

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000917-MR
AND
NO. 2007-CA-002088-MR

BRYAN P. VINCENT

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 07-CR-00021

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: COMBS, CHIEF JUDGE; WINE, JUDGE; BUCKINGHAM,¹ SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Bryan P. Vincent appeals from a judgment of the Muhlenburg Circuit Court sentencing him to 12 years in prison and also from

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

the court's denial of his Kentucky Rules of Civil Procedure (CR) 60.02 motion.

We affirm.

Vincent entered conditional pleas of guilty in the Muhlenburg Circuit Court to manufacturing methamphetamine, possession of anhydrous ammonia in an unapproved container, possession of drug paraphernalia, and possession of marijuana. His guilty pleas followed an evidentiary hearing and the court's denial of his motion to suppress evidence. On April 3, 2007, the court entered a judgment sentencing Vincent to 12 years in prison. Vincent appeals first from that judgment.

On August 20, 2007, Officer Matt Lear, the investigating officer in the case, was charged and arrested for the criminal offenses of theft of a controlled substance under \$300, tampering with physical evidence, and second-degree possession of a controlled substance. Those charges were unrelated to Vincent's case. On September 14, 2007, Vincent filed a CR 60.02 motion to vacate his conviction and sentence based on newly discovered evidence. He also requested an evidentiary hearing on his motion. In response the Commonwealth filed an affidavit from the other investigating officer, Officer Brent Roberson. The court denied the motion without an evidentiary hearing, and this second appeal by Vincent followed. The two appeals have been consolidated for our consideration.

The incident that led to the charges against Vincent occurred on the night of February 11, 2007. Officer Lear testified at the suppression hearing that he was driving down the highway when he smelled the odor of ether. He stopped to investigate the source of the odor and went to the residence of a man named

Vaught. Officer Lear and Vaught walked around Vaught's property and approached a wooded area in the direction of Vincent's house trailer as the odor became stronger. After Officer Lear observed lights come on and two people come out of the trailer, he obtained assistance from Officer Roberson.

The officers went to the front of the Vincent residence where they encountered Vincent who said he thought he had heard prowlers. The officers smelled a strong odor of ether that seemed to be coming from a building behind the trailer. Officer Lear went to the building and observed a propane tank. Knowing that such tanks are commonly used in the manufacturing process of methamphetamine, the officer requested Vincent to give him consent to search the trailer and outbuilding. Vincent denied permission to search, and the officer then obtained a search warrant. A search of the premises led to incriminating evidence being seized and to Vincent's conviction on various charges.

In the appeal of the judgment convicting and sentencing Vincent, Vincent argues that the officers violated his rights by unlawfully entering the curtilage area to his residence before seeking the search warrant. He maintains that the area behind his trailer was a protected area that the officers had no right to enter without his permission or a search warrant.

In response to Vincent's argument, the Commonwealth first responds that this argument is different from the argument raised by Vincent before the trial court. The Commonwealth correctly notes that Vincent's argument before the trial court concerned whether Officer Lear had smelled the ether from the highway

before entering onto Vincent's property. Citing *Kennedy v. Commonwealth*, 544 S.W.2d 219 (Ky. 1976), the Commonwealth asserts that this court should not review Vincent's argument because Vincent is prohibited from raising a new issue before the appellate court.

We agree. As the court held in the *Kennedy* case, one may not "feed one can of worms to the trial judge and another to the appellate court." *Id.* at 222. As Vincent did not raise the curtilage issue before the trial court, we decline to consider it on appeal.

In his appeal of the trial court's denial of his CR 60.02 motion, Vincent argues that the court erroneously denied an evidentiary hearing that would have allowed him "to explore the length and depth of Officer Lear's drug usage." He also states that by denying an evidentiary hearing, the court erroneously deprived him of the opportunity to cross-examine Officer Roberson, who had provided an affidavit stating that he had also smelled the odor of ether. Vincent claims that this denied him the right to confront witnesses against him.

Vincent has not cited any legal authority for the proposition that Officer Lear's later arrest on charges unrelated to Vincent's case could support the granting of CR 60.02 relief on the ground of newly discovered evidence. Further, our own review has not revealed any authority to support Vincent's argument.

In *Collins v. Commonwealth*, 951 S.W.2d 569 (Ky. 1997), the Kentucky Supreme Court held as follows:

Granting a new trial is within the discretion of the trial court, and such is disfavored when the grounds are newly discovered evidence which is merely cumulative or impeaching in nature. Epperson v. Commonwealth, Ky., 809 S.W.2d 835 (1990). Newly discovered evidence “must be of such decisive value or force that it would with reasonable certainty, change the verdict or that it would probably change the result if a new trial should be granted.” Coots v. Commonwealth, Ky., 418 S.W.2d 752, 754 (1967).

Id. at 576.

As for Vincent’s argument that the court’s denial of an evidentiary hearing deprived him of his right to cross-examine and confront Officer Roberson concerning the incident, we note that Vincent could have subpoenaed the officer for the suppression hearing and questioned him at that time.

“A movant is not entitled to a hearing on a CR 60.02 motion unless he affirmatively alleges facts which, if true, justify vacating the judgment and further allege[s] special circumstances that justify CR 60.02 relief.” *White v. Commonwealth*, 32 S.W.2d 83, 86 (Ky. App. 2000). We conclude that the trial court properly denied Vincent’s CR 60.02 motion on its face without an evidentiary hearing.

The judgment and the order of the Muhlenburg Circuit Court are affirmed.

ALL CONCUR.

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