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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001526-MR

CHAD ERIC SHOFNER — APPELLANT

v.

APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE SAMUEL TODD SPALDING, JUDGE
ACTION NO. 01-CR-00141

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, DIXON AND TAYLOR, JUDGES.

COMBS, JUDGE: Appellant, Chad Eric Shofner, *pro se*, appeals from the denial of his motion filed pursuant to CR[1] 60.02. After our review, we affirm.

[1] Kentucky Rules of Civil Procedure.

The underlying facts are summarized in *Shofner v. Commonwealth*, 2006-CA-000985-MR, 2007 WL 2894929, at *1 (Ky. App. Oct. 5, 2007), in which this Court affirmed the denial of Shofner's RCr 11.42 motion:

> It is undisputed that on November 26, 2001, appellant shot and killed Michael Appleby and Darlene Appleby at their residence in Taylor County, Kentucky. Appellant's estranged wife, Jennifer Shofner . . . was having an affair with Michael and was living with him at the time of the murders. Darlene was Michael's mother. After killing Michael and Darlene, appellant kidnapped Jennifer.
>
> Appellant was indicted upon two counts of capital murder (Kentucky Revised Statutes (KRS) 507.020) and upon one count of kidnapping (KRS 509.040). Appellant eventually entered a guilty plea to all charges without the benefit of a plea bargain from the Commonwealth. He also agreed to waive jury sentencing. The parties agreed that the trial court would sentence appellant without a jury and that all sentences would be available, including the death penalty. At the sentencing hearing, the Commonwealth introduced evidence that the crimes were premeditated and offered evidence that appellant previously stated he was going to kill Michael and Jennifer. For the defense, appellant testified that he did not go to the residence intending to kill anyone and that he only took the rifle for self-protection. Appellant stated that he shot Michael in self-defense and shot Darlene accidentally. Multiple witnesses were called to testify as to appellant's upbringing, relationships, and social interactions. On October 31, 2002, the circuit court sentenced appellant to two terms of life imprisonment without the possibility of parole. These terms were ordered to run concurrently. Appellant's direct appeal was affirmed by the Supreme Court in *Shofner v. Commonwealth*, 149 S.W.3d 401 (Ky. 2004).

On May 1, 2017, Shofner filed a motion pursuant to CR 60.02(b) "in conjunction with" (e) and (f) based on newly-discovered evidence. Shofner asserted that his sentence was:

> based solely upon sworn testimony of an alleged "surviving witness", Jennifer Shofner, who has been exposed by newly discovered evidence to have perjured herself before the Taylor County Grand Jury, any and all involved prosecution agents, as well as any and all involved police investigative authorities; effectively convincing involved authorities that Movant was a crazed killer, rather than a love-struck dupe subjected to her manipulations.

Shofner contended that his telephone conversations with Jennifer as recorded on the prison phone system establish that he is not guilty of the charged offenses and that "it was not until May 2016, that Movant was able to persuade Jennifer to talk truthfully to him on the telephone." Shofner also argued for a new trial pursuant to RCr[2] 10.02 and 10.06.

On May 16, 2017, Shofner, *pro se*, appeared at motion hour. The court advised that it would take his CR 60.02 motion under advisement. By Order rendered on May 23, 2017, and entered of record on May 24, 2017, the court denied Shofner's motion to set aside his conviction pursuant to CR 60.02 in relevant part as follows:

[2] Kentucky Rules of Criminal Procedure.

> On the 1st day of May 2017, the Defendant filed a motion to set aside his conviction pursuant to Criminal Rule [*sic*] 60.02(b), (e) and (f). The Defendant filed a written memorandum on his behalf and attached a transcript of telephone calls conducted between the Defendant and Jennifer Shofner which purportedly occurred on the 8th of May, 2016. The Defendant in support of his motion also attached excerpts of the Grand Jury testimony, testimony taken at the 11.42 hearing and Ms. Shofner's interview with former Taylor County Deputy Sheriff Dan Durham. The Defendant alleges Jennifer Shofner was the primary witness in the case against him. The Defendant argues he ultimately decided to enter a plea of guilty to the offenses based upon statements Ms. Shofner had given which the Defendant alleges were false. Accordingly, the Defendant requests to set aside his conviction.

The court explained that it had read all of Shofner's record and that the only statement in which Jennifer "acknowledged giving false testimony was her statement that 'the only thing I did not tell the truth about is sleeping with you.' … However, at no point in any of the transcripts did Ms. Shofner make any admission about giving false testimony to any of the pertinent facts of the Defendant's conviction."

On May 24, 2016, Shofner filed a request to introduce two compact disks (CDs) of his telephone conversations with Jennifer that were recorded by the prison authorities. On June 6, 2017, Shofner filed a motion to alter or amend judgment pursuant to CR 59.05, *inter alia*, because the court had ruled upon his CR 60.02 motion without the benefit of the audio recordings. On June 27, 2017,

the court heard the motion. Shofner, *pro se*, appeared. The June 27, 2017, docket sheet order reflects that Shofner's CR 59.05 motion "is taken under advisement. Court will review audio recordings between the Defendant and Jennifer Shofner and will enter written decision in 15 days."

The court's order entered July 3, 2017, provides in relevant part as follows:

> The Court conducted a hearing on June 27, 2017, and having reviewed the audio recordings and having considered the oral and written arguments of the Defendant, the Court record and being otherwise sufficiently advised, hereby ORDERS as follows:
>
> 1. The Court's Order Denying Defendant's Motion to Set Aside Conviction entered May 24, 2017, is incorporated into this Order for appellate purposes.
> 2. The Defendant's Motion to Alter, Amend or Vacate the Court's Order May 24, 2017, is DENIED.

(Emphasis original).

On July 14, 2017, Shofner filed a motion to alter, amend, or vacate the court's July 3, 2017, order and a request for findings of fact and conclusions of law. The court's docket sheet order entered on August 1, 2017, reflects that "Motion of Defendant to alter, amend or vacate prior orders of this Court are [*sic*] denied." On August 3, 2017, Shofner filed a motion to proceed *in forma pauperis*, a designation of record on appeal, and a tendered Notice of Appeal. By order

entered on September 19, 2017, the court granted Shofner's request to proceed *in forma pauperis* and directed the Clerk to process Shofner's Notice of Appeal and designation of record.

On appeal, Shofner contends that "prior to denying CR 60.02 relief, [the] trial court had not listened to nor considered the merits of Appellant's recorded evidence …." He argues that the trial court abused its discretion in denying Appellant "any judicial investigation, via a meaningful hearing wherein … the exposed lies and fraud of Jennifer would be confronted by the court hearing the testimony of Appellant's RCr 11.42 witnesses …."

Shofner also claims that *Potter v. Eli Lilly and Co.*, 926 S.W.2d 449 (Ky. 1996), *abrogated by Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2004), mandates that the trial court conduct an investigative hearing. However, Shofner's reliance on *Potter* is misplaced. *Potter* involved the trial court's inherent authority to conduct an investigation where it suspected that the parties had secretly settled the case before it was submitted to the jury.

CR 60.02 provides as follows:

> On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than

> perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.

Before a movant seeking CR 60.02 relief "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 … [the] relief [sought]." *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983).

In the case before us, the trial court determined that "at no point in any of the transcripts did [Jennifer] make any admission about giving false testimony to any of the pertinent facts of the Defendant's conviction." Nothing gave the court reason to believe that Shofner "is not guilty of the crimes for which he plead guilty." The court **did review** the audio recordings after Shofner filed them as reflected in its July 3, 2017, Order noted above. Nonetheless, it remained unpersuaded.

Having reviewed the record, including the audio recordings, we cannot say that the trial court abused its discretion in denying Shofner's CR 60.02 motion.

> Whether a Defendant is entitled to the extraordinary relief provided by CR 60.02 is a matter left to the sound discretion of the court and the exercise of that discretion will not be disturbed on appeal except for abuse. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

Meece v. Commonwealth, 529 S.W.3d 281, 285 (Ky. 2017) (internal quotation marks and citations omitted).

Shofner also argues that the trial court abused its discretion when it failed to grant relief pursuant to RCr 10.02[3] and/or RCr 10.06.[4] We agree with the Commonwealth that the court's reasoning in denying Shofner's CR 60.02 motion serves to dismiss his arguments under RCr 10.02 and 10.06 as well.

We affirm the Orders of the Taylor Circuit Court.

ALL CONCUR.

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[3] RCr 10.02(1) provides that:

> Upon motion of a defendant, the court may grant a new trial for any cause which prevented the defendant from having a fair trial, or if required in the interest of justice. If trial was by the court without a jury, the court may vacate the judgment, take additional testimony and direct the entry of a new judgment."

[4] RCr 10.06(1) provides that:

> The motion for a new trial shall be served not later than five (5) days after return of the verdict. A motion for a new trial based upon the ground of newly discovered evidence shall be made within one (1) year after the entry of the judgment or at a later time if the court for good cause so permits.

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