

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000425-MR

QUINCY BAILEY

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE ROBERT J. HINES, JUDGE
ACTION NO. 04-CR-00361

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; ACREE AND VANMETER, JUDGES.

VANMETER, JUDGE: Quincy Bailey appeals *pro se* from the McCracken Circuit Court's order denying his motion for relief pursuant to CR¹ 60.02. We affirm.

Following a jury trial, Bailey was convicted of murder and sentenced to life in prison. His conviction was affirmed on direct appeal to the Kentucky Supreme Court. One of the issues addressed in that appeal was an unpreserved

¹ Kentucky Rules of Civil Procedure.

error in the chronological order of the jury instructions and in the wording of the verdict form. Bailey argued that the jury intended to find him guilty of first-degree manslaughter rather than murder, but was confused by the wording of the form.

The jury instructions were numbered in this case, with Instructions 1 and 2 relating to the presumption of innocence and statutory definitions, respectively. Four homicide instructions were given: murder (Instruction 3); first-degree manslaughter (Instruction 4); second-degree manslaughter (Instruction 5); and reckless homicide (Instruction 6). Instructions 7 through 11 contained the self-protection instruction and its accompanying qualification instructions (wanton or reckless belief, initial aggressor, and provocation). The final instruction required a unanimous verdict. Each instruction was printed on a separate sheet of paper. The trial court correctly read the jury instructions to the jury and a packet of instructions was provided to each juror. However, in that packet, the first-degree manslaughter instruction was erroneously placed before the murder instruction. That is, the first six written instructions were given to the jury in the following order: Instruction 1 (presumption of innocence); Instruction 2 (definitions); Instruction 4 (first-degree manslaughter); Instruction 3 (Murder); Instruction 5 (second-degree manslaughter); and Instruction 6 (reckless homicide). Undoubtedly, this was an administrative mistake.

Unfortunately, the verdict form compounded this error. The written verdict form directed the jury to execute only one of five possible verdicts. The jury executed, and the foreperson signed, the first verdict statement: “We, the jury, find the Defendant, Quincy D. Bailey, guilty of Murder under Instruction No. 4.” As stated above, Instruction 4 relates to first-degree manslaughter, not murder, though it was the first homicide instruction in the packet. Thus, on the face of the verdict form, two equally plausible interpretations exist: that the jury found Appellant guilty of murder, though the instruction erroneously refers to Instruction No. 4; or that the jury found Appellant guilty of first-degree manslaughter

under Instruction No. 4, though the instruction erroneously refers to murder.

The ambiguity in the verdict form was not recognized at trial. The trial court accepted the verdict without objection from either party and polled the jury as to their finding of murder. Judgment was entered. Apparently, the trial court later realized the error in the verdict and issued an order the following week which stated: “The jury was polled as to their finding. Although, there is a typographical error in the verdict form, that both the Commonwealth and the defense counsel over looked (sic), it does not effect (sic) the outcome of the jurors (sic) clear verdict of murder.” Appellant's final sentencing occurred about a month later and, again, defense counsel made no objection regarding the verdict form.

Bailey v. Commonwealth, 2009 WL 1830808, at *5-6 (Ky. 2009) (2006-SC-000785-MR).

The Supreme Court reviewed the issue for palpable error and concluded as follows:

The circumstances surrounding this jury verdict are highly unusual, and Appellant’s arguments implicate the most fundamental rights of a criminal defendant: the right to a unanimous verdict and the absolute necessity of clear and unambiguous verdicts, particularly in criminal cases. For this reason, we have undertaken an especially thorough review of the record in this case.

It is our conclusion that the jury intended to find Appellant guilty of murder. The evidence adduced at trial strongly supported the finding that Appellant returned to The Set [an area of Paducah] with the intention of killing Askew in revenge. When polled as to the finding of murder, no juror objected or attempted to correct the trial court. The jury’s recommended sentence reflects a belief that the crime was so egregious as to warrant the highest possible sentence. Even after the

verdict's deficiency was revealed, all parties proceeded with final sentencing under the belief that Appellant was found guilty of murder. In light of these circumstances, the jury's intent can be fairly ascertained. Therefore, Appellant's claim has been waived and is unpreserved for appellate review.

Id. at *8.

On January 8, 2010, Bailey filed a *pro se* motion pursuant to CR 60.02 asking the trial court to amend the judgment of conviction to reflect a sentence consistent with a conviction of manslaughter. The trial court denied the motion, ruling that the issue raised therein had already been decided on direct appeal by the Supreme Court. This appeal followed.

This court reviews the denial of a CR 60.02 motion for an abuse of discretion by the trial court. *Stoker v. Commonwealth*, 289 S.W.3d 592, 596 (Ky.App. 2009).

In Bailey's case, the issue of the ambiguous verdict form was fully reviewed and resolved by the Supreme Court on direct appeal. It may not, therefore, be reconsidered under CR 60.02.

Civil Rule 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could "reasonably have been presented" by direct appeal or RCr 11.42 proceedings. RCr 11.42(3); *Gross v. Commonwealth*, [648 S.W.2d 853 (Ky. 1983)] at 855, 856. The obvious purpose of this principle is to prevent the relitigation of issues which either were or could have been litigated in a similar proceeding. As stated in *Gross*, 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, 144.

Id. at 856. In summary, CR 60.02 is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings.

McQueen v. Commonwealth, 948 S.W.2d 415, 416 (Ky. 1997).

Bailey nonetheless attempts to distinguish his claim of error under CR 60.02 from the issues that were addressed and resolved in his direct appeal. He contends that he is focusing on an error in sentencing, rather than on the jury instructions and resulting verdict. But any error in sentencing could have been raised on direct appeal and is consequently barred. Moreover, since the Supreme Court has already ruled that the verdict of murder was not compromised by any errors in the instructions, the imposition of a life sentence as a result of that verdict was similarly without error. The trial court did not abuse its discretion in denying Bailey's motion for CR 60.02 relief.

The order of the McCracken Circuit Court is affirmed.

ALL CONCUR.

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