

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001707-MR

SHANNON GEARY

APPELLANT

v. APPEAL FROM MUHLENBURG CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
ACTION NO. 14-CR-00167

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, D. LAMBERT AND THOMPSON, JUDGES.

COMBS, JUDGE: Shannon Geary appeals from an Order of the Muhlenberg Circuit Court that denied his Motion for Relief filed pursuant to CR¹ 60.02. After our review, we affirm.

¹ Kentucky Rules of Civil Procedure.

On August 27, 2014, William "D.D." Faith was robbed at gunpoint in his home by three individuals, two men and a woman. One of the male robbers concealed his identity with a bandana over his face; he told Faith "this is what you get for messing with a married woman." Faith identified Jesse Hailey as the unmasked male robber and Kristi Copeland as the female robber. Copeland told police that Shannon Geary was the third robber. She told police that robbing Faith had been Geary's idea because Faith was involved with Geary's wife, Corrie Enix.

When the police apprehended Geary, he was in possession of multiple items -- including guns -- that matched the description of items stolen from Faith's home. Prior to Geary's trial, Jesse Hailey accepted a plea deal in exchange for his testimony detailing Geary's role in the robbery. During his plea hearing, Hailey stated under oath that Geary had been the masked robber. At Geary's trial, Hailey also testified that Geary had participated in the robbery.

On April 7, 2015, a jury found Geary guilty of robbery in the first degree (KRS² 515.020) and of being a persistent felony offender in the first degree KRS 532.080. On April 28, 2015, the circuit court entered its judgment and sentenced Geary to serve thirty years in prison consistent with the jury's recommendation.

On July 1, 2016, Geary filed a motion pursuant to CR 60.02 to vacate his sentence, contending that Jesse Hailey had committed perjury when he claimed that Geary was the third participant in the robbery. Geary attached an affidavit

² Kentucky Revised Statutes.

executed by Jesse Hailey on August 10, 2015, stating that an unidentified man called "Izzy" had been the actual masked man in the robbery of William Faith. On August 18, 2016, the circuit court denied Geary's motion. This appeal followed.

The standard governing our review of a trial court's denial of a CR 60.02 motion is whether the trial court abused its discretion. *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996); *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000). “The test for abuse of discretion is whether the judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Absent a “flagrant miscarriage of justice,” we will affirm the circuit court. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

Geary cited subsections (a), (b), and (c) of CR 60.02 in support of his motion for relief. Under those provisions, a motion must be filed “not more than one year after the judgment, order, or proceeding was entered or taken.” The circuit court held that Geary’s motion was untimely because he filed his motion on July 1, 2016, and the final judgment was entered on April 28, 2015. Geary contends that the time for filing the motion should be tolled because Hailey did not execute the affidavit until August 10, 2015.³ However, Geary provides no legal authority for that position, and we are persuaded that it is without merit.

In *Commonwealth v. Spaulding*, 991 S.W.2d 651, 655 (Ky. 1999), the Supreme Court held that a challenge to a conviction premised on perjury may be

³ The one-year time limit for filing a CR 60.02 motion is also not affected by the pendency of a direct appeal. *Meredith v. Commonwealth*, 312 S.W.2d 460, 462 (Ky. 1958).

brought under CR 60.02(f) where there is no fixed time limitation, but it must be brought within a “reasonable” time. In *Spaulding*, the Court noted that CR 60.02(f) is a catch-all provision that encompasses those rare grounds which would justify relief pursuant to writ of *coram nobis* and which are not otherwise set forth in the rule. A writ of *coram nobis* is an extraordinary remedy which may issue for situations resulting in the deprivation of life or liberty without due process of law. *Merrifield v. Commonwealth, ex rel. Buckman*, 283 S.W.2d 214, 215 (Ky. 1955).

Thus, if the introduction of perjured testimony . . . amounted to a denial of due process of law, then his motion is properly brought under CR 60.02(f) and is subject to a reasonable time limit rather than a one-year time limit. The resolution of this question turns on the more general issue of whether a conviction based on perjured testimony rises to the level of a denial of due process of law. . . .

Spaulding, 991 S.W.2d at 655.

A defendant raising a claim of perjury under CR 60.02(f) faces a heightened burden to justify a new trial. When a defendant requests CR 60.02(f) relief on the ground that a witness perjured himself without the prosecution's knowledge, “the burden remains on the defendant to show both that a reasonable certainty exists as to the falsity of the testimony and that the conviction probably would not have resulted had the truth been known before he can be entitled to such relief.” *Spaulding*, 991 S.W.2d at 657. Geary has not satisfied his burden to shown that he is entitled to relief under CR 60.02(f).

“[M]ere recantation of testimony does not alone require the granting of a new trial; only in extraordinary and unusual circumstances will a new trial be granted because of recanting statements.” *Thacker v. Commonwealth*, 453 S.W.2d 566, 568 (Ky. 1970). Recanting testimony “is viewed with suspicion.” *Id.* Indeed, such testimony is “quite naturally regarded with great distrust and usually given very little weight.” *Hensley v. Commonwealth*, 488 S.W.2d 338, 339 (Ky. 1972).

First, the credibility of Hailey’s affidavit is highly questionable. In the letter sent to Geary by the Kentucky Innocence Project dated March 7, 2016, the investigator stated: “I have also included the affidavit that was completed by Jesse Hailey. However, as you are aware, I must advise that Mr. Hailey has since recanted the information presented in that affidavit.” The affidavit also is rebutted by: Hailey's testimony at Geary's trial; his testimony during entry of his guilty plea; and his letter to the Commonwealth's attorney seeking to modify his guilty plea, in which Hailey stated, "I told you the complete truth about these robberies."

Second, the change in Jesse Hailey's testimony is not of such a conclusive character that it would have changed the outcome of the case. The circuit court noted other aspects of the evidence supporting the conviction. For instance, Kristi Copeland, the third participant in the robbery, testified extensively about the robbery and Geary’s participation. There was no other evidence supporting Hailey’s accusation implicating a person named “Izzy.” In fact, Geary

argued during the trial and on appeal that the third robber was a person named Jeff Springer. *See Geary v. Commonwealth*, 490 S.W.3d 354 (Ky. 2016).

Geary also admitted at trial that he was with Copeland and Hailey on the date of the robbery. He acknowledged that he had recently married Corrie Enix, who had had a relationship with William Faith; *ergo*, the statement of the masked robber about Faith's "messing with a married woman." Finally, Geary was found in possession of the victim's stolen guns when he was apprehended by the police. Consequently, even if Hailey's testimony had been different, we are not persuaded that the result of the trial would have been different or that Geary would not have been convicted. We conclude that the trial court did not abuse its discretion by denying Geary's CR 60.02 motion.

We affirm the order of the Jefferson Circuit Court.

LAMBERT, D., JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

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