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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001283-MR

CHARLES HENSLEY — APPELLANT

v.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 00-CR-00187

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; CLAYTON AND THOMPSON, JUDGES.

CLAYTON, JUDGE: Charles Hensley brings this appeal from an order of the Harlan Circuit Court denying his motion for a new trial under Kentucky Rules of Criminal Procedure (RCr) 10.02 and his motion to vacate his sentence under Kentucky Rules of Civil Procedure (CR) 60.02. Finding no error, we affirm.

On October 19, 2000, Anna Young discovered a body lying with multiple stab wounds in the road. Nearby, she saw Hensley, covered in blood, attempting to get an automobile out of a ditch. The body was found approximately fifteen feet from Cletus Robbins's porch. Young went to Robbins's house, who identified the victim as Rocky Haywood. When the police arrived, Hensley had gone to his mother's house and showered, claiming that he was afraid he would be exposed to AIDS. Hensley told police that he had been talking to Haywood when someone ran up to Hensley, pushed him, and began stabbing Haywood. Following an investigation, Hensley was indicted for Haywood's murder.

Robbins offered key testimony at Hensley's trial. The Commonwealth also introduced significant physical evidence, including a hair found on Hensley's vehicle. Linda Winkle, a specialist at the KSP Crime Lab, found that the hair was similar to both Hensley's and Haywood's hair. She analyzed the knife blade and handle for blood, and found that the blood on the knife was Haywood's. She also presented a paper towel from the floorboard of the car, which contained enzymes and DNA consistent with Hensley's. The Kentucky State Police (KSP) could not identify any usable fingerprints on the knife.

A jury convicted Hensley and recommended a sentence of life imprisonment. On March 5, 2003, the trial court imposed the recommended sentence. The Kentucky Supreme Court affirmed his conviction and sentence on direct appeal. *Hensley v. Kentucky,* 2005 WL 2674974 (Ky. 2005) (unpublished). Hensley then filed a motion for a new trial "due to a palpable error pursuant to CR

61.02." The trial court denied his motion, and this Court affirmed on appeal. *Hensley v. Commonwealth,* 2007 WL 3122271 (Ky. App. 2007) (unpublished).

Hensley then filed a *pro se* RCr 11.42 motion which appointed counsel supplemented. The trial court denied Hensley's motion and he appealed to this Court. *Hensley v. Commonwealth*, 2013 WL 5048758 (Ky. App. 2013) (unpublished). On appeal of the denial of Hensley's RCr 11.42 motion, he argued his counsel was ineffective for failing to locate medical records showing he suffered a shoulder injury which he claimed would have prevented him from murdering Haywood. *Id.* at *4. He also argued the trial court denied him access to DNA testing "on a hair [found in the victim's car] previously admitted into evidence, a hair on the knife, a blood drop found several feet from the body of the victim, and alleged touch DNA on the handle of the knife." *Id.* at *6. This court affirmed as to Hensley's first allegation of error but reversed regarding Hensley's argument for DNA testing. *Id.*

On remand, the trial court ordered the following evidence released for testing: the knife, the hair found on the knife, hairs found in the car, and the blood located twenty-seven feet away from the victim. The trial court subsequently ordered several government agencies and offices to conduct a search for the evidence. Though a hair from Haywood's car was located, the search was otherwise unsuccessful.[1]

[1] Hensley's counsel filed a motion requesting the circuit court to direct the Kentucky State Police to determine whether this hair was a root. If so, counsel stated it could be subject to DNA testing. If not, counsel stated that other testing would be appropriate. However, it appears that no further action was taken to subject this evidence to any additional testing. Hensley has also

Hensley then filed a motion under RCr 10.02 and CR 60.02. In it, he alleged he was entitled to a new trial because he had obtained an affidavit from Michael Noe stating he had overheard Cletus Robbins tell Dwayne Harris that Robbins had murdered Haywood. He also argued the Commonwealth failed to preserve potentially exculpatory evidence. The trial court denied Hensley's claim regarding the DNA evidence, finding Hensley had not demonstrated the Commonwealth had acted in bad faith. The court granted an evidentiary hearing concerning the third-party confession.

The hearing took place on June 13, 2016. At the hearing, Noe testified he knew Robbins because Noe was working for Robbins's friend, Harris. Noe testified that over ten years prior, he had overheard Robbins tell Harris that, referring to Haywood, he had "cut the goddamned son of a bitch's head off." Hensley testified that when he first heard the statement he told Kentucky State Police Detective Roy Pace,[2] but that Detective Pace "wasn't worried about it." Noe further testified he believed he told Hensley's father. Noe stated that he did not believe Robbins was a trustworthy person, but that he believed Robbins when he made the statement based on Robbins's poor reputation. Even though Noe didn't know for certain whether Robbins was intoxicated when he made the statement, Noe believed he was.

not argued he is entitled to such testing on appeal.

[2] Noe was unsure of whether Detective Pace was retired at the time he called him.

Hensley also testified at the hearing. Hensley testified his father first informed him about ten years ago that Noe had information related to his case. Hensley stated he informed his lawyers of this, but they "didn't have any luck." He testified that he was only able to obtain Noe's testimony through his post-conviction attorney. The trial court denied Hensley's CR 60.02 motion on the basis that the confession would not have changed the outcome of the trial.

On appeal, Hensley argues (1) the trial court abused its discretion in denying Hensley's claim based on the third-party confession of Robbins, and (2) the trial court abused its discretion in denying a new trial due to the Commonwealth's failure to preserve evidence.

The trial court's denial of a CR 60.02 motion is reviewed for an abuse of discretion. *Partin v. Commonwealth*, 337 S.W.3d 639, 640 (Ky. App. 2010). A trial court abuses its discretion when its decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted). Absent a "flagrant miscarriage of justice," the trial court should be affirmed. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

Hensley argues the trial court abused its discretion in denying his claim based on Robbins's third-party confession. First, the circumstances surrounding Robbins's alleged confession do not indicate that it was reliable. Noe believed Robbins to be intoxicated when he confessed. Noe also testified Robbins was not a trustworthy individual, noting Robbins "ain't never been honest about

nothing." The circuit court had further reason to doubt the statement's veracity because it was first made over ten years before the date of the hearing.

Additionally, the evidence in Hensley's case does not corroborate Robbins's confession. A witness testified that she discovered Hensley near the body, covered in blood; Robbins was located inside his house when the witness knocked on his door. Though Hensley claimed a third party committed the murder in his statements to police, his statements were contradicted in several instances by evidence introduced at trial. For example, even though Hensley claimed he threw the knife in a field after the altercation with the alleged third-party attacker, the knife was found in Haywood's car. Having considered the evidence and the reliability of Robbins's statement, "we are not persuaded that the new evidence is of such decisive value or force that it would, with reasonable certainty, have changed the verdict or that it would probably change the result if a new trial should be granted." *Foley v. Commonwealth*, 425 S.W.3d 880, 888 (Ky. 2014) (citation and internal quotation marks omitted). The circuit court did not abuse its discretion when it denied Hensley relief as to this issue. Having decided this matter, we decline to address the Commonwealth's other arguments that Robbins's confession did not constitute "newly discovered evidence," that the issue is procedurally barred as successive, and that the CR 60.02 motion was untimely filed.

Hensley next argues that the trial court erred when it denied a hearing on Hensley's claim that he was entitled to a new trial based on the

Commonwealth's destruction of the knife, the hair found on the knife, and the blood located twenty-seven feet away from the victim.

> In failure-to-preserve cases, the defendant must . . . be able to show both that the missing evidence "possess[ed] an exculpatory value that was apparent before the evidence was destroyed" and that he was "unable to obtain comparable evidence by other reasonably available means." *California v. Trombetta,* 467 U.S. 479, 489, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). Thus, to make out a due process violation where evidence has been destroyed, the defendant must show (1) that the State acted in bad faith in failing to preserve the evidence; (2) that the exculpatory potential of the evidence was apparent before its destruction; and (3) that the evidence was, to some extent, irreplaceable. The first two elements are interrelated. It must appear that the State deliberately sought to suppress material, potentially exculpatory evidence.

McPherson v. Commonwealth, 360 S.W.3d 207, 217 (Ky. 2012).

Here, only the second and third prongs of this test are satisfied. The missing evidence was not tested by the Defendant before it was lost and the test results could have implicated an alternative perpetrator, therefore this evidence may have had some potential exculpatory value. *See Garland v. Commonwealth*, 458 S.W.3d 781, 786 (Ky. 2015). Furthermore, its exculpatory value would have been apparent before its destruction. *Id.* Additionally, this physical evidence is "to some extent, irreplaceable." *McPherson*, 360 S.W.3d at 217. Despite this, however, there is no evidence the government acted in bad faith.

Hensley, noting the trial court entered several orders to preserve the evidence, requests this Court adopt the rule that bad faith is presumed where

evidence is destroyed or lost and a preservation order is in place before the conviction is final. We decline to do so. Nothing in the record demonstrates that the evidence he sought to be tested was actually destroyed, only that it is now missing. There is no affirmative proof how or why the evidence was lost, let alone evidence of bad faith. Additionally, the trial court first ordered the various government agencies to search their offices for the evidence in 2015, over twelve years after Hensley was sentenced in 2003. "Undoubtedly, the passage of time . . . aggravate[s] the difficulty of producing reliable evidence[.]" *Tabler v. Wallace*, 704 S.W.2d 179, 185 (Ky. 1985) (quoting *Overland Constr. Co. v. Sirmons,* 369 So.2d 572, 574 (Fla. 1979)). Failure to recover evidence after a twelve-year delay should not lead to a presumption of bad faith. The circuit court did not abuse its discretion when it denied Hensley relief as to this issue.

Finally, we deny Hensley's motion under RCr 10.02. RCr 10.02 permits a trial court to grant a new trial "for any cause which prevented the defendant from having a fair trial, or if required in the interest of justice." RCr 10.02(1). "[T]o warrant the setting aside of a verdict and granting a new trial, 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." *Foley v. Commonwealth*, 425 S.W.3d 880, 888 (Ky. 2014) (citation and internal quotation marks omitted). For the reasons explained above, the evidence set forth by Hensley does not meet this standard.

For the foregoing reasons, the order of the Harlan Circuit Court denying Hensley's motion under RCr 10.02 and CR 60.02 is affirmed.

ALL CONCUR.

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