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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000211-MR

QUINCY OMAR CROSS APPELLANT

v.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 07-CR-00060

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; JOHNSON AND NICKELL, JUDGES.

CLAYTON, CHIEF JUDGE: Quincy Omar Cross appeals from the Graves Circuit Court's order denying his Kentucky Rules of Civil Procedure (CR) 60.02 motion. Finding no error, we affirm.

On May 21, 2008, Quincy was convicted of kidnapping, murder, sodomy in the first degree, rape in the first degree, abuse of a corpse, and tampering with physical evidence. He was sentenced to life imprisonment without

parole. Quincy appealed the conviction to the Kentucky Supreme Court, which affirmed, in an unpublished opinion, *Cross v. Commonwealth*, 2008-SC-000465-MR, 2009 WL 4251649 (Ky. Nov. 25, 2009).

Next, on June 6, 2011, Quincy filed a Kentucky Rules of Criminal Procedure (RCr) 11.42 motion, which was denied by the trial court. Quincy appealed the decision to our Court, and we affirmed the trial court's decision. The Supreme Court denied discretionary review. *Cross v. Commonwealth*, 2011-CA-002136-MR, 2014 WL 505575, at *4 (Ky. App. Feb. 7, 2014).

Quincy has now filed a CR 60.02 motion requesting a new trial based on his assertion that three witnesses recanted their testimony. On November 9, 2016, the trial court denied the motion, and Quincy now appeals this decision.

The standard of review for a CR 60.02 motion is abuse of discretion. *Baze v. Commonwealth*, 276 S.W.3d 761, 765 (Ky. 2008). To ascertain whether there was an abuse of discretion by the trial court, we must examine "whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id*. (quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

Relief under CR 60.02 is allowed when it is based upon claims of error, which are unknown and could not have been known by the moving party even with the exercise of reasonable diligence. *Sanders v. Commonwealth*, 339

S.W.3d 427, 437 (Ky. 2011). Such claims must also be timely presented to the trial court. *Id*. Further, the rule provides a special form of relief, and "is not intended as merely an additional opportunity to raise claims which could and should have been raised in prior proceedings[.]" *Id*. Therefore, "[t]he movant must demonstrate why he is entitled to this special, extraordinary relief." *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). The relief is extreme, limited, and reserved for those times when justice itself requires an avenue for the plight endured by the aggrieved party. *See id.*

Further, Quincy's motion relies specifically on CR 60.02(f), which is the catchall provision and permits relief for "any other reason of an extraordinary nature justifying relief[,]" not enumerated in CR 60.02(a)-(e). It is axiomatic that CR 60.02(f) "requires extraordinary circumstances to be shown before relief will be granted." *Berry v. Cabinet for Families & Children ex rel. Howard*, 998 S.W.2d 464, 467 (Ky. 1999) (citing *Bishir v. Bishir*, 698 S.W.2d 823 (Ky. 1985)). Indeed, because it is optimal to accord finality to judgments, courts should permit motions under CR 60.02(f) "only with extreme caution, and only under most unusual circumstances." *Cawood v. Cawood*, 329 S.W.2d 569, 571 (Ky. 1959).

As mentioned, the time for making these motions, while not specifically limited by CR 60.02(f), still must be made within a reasonable time. *Campbell v. Commonwealth*, 316 S.W.3d 315, 318 (Ky. App. 2009). In fact, it is

the province of the trial judge, in granting or denying a CR 60.02 motion, to determine whether the passage of time between the judgment and the motion is reasonable considering the fading memories of witnesses. *Gross*, 648 S.W.2d at 858.

Quincy argues on appeal that the trial court abused its discretion in denying the CR 60.02 motion because three witnesses, described by him as "key" witnesses, have now changed their testimony and are claiming that they were pressured by investigators when they testified. The three witnesses are Rosie Crice, Victoria Caldwell, and Vinisha Stubblefield. Quincy contends that his conviction was based substantially on the testimony of these three witnesses.

The trial court denied the motion for two procedural reasons and on the merits. First, Quincy's own exhibits, which were attached to the motion, demonstrate that he was aware of Vinisha and Victoria's recanted testimony by at least 2012, and Rosie's recanted testimony by 2008. The trial court held that it was unreasonable for Quincy to wait so long to raise this issue. We agree. Motions under CR 60.02 must be raised in timely fashion. A determination of reasonable time is left to the trial court. Here, the information was known well before the filing of the CR 60.02(f) motion, and hence, the trial court did not abuse its discretion in finding the four-year delay was untimely.

Another procedural reason that the trial court denied the CR 60.02 motion was because Quincy's contentions could have been raised in the direct appeal or had already been raised in the RCr 11.42 proceeding. Issues raised in a CR 60.02 motion are precluded if they could have been raised in either a direct appeal or an RCr 11.42 action. *Owens v. Commonwealth*, 512 S.W.3d 1, 14 (Ky. App. 2017).

The interrelationship between direct appeals, CR 60.02 motions, and RCr 11.42 actions was carefully outlined in *Gross v. Commonwealth*. 648 S.W.2d at 857. The appeal/post-conviction process involves three basic steps. The first step is a direct appeal stating every reasonably known ground for the appeal. *Id*. The second step is for the defendant to seek an RCr 11.42 proceeding by providing all reasonably known grounds that would permit this remedy. *Id*. The third step, if legally authorized, is filing a CR 60.02 motion raising "circumstances of an extraordinary nature justifying relief." *Id*. The relief under CR 60.02 is reserved "for relief that is not available by direct appeal and not available under RCr 11.42." *Id*. at 856. Significantly, a defendant may not use CR 60.02 to raise any issues that could have reasonably presented by direct appeal or an RCr 11.42 proceeding. *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997).

A review of the three witnesses' testimony shows that Quincy has not provided "any other reason of an extraordinary nature justifying relief." CR

60.02(f). Beginning with Rosie Crice, we note that she testified at the original criminal trial about Quincy's involvement. Following her testimony for the prosecution, Quincy's defense called Rosie, and she claimed that she had told the Kentucky Bureau of Investigation that she did not know anything about Quincy's actions and was lying because of the investigators threatening to take her children away from her. Later, Rosie pled guilty to perjury at the trial. Since Rosie's recantation took place during the trial, Quincy could have easily included his claim that she was changing her testimony in the direct appeal. Furthermore, she was subject to cross-examination regarding her recanted testimony.

Regarding Victoria Caldwell and Vinisha Stubblefield's testimony, Quincy raised the issue of their testimony in the ineffective assistance of counsel claim in the RCr 11.42 action. After Quincy appealed the trial court's denial of the RCr 11.42 motion, our Court, in its unpublished opinion, stated concerning the alleged, prior inconsistent statements of the witnesses:

> Central to the defense's trial strategy was an effort to undermine the credibility of the Commonwealth's two key fact witnesses. The record reflects that defense counsel investigated Stubblefield and Caldwell, discovered they had lied in the past, and repeatedly brought the lies to the jury's attention. Cross's trial counsel impeached both witnesses with prior inconsistent statements they had made to investigators and elicited admissions from both of them that they had told numerous lies prior to trial. Their history of dishonesty was in the record, and doubts about their credibility were placed before jurors.

Cross, 2014 WL 505575, at *4. Since Quincy raised the issue of the credibility of these two witnesses' testimony in the RCr 11.42 motion, we hold that he is now precluded from raising them a second time in the CR 60.02 motion. *See Gross v. Commonwealth*, 648 S.W.2d at 857.

After determining that a procedural bar prohibited the re-hearing of the issue of the alleged recantations of testimony by these three witnesses, the trial court addressed the merits of Quincy's arguments in the CR 60.02 motion. The trial court found that Quincy's claims were meritless. As mentioned, Rosie testified and recanted during the trial. Thus, the jury was able to hear both versions of her testimony before making its decision.

Victoria's alleged recantation was found in the affidavit of Dale Elliot, but the Commonwealth filed an affidavit by Victoria denying the statements attributed to her in Elliot's affidavit and again implicating Quincy. And even though Vinisha alleged in her interview that she was pressured into testifying, she still implicated Quincy and observed that she was afraid of him. The trial court found, notwithstanding the apparent pressure by the investigators, it could not locate anything in the transcript that exonerated Quincy.

In sum, the trial court concluded that our Court in its opinion in the RCr 11.42 appeal explored the inconsistencies of these witnesses. Therefore,

Quincy has failed to establish under CR 60.02 "any other reason of an extraordinary nature justifying relief." CR 60.02(f).

Lastly, the trial court pointed out that the law concerning recanted testimony specifies that such alleged recantations are regarded with distrust and suspicion. "Affidavits in which witnesses recant their testimony are quite naturally regarded with great distrust and usually given very little weight." *Hensley v. Commonwealth*, 488 S.W.2d 338, 339 (Ky. 1972).

The Court has explained that "there are special rules for situations of recanted testimony." *Thacker v. Commonwealth*, 453 S.W.2d 566, 568 (Ky. 1970). In general, recanted testimony is viewed with suspicion, does not alone require a new trial, and only in extraordinary and unusual circumstances will a new trial be granted because of recanted statements. *Id.* Furthermore, recanted "statements will form the basis for a new trial only when the court is satisfied of their truth[.]" *Id.* Finally, the trial judge is in the best position to determine the veracity of the witnesses. *Id*. In the matter at hand, no basis has been provided to disturb the trial court's decision denying the CR 60.02 motion.

Further, countering Quincy's claim for a new trial or to set aside the judgment, is the trial record, which includes Quincy's own multiple statements incriminating himself to other trial witnesses. Accordingly, Quincy has not established that the trial court abused its discretion in denying the CR 60.02(f)

motion. Consequently, we affirm the decision of the Graves Circuit Court because Quincy's arguments fail to demonstrate that the trial court abused its discretion or committed any error in denying the CR 60.02 motion.

ALL CONCUR.

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