errors in matter of fact which (1) had not been put into issue or passed on, (2) were unknown and could not have been known to the party by the exercise of reasonable diligence and in time to have been otherwise presented to the court, or (3) which the party was prevented from so presenting by duress, fear, or other sufficient cause. *Black's Law Dictionary, Fifth Edition*, 487, 1444.
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> In *Harris v. Commonwealth*, Ky., 296 S.W.2d 700 (1956), this court held that 60.02 does not extend the scope of the remedy of coram nobis nor add additional grounds of relief. We held that coram nobis "is an extraordinary and residual remedy to correct or vacate a judgment upon facts or grounds, not appearing on the face of the record and not available by appeal or otherwise, which were not discovered until after rendition of judgment without fault of the party seeking relief."

In *Jones v. Commonwealth*, 269 Ky. 779, 108 S.W.2d 816, 817 (1937), this court held that the purpose for the writ is to obtain a new trial in situations in "which the real facts, as later presented on application for the writ, rendered the original trial tantamount to none at all, and when to enforce the judgment as rendered would be an absolute denial of justice and analogous to the taking of life or property without due process of law."

Thus, while the remedies formerly available in criminal cases by writ of coram nobis have been preserved by CR 60.02 (*Balsley v. Commonwealth*, Ky., 428 S.W.2d 614, 616 (1967)), the remedies have not been extended, but have been limited by the language of that rule.

CR 60.02 limits relief in these particulars:

1) The first three grounds specified in the rule [(a) mistake, inadvertence, surprise or excusable neglect, (b) newly discovered evidence, (c) perjury] are limited to application for relief "not more than one year after the judgment."

2) The additional specified grounds for relief are (a) fraud, (b) the judgment is void, vacated in another case, satisfied and released, or otherwise no longer equitable, or (c) other reasons of an "extraordinary nature" justifying relief. These grounds are specific and explicit. Claims alleging that convictions were obtained in violation of constitutionally protected rights do not fit any of these grounds except the last one, "any other reason of an extraordinary nature justifying relief." In *Copeland v. Commonwealth*, Ky., 415 S.W.2d 842 (1967), we refused to grant CR 60.02 relief where the alleged constitutionally impermissible act (failure to provide counsel when taking a guilty plea) could have been raised in an earlier proceeding. This establishes as precedent that such grounds are not automatic, but subject to the qualification that there must be circumstances of an extraordinary nature justifying relief.

3) CR 60.02 relief is discretionary. The rule provides that the court "may, upon such terms as are just, relieve a party from its final judgment . . ." (emphasis added).

4) CR 60.02 further provides, as a threshold to relief, that "the motion shall be made within a reasonable time. . . ."

We hold that the proper procedure for a defendant aggrieved by a judgment in a criminal case is to directly appeal that judgment, stating every ground of error which it is reasonable to expect that he or his counsel is aware of when the appeal is taken.

Next, we hold that a defendant is required to avail himself of RCr 11.42 while in custody under sentence or on probation, parole or conditional discharge, as to any ground of which he is aware, or should be aware, during the period when this remedy is available to him. Final disposition of that motion, or waiver of the opportunity to make it, shall conclude all issues that reasonably could have been presented in that proceeding. The language of RCr 11.42 forecloses the defendant from raising any questions under CR 60.02 which are "issues that could reasonably have been presented" by RCr 11.42 proceedings.

We adopt in this case, from the opinion in *Alvey v. Commonwealth*, Ky., 648 S.W.2d 858 (1983), published this day, the following:

> "(W)e should not afford the defendant a second bite at the apple. Moreover, we fail to perceive that there is any constitutional impediment in following such a course since we do not believe that the persistent felony offender type of situation was anticipated or was it meant to be encompassed in *Boykin v. Alabama*." (Citation omitted)

Based upon our review of the record, we hold that the trial court did not abuse its considerable discretion in denying Blair's CR 60.02 motion for relief. First, we note that Blair spent a considerable portion of his brief arguing that the trial judge was biased; that issue was not argued below in Blair's CR 60.02 motion and was in fact addressed, and rejected, in his earlier RCr 11.42 proceeding. Accordingly, we shall not address that portion of Blair's brief. Furthermore, we hold that Blair's request for independent testing should have been raised before the trial court and, if necessary, by direct appeal to the Supreme Court. *See Sanders v. Commonwealth*, 89 S.W.3d 380 (Ky. 2002); *Sanborn v. Commonwealth*, 975 S.W.2d 905 (Ky. 1998). Finally, we hold that the trial court did not abuse its discretion in rejecting the unsworn statement Blair submitted with his CR 60.02 motion. The jury clearly rejected Blair's attempt during the trial to place blame for the crimes on Keith Blair. In their recorded testimony, A.F. and C.F. clearly identified Blair as the perpetrator of the crimes, even after being asked about Keith Blair on cross-examination. In conclusion, we hold that Blair's motion is time barred under CR 60.02(b) and that he has not established any other reason of an extraordinary nature supporting his motion under CR 60.02(f).

For the foregoing reasons, the order of the Boyd Circuit Court denying Blair's CR 60.02 motion is affirmed.

ALL CONCUR.

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