

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002354-MR

JUAN LEOTIS SANDERS
CECILIA SANDERS

APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 02-CR-002491

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, JUDGE; HENRY AND ISAAC,¹ SENIOR JUDGES.

HENRY, SENIOR JUDGE: Juan Leotis Sanders and Cecilia Sanders appeal from the denial of their motion for post-conviction relief under Kentucky Rules of Civil Procedure (CR) 60.02. Appellants argue they are entitled to have the judgments

¹ Senior Judges Michael L. Henry and Sheila R. Isaac sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

against them set aside on the grounds of newly discovered evidence and perjury.

After reviewing the record and briefs, we affirm.

Appellants were convicted of Planting, Cultivating or Harvesting with Intent to Sell Marijuana and Illegal Use or Possession of Drug Paraphernalia pursuant to Kentucky Revised Statutes (KRS) 218A.1423, Complicity pursuant to KRS 502.020, and Illegal Use or Possession of Drug Paraphernalia pursuant to KRS 218A.500. Juan was also convicted of being a persistent felony offender (PFO) in the second degree. This Court fully set forth the rather convoluted facts underlying the present appeal in an unpublished opinion affirming Appellants' convictions on direct appeal as follows:

Juan had previously been convicted of manslaughter, but was free on bond pending his appeal of this conviction. His address listed on the appeal bond was 3902 Vantage Place Louisville, Kentucky. On August 22, 2002, his conviction was affirmed by the Kentucky Court of Appeals and his appeal bond was revoked. Subsequently, a warrant was issued for his arrest listing his address as 4910 Shumake Way or 5307 Regent Way, both in Louisville, Kentucky. Juan was also a suspect in an unrelated shooting incident that occurred on October 28, 2002. On October 29, 2002, a confidential informant notified the police that Juan was located at 3902 Vantage Place, and police began surveillance of that residence.

On October 29, 2002, at 10:20 a.m., Juan was arrested in the driveway of 3902 Vantage Place after leaving the house and attempting to enter a Lincoln Navigator. Apparently unaware that Juan was in custody, an officer was in the process of obtaining a search warrant for the 3902 Vantage Place residence, seeking Juan and any evidence linking him to the unrelated shooting incident. A Jefferson Circuit Court judge issued that warrant at approximately 3:00 p.m. Subsequently, police officers searched the 3902 Vantage Place residence, but did not find any evidence relating to the

shooting. Instead, they discovered sixty-five marijuana plants, grow lights, potting soil, fertilizer, and large sums of money. The officers also found a small amount of marijuana in a bedroom and a marijuana leaf in the Lincoln Navigator. An officer then obtained a second warrant from a different judge relating to the marijuana and drug paraphernalia, and the officers seized these items, as well as the Lincoln Navigator and another vehicle.

On November 6, 2002, Juan and Cecilia were both indicted for Planting, Cultivating, or Harvesting with Intent to Sell Marijuana, Complicity, and Illegal Use or Possession of Marijuana. Juan was also indicted for being a Persistent Felony Offender in the Second Degree. On January 21, 2003, Juan moved, through counsel, to suppress all items seized from the Lincoln Navigator due to lack of probable cause. Then, on January 23, 2003, Cecilia moved to suppress all items from the residence and vehicle related to drug activity due to lack of probable cause. The trial court denied both Juan and Cecilia's motions to suppress on October 27, 2003, finding that there was probable cause for both warrants.

On December 29, 2003, Juan filed a pro se motion to suppress evidence of the alleged illegal search of the 3902 Vantage Place residence and requested a hearing, pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), arguing that the warrant was based on materially false information. On March 2, 2004, Juan then filed a motion to dismiss the charges against him because there was no probable cause for the search warrant. The trial court denied Juan's motion and denied his request for a hearing on July 21, 2004. Juan later filed a motion, by counsel, for the court to reconsider his motion to suppress, but the trial court denied the motion. On August 11, 2004, Cecilia moved to adopt Juan's motion to set aside the order denying the motion to suppress. The motion to adopt was granted; however, the trial court denied the motion to reconsider.

Juan and Cecilia were tried together before a jury beginning on August 9, 2006. The trial court continued to deny any suppression of evidence seized during the search of the Vantage Place residence and the vehicles. Both Juan and Cecilia were convicted of Planting, Cultivating or Harvesting with Intent to

Sell Marijuana, Complicity, and Illegal Use or Possession of Drug Paraphernalia. Juan's sentence was enhanced by his PFO II status.

Sanders v. Commonwealth, 2006-CA-002282-MR, 2008 WL 2219789 (Ky. App. May 30, 2008). In October 2007, Appellants filed a motion for post-conviction relief under CR 60.02 alleging that police chemist, Amelia Gordon, had committed perjury and that the Commonwealth failed to provide the defense with the complete results of the laboratory tests on the marijuana. Appellants also alleged that Detective Clarence Marthet fabricated a portion of his affidavit in order to obtain both the initial and ultimate search warrants for their residence. Following a hearing, the trial court denied the motion. This appeal followed.

Appellants first argue that the trial court erred by failing to set aside the judgments based on their allegation that Detective Marthet fabricated his affidavit in order to obtain both the initial and ultimate search warrants for their residence. The trial court found that any issues relating to the initial search warrant were irrelevant to the drug charges because the initial warrant was based on a shooting incident for which neither of the Appellants was charged. The trial court also found that there was no good faith basis and no proof whatsoever to support the allegation that Detective Marthet fabricated the affidavit to obtain the search warrant for the residence relating to the drug activity.

We review the denial of a CR 60.02 motion under an abuse of discretion standard. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000); *Brown v. Commonwealth*, 932 S.W.2d 359, 361 (Ky. 1996). The test for abuse of

discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Therefore, we affirm the lower court's decision unless there is a showing of some “flagrant miscarriage of justice.” *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

The evidentiary hearing on the CR 60.02 motion was not included in the record. A silent record is presumed to support the decision of the trial court. *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985). At the hearing, Daryl Malone testified that he did not identify Juan Sanders as a suspect when he reported the shooting to police, which was the basis of the initial search warrant. Apparently, Detective Marthet was not called to testify at the hearing. Malone’s testimony, taken alone, does not establish anything other than he did not identify Sanders as the shooter. As stated above, Appellants were never charged in connection with the shooting. We conclude that the trial court did not abuse its discretion by failing to set aside the judgments on this basis. The issue regarding the search warrant for the ultimate crime scene was litigated prior to trial. This Court affirmed on direct appeal. CR 60.02 is not a vehicle to relitigate previously determined issues. *McQueen v. Commonwealth*, 948 S.W.2d 415, 415 (Ky. 1997).

Next, Appellants argue that police chemist, Amelia Gordon, committed perjury and that the Commonwealth failed to disclose the entirety of its laboratory results on the marijuana. Appellants allege that Gordon contradicted her trial testimony at the evidentiary hearing on the CR 60.02 motion. However, as

stated above, this hearing was not included in the record. The trial court found that Gordon's testimony at the evidentiary hearing was entirely consistent with her trial testimony. Further, the trial court found that the Commonwealth provided Appellants with the entire laboratory report. Moreover, claims that the Commonwealth failed to disclose evidence could and should have been raised on direct appeal. *Hodge v. Commonwealth*, 116 S.W.3d 463, 467-68 (Ky. 2003). Appellants have failed to establish that they are entitled to extraordinary relief. The trial court did not abuse its discretion.

Accordingly, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Juan Leotis Sanders, pro se
West Liberty, Kentucky

Cecilia Sanders, pro se
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky