

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-001028-MR

GLENN RAHAN DONEGHY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 10-CR-00766

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MAZE, NICKELL AND VANMETER, JUDGES.

NICKELL, JUDGE: Glenn Rahan Doneghy, *pro se*, appeals the order of the Fayette Circuit Court denying his Kentucky Rules of Civil Procedure (CR) 60.02 motion. For the following reasons, we affirm.

In April 2010, a vehicle driven by Doneghy struck and killed Officer Bryan Durman as he was standing inside the door of an automobile investigating a

noise complaint. Doneghy fled the scene, but police later found him barricaded inside his residence. After police forced him out of his apartment, Doneghy fought with officers in an attempt to escape. He was finally arrested and a search of his apartment produced several items of contraband.

After a three-week trial in June 2011, a jury convicted Doneghy of second-degree manslaughter; leaving the scene of an accident/failure to render aid or assistance; second-degree assault; fourth-degree assault; first-degree possession of a controlled substance (cocaine); possession of marijuana; and possession of drug paraphernalia. In total, the jury recommended Doneghy serve a total of thirty years' imprisonment. However, the trial judge imposed a sentence of twenty years' imprisonment, the maximum allowed by Kentucky Revised Statutes (KRS) 532.110¹ under the circumstances.

Following his conviction, Doneghy moved for a new trial due to issues with jury sequestration. The trial court overruled his motion on August 10, 2011. He next appealed his conviction directly to the Supreme Court of Kentucky which, on June 20, 2013, affirmed. *Doneghy v. Commonwealth*, 410 S.W.3d 95 (Ky. 2013). Doneghy then moved, *pro se*, to modify his sentence pursuant to CR² 60.02. The trial court denied the motion, noting the Supreme Court had either

¹ KRS 532.110 (1) (c) states in pertinent part, “[t]he aggregate of consecutive indeterminate terms shall not exceed in maximum length the longest extended term . . . for the highest class of crime for which any of the sentences is imposed.”

² Kentucky Rules of Civil Procedure.

already decided the issues raised, or the issues could have been pursued on direct appeal or in a timely petition for post-conviction relief. This appeal followed.

The purpose of CR 60.02 is to provide relief which is unavailable by direct appeal or RCr 11.42. *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). To be entitled to a hearing on the motion, the movant “must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify . . . relief.” *Gross*, 648 S.W.2d at 856.

“The standard of review of an appeal involving a CR 60.02 motion is whether the trial court abused its discretion.” *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000). To amount to an abuse of discretion, the trial court's decision must be “arbitrary, unreasonable, unfair, or unsupported by sound legal principals.” *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007) (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)). Absent a “flagrant miscarriage of justice,” we will affirm the trial court. *Gross*, 648 S.W.2d at 858.

On appeal, Doneghy raises seven issues he believes merit relief under CR 60.02: (1) the trial judge improperly displayed emotion to the jury; (2) insufficient proof supported his conviction of second-degree assault; (3) the judge made statements during sentencing showing bias; (4) the judge failed to recuse himself; (5) the judge improperly made a statement to the Commonwealth's attorney outside the presence of defense counsel; (6) the record contained evidence to impeach a witnesses' testimony; and (7) the trial court improperly allowed the jury, during deliberations, to go to lunch unaccompanied by a bailiff or other court

officer. Having reviewed each of Doneghy's seven issues, we discern no error and affirm.

Doneghy's claim regarding the judge's alleged display of emotion in the presence of the jury, and his claim of insufficient evidence to support a conviction of second-degree assault, were both raised and rejected by our Supreme Court on direct appeal. Under the law of the case doctrine, "issues decided in earlier appeals should not be revisited in subsequent ones." *Brown v. Commonwealth*, 313 S.W.3d 577, 610 (Ky. 2010). Therefore, in light of our high court's ruling, these two issues are barred from our consideration.

Doneghy's next three issues deal with alleged judicial bias. Specifically, Doneghy claims the judge made biased statements during sentencing, failed to recuse himself, and had *ex parte* communications with the Commonwealth's attorney. While we are convinced Doneghy has not shown the judge was partial or in any way prejudiced toward the defense, we do not need to reach the merits of Doneghy's claims. "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." *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). The purpose of CR 60.02 is to provide trial courts a means to correct errors made apparent by certain facts arising after entry of judgment and those which could not be corrected through any other procedural means. *Gross*, 648 S.W.2d at 888. Each of Doneghy's alleged instances of judicial bias was known to him during and after trial and prior to the

filing of his direct appeal. Each alleged incident was also part of the video record. Therefore, each of these issues could have been raised on direct appeal but were not. Because he failed to raise the allegations at the appropriate time, he is foreclosed from doing so now.

Doneghy next claims evidence indicates false testimony was used against him. Specifically, he cites surveillance video in the record he claims contradicts Commonwealth witness Jessie McDowell's testimony. McDowell stated she observed a black male driver, wearing a long-sleeved white shirt and white baseball hat, run a traffic light as it turned red. Doneghy claims surveillance video from a nearby gas station shows the driver was wearing different colored clothing.

The perjured testimony is addressed by CR 60.02(c). That provision specifically states motions made pursuant to 60.02(c) shall be made "not more than one year after the judgment, order, or proceeding was entered or taken." The judgment against Doneghy was entered on June 30, 2011, and he filed his CR 60.02 motion on March 28, 2014. The video evidence that supposedly contradicts McDowell's testimony is part of the record and the issue could have been raised well within the time limit. To the extent his motion was brought under CR 60.02(c), it was not filed within one year of the judgment and it is, therefore, untimely.

Our Supreme Court has held actions predicated on the basis of perjury may be brought pursuant to CR 60.02 (f), and subjected to the reasonable time limitation of the rule, if the claim is extraordinary in nature. *Commonwealth v.*

Spaulding, 991 S.W.2d 651, 657 (Ky. 1999). However, the burden remains on the movant to show a reasonable certainty of falsity, and that the conviction likely would not have resulted without the perjured testimony. *Id.* Here, it is clear Doneghy cannot meet this heavy burden. There was overwhelming evidence demonstrating Doneghy was the driver of the vehicle that hit and killed Officer Durman. The vehicle belonged to Doneghy; he was seen driving the vehicle on the night in question; surveillance video shows him driving the vehicle on the night in question; and, his subsequent action of barricading himself in his apartment suggests a consciousness of guilt. In light of the overwhelming evidence, we find it immaterial that McDowell may have misidentified the color and type of clothing the driver of the vehicle was wearing. After reviewing the record, we are convinced that even absent McDowell's entire testimony, the weight of the evidence was clearly sufficient to support Doneghy's conviction.

Finally, Doneghy alleges the trial court improperly allowed the jury during deliberations to go to lunch unaccompanied by a bailiff or other court officer. Doneghy moved for a new trial on this issue but was denied. He decided not to pursue the issue on direct appeal to the Supreme Court of Kentucky.

In *Winstead v. Commonwealth*, 327 S.W.3d 386 (Ky. 2010), the Supreme Court of Kentucky held a trial judge has discretion to determine whether leaving jurors unmonitored during deliberations warrants a mistrial. In so holding, the Court overruled *Hamilton v. Commonwealth*, 285 S.W.2d 156 (Ky. 1955), which had required reversal or mistrial where "there existed an opportunity for outside

influence upon jurors—even without actual proof of improper influence[.]”
Winstead, 327 S.W.3d at 401. The Court noted an abuse of discretion could be found where there is a clear showing of manifest necessity for a mistrial, such as proof the case was discussed, or the trial court did not admonish the jurors. Here, the record clearly indicates the trial judge admonished the jurors before releasing them for lunch. Moreover, Doneghy offers no proof of improper influence. Based on his clear admonition and the lack of proof the case was discussed, we are certain the trial judge acted well within his discretion when he determined a mistrial was unwarranted on this occasion.

Regardless, as stated above, CR 60.02 is not merely an additional opportunity to attack issues which could and should have been previously raised. Rather, it is intended for extraordinary situations that demand extraordinary relief. Because this matter could have been raised on direct appeal, it is improper for a CR 60.02 motion.

For the foregoing reasons, the order of the Fayette Circuit Court denying Doneghy’s CR 60.02 motion is affirmed.

ALL CONCUR.

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