

RENDERED: DECEMBER 22, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001804-MR

TONY GLASPER

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. C. MCKAY CHAUVIN, JUDGE
ACTION NO. 05-CR-000473

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, DIXON, AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Tony Glasper appeals from an order of the Jefferson Circuit Court denying his motion to vacate his conviction under Kentucky Rules of Civil Procedure (CR) 60.02. After careful review, we affirm.

This case came before the Kentucky Supreme Court on direct appeal, and its opinion entered September 25, 2007, sets forth the facts of the case as follows:

On the evening of March 27, 2001, the victim in this case, S.C., became intoxicated while drinking an entire bottle of Amaretto at her home. Sometime between 11:00 p.m. and 1:00 a.m. that night, she decided to go to a local liquor store to purchase another bottle. At the liquor store, she obtained a cup of ice and began drinking the Amaretto she just purchased. S.C. was very intoxicated that night and only remembers portions of what happened next.

After remaining at the liquor store for about thirty to forty minutes, S.C. met Appellant. The two soon left in Appellant's vehicle to obtain marijuana. After driving a short distance, Appellant stopped the vehicle and attacked S.C. Photographs taken at the hospital that night showed swelling and bruising near S.C.'s eyes, nose, and lips. There was also a laceration on S.C.'s right leg. S.C. remembers being choked by Appellant. S.C. told Appellant that she would do anything he wanted if he would permit her to live. Appellant ordered S.C. into the back seat and then sexually assaulted S.C. Fluid samples from S.C.'s arm and abdomen were eventually shown to contain Appellant's DNA.

After the attack, Appellant returned S.C. to the liquor store. Appellant asked S.C. if she still wanted some "weed." To placate him, S.C. agreed. Appellant told S.C. to give him her telephone number and she complied, writing down a fake name and number. Appellant then gave S.C. a piece of paper with the name "Tony" written on it and a telephone number. The telephone number was later determined to be that of Appellant's sister.

Once Appellant left, S.C. immediately drove to an unmanned police / EMS substation. Police eventually responded to her calls of distress and S.C. was transported to the hospital. At the hospital, S.C. was examined and a "rape kit" was collected. S.C. gave the slip of paper containing Appellant's name to police, as well as what she thought were the first three digits of Appellant's license plate (she was one digit off).

In March 2003, the police determined that the DNA found on S.C. matched that of Appellant. Appellant was subsequently tried and found guilty of the crimes set forth above in December 2005. A judgment was entered against Appellant on March 16, 2006.

Glasper v. Commonwealth, 2006-SC-000300, slip op. at 1-2 (September 25, 2007).

On February 10, 2005, a Jefferson County grand jury indicted Glasper, charging him with sodomy in the first degree and assault in the fourth degree. On October 18, 2005, the grand jury issued a second indictment, thereby adding the charge of being a persistent felony offender in the first degree (PFO). Glasper was tried in December 2005, and the jury found him guilty of sexual abuse in the first degree and assault in the fourth degree but acquitted him of the charge for sodomy in the first degree. The jury also convicted him of being a PFO in the first degree. The jury recommended a sentence of imprisonment of five years for the sexual abuse conviction and nine months for the assault charge, to be enhanced to twenty years by virtue of the PFO conviction. On March 16, 2006, the trial court entered judgment against Glasper, sentencing him to twenty years' imprisonment.

From this judgment and sentence, Glasper appealed to the Kentucky Supreme Court, which affirmed his convictions. On July 24, 2007, Glasper filed a motion to vacate judgment under Kentucky Rules of Criminal Procedure (RCr) 11.42, arguing that his trial counsel was ineffective. On August 15, 2007, the trial court denied the motion because Glasper had failed to serve the prosecutor with a copy of his motion and had failed to comply with Kentucky Revised Statutes

(KRS) 31.110(3). On August 29, 2007, Glasper resubmitted his motion under CR 59.05, and on October 25, 2007, the Jefferson Circuit Court vacated the August 15, 2007, order and denied the initial RCr 11.42 motion. Glasper appealed to this Court, but we affirmed the denial of the RCr 11.42 motion on January 23, 2009. Glasper did not seek discretionary review by the Kentucky Supreme Court.

Thereafter, in September 2009, Glasper filed a motion to vacate judgment under CR 60.02.¹ On July 17, 2010, Glasper filed a petition for writ of mandamus in this Court, seeking an order directing the trial judge to rule on his CR 60.02 motion. On October 27, 2010, this Court denied Glasper's petition as moot. On September 1, 2010, the trial judge summarily denied the motion, finding that the CR 60.02 motion was "entirely devoid of factual basis or legal merit." Glasper now appeals again.

Glasper first argues that the trial court erred when it denied his CR 60.02 motion for failure to set forth grounds upon which relief may be granted. Specifically, Glasper argues that his "conviction was procedurally barred in that there was no adequate verification made of his being convicted on any prior felonies [sic] as such the judgment on that conviction is void *ab initio* and as such should have been set aside by the trial court." Glasper contends that the Commonwealth never addressed the fact that there was never any proof offered to support the PFO indictment and subsequent conviction. He claims that the only

¹ The CR 60.02 motion does not appear in the record. It is possible that the motion was filed in the companion case, File No. 05-CR-3112.

evidence entered into the record was a printed out sheet supposedly signed by the Illinois Department of Corrections.

The Commonwealth argues that Glasper should have presented his sufficiency of the evidence arguments on direct appeal and that motions filed under CR 60.02 are limited to issues that could not have been brought on direct appeal.

We agree with the Commonwealth.

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.

Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983). During his direct appeal to the Supreme Court, Glasper did not argue that the PFO evidence was insufficient. Instead, his sole argument on direct appeal was that he was improperly denied a mistrial when he was caught off guard by the victim's testimony that at the time of the attack she was suffering from mental problems and had been diagnosed with bipolar disorder. As stated above, the Supreme Court affirmed Glasper's convictions, holding that he had access to the victim's medical records which indicated prior mental health issues that would have put Glasper on

notice as to the victim's possible testimony. Clearly Glasper did not present his sufficiency of the evidence argument on direct appeal.

Based on the foregoing, Glasper's CR 60.02 motion was not the proper vehicle to be used to attack the prior judgments of conviction which formed the basis of his PFO charge and he is not entitled to extraordinary relief. Further, Glasper was not entitled to an evidentiary hearing, as he did not allege facts that, if true, would justify vacating his conviction. Therefore, we affirm the trial court's September 01, 2010, order denying Glasper CR 60.02 relief.

ALL CONCUR.

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