

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000575-MR

JACK HOLLAND

APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 80-CR-00065

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART AND REMANDING

** ** * * * **

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND SPALDING, JUDGES.

SPALDING, JUDGE: On January 20, 1980, Barbara Helm went missing after leaving work at the Blue Boar Cafeteria in Louisville, Kentucky. Four days later, on January 24, 1980, Helm's body was found on a roadside embankment in nearby Oldham County, Kentucky. On January 30, 1980, Jack Joe Holland – Appellant herein – was questioned, for the second time in as many weeks, by authorities

about Helm's disappearance. He denied having any part in Helm's disappearance and claimed that he had been with one Larry James at an establishment known as the Do Drop Inn and, later, at Wendell's Tavern, both located in Louisville, at the time Helm disappeared. James was later questioned and confirmed Holland's alibi.

Later, George Waldrige offered information related to the Blue Boar crimes in exchange for leniency in regard to charges related to a motor vehicle accident in which he had earlier been involved. The authorities arranged for Waldrige to contact Holland and discuss the Blue Boar crimes, but under the guise of discussing a fictitious bank robbery. The ensuing conversation was to be monitored and recorded by the authorities.

A subsequent phone call between Waldrige and Holland, during which the two agreed to meet later in the day to discuss the would-be robbery, was recorded. The meeting that took place was monitored as well, and law enforcement arrested Holland and James later that evening.

At trial, Waldrige testified that Holland had asked for his help in robbing the Blue Boar and that he had confessed to killing Helm. Holland was found guilty and convicted of the robbery and murder of Helm. He was sentenced to twenty years' imprisonment for the robbery and the death penalty for murder. However, the Kentucky Supreme Court reversed and remanded on appeal. *Holland v. Commonwealth*, 703 S.W.2d 876 (Ky. 1985). On remand, Holland,

pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), pleaded guilty to one count of murder and one count of robbery in the first degree, and was found to be a second-degree persistent felony offender. He was sentenced to life imprisonment on March 5, 1987.

At this juncture, it is necessary to make note of the activity that occurred within the respective Commonwealth's Attorney offices of Jefferson and Oldham counties during the summer of 1981. In August of that year, John W. Stewart, an Assistant Commonwealth's Attorney in Jefferson County, wrote a letter (hereinafter referred to as the "Stewart letter") to Bruce Hamilton, the Commonwealth's Attorney for Oldham County. This letter was in response to Hamilton's apparent efforts to obtain the cooperation of the Jefferson County Commonwealth's Attorney's office in getting George Waldridge placed in a "safe place" within the Kentucky Department of Corrections. Stewart declined to assist, explaining that he viewed Waldridge in a negative light, and that, in his opinion, Waldridge would "do anything or say anything for anybody in an attempt to better his cause." Stewart further commented that Waldridge, during his Jefferson County trial, had "alleged that Detective Ashcraft [(a detective that was initially involved in investigating the Blue Boar crimes)] coerced his testimony in [Appellant's] murder trial by physically abusing him prior to his testimony."

In December of 1993, Appellant filed a CR¹ 60.02 motion with the Oldham Circuit Court. Appellant's requested relief was denied via order entered on May 9, 1994.

On April 3, 1997, Appellant filed a motion pursuant to RCr² 11.42, alleging ineffective assistance of counsel. The trial court appointed counsel to represent Appellant in the associated proceedings, and on April 15, 2002, an evidentiary hearing was held on Appellant's motion. The motion was denied via an opinion and order entered by the lower court on April 29, 2002. This Court affirmed the lower court's judgment on September 5, 2003, via an unpublished opinion. *Holland v. Commonwealth*, No. 2002-CA-000974-MR, 2003 WL 22064047 (Ky. App. Sept. 5, 2003). The Kentucky Supreme Court entered an order denying discretionary review on March 10, 2004.

On January 29, 2004, Appellant filed a second CR 60.02 motion in Oldham Circuit Court. The motion was, once again, denied. On this occasion, however, the trial court denied the motion as improper because, in its view, the issues raised by the new motion had already been raised in the RCr 11.42 motion. Appellant did not appeal the trial court's order.

¹ Kentucky Rules of Civil Procedure.

² Kentucky Rules of Criminal Procedure.

Subsequently, on March 17, 2005, Appellant filed a petition for habeas corpus in the United States District Court for the Western District of Kentucky. Appellant fared no better in federal court, however, and on February 7, 2006, the federal district court entered an order denying Appellant's requested habeas relief.

Finally, on March 21, 2016, Appellant filed the motion that would ultimately serve as the subject of this appeal. Proceeding *pro se*, Appellant filed yet another CR 60.02 motion, alleging *Brady*³ violations, as well as several other *pro se* motions. The trial court appointed counsel to assist Appellant with his post-conviction motions, and counsel supplemented Appellant's CR 60.02 motion. Thereafter, counsel supplemented Appellant's motion once again, this time raising additional claims under RCr 11.42. On September 29, 2017, the Commonwealth filed a response to Appellant's motions. Appellant later filed a reply and made clear that he intended to seek an evidentiary hearing.

Within Appellant's combination CR 60.02/RCr 11.42 motion, he claimed that Waldrige had been coerced into testifying that Appellant had committed the robbery and murder of Helm. Specifically, Appellant claimed that the aforementioned Detective Ashcraft, after Waldrige had indicated that he was unwilling to testify against Appellant, had "plac[ed] his knee in [Waldrige's]

³ See *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

chest while Waldrige was sitting and slapp[ed] him for approximately 4 to 5 minutes to make [Waldrige] testify that [a]ppellant Jack Joe Holland committed the robbery and murder” and to testify that Appellant had requested Waldrige’s assistance in committing the Blue Boar crimes.

Appellant made a number of arguments in his motion. First, Appellant claimed that his counsel was ineffective in failing to make him aware of testimony presented during Waldrige’s trial in which Waldrige stated that Detective Ashcraft had physically coerced his testimony in Appellant’s trial. Second, Appellant claimed that the Stewart letter constituted exculpatory evidence, and that, had he known about the information contained in the letter, he would not have pleaded guilty, but would instead have insisted on going to trial.

In addition to the Stewart letter, Appellant pointed to the existence of an affidavit executed on October 21, 2016, and signed by Waldrige. Within that affidavit, Waldrige recanted the testimony he had offered at Appellant’s first trial, stating that he had “testified at the trial of Jack Holland,” but that Holland had “never told [him] that he had committed the Blue Boar murder of Barbara Helm.”

On March 27, 2018, the trial court, without holding an evidentiary hearing on the matter, entered an order denying Appellant’s motions. The court held that Appellant’s counsel was only required to conduct a “reasonable investigation for evidence” and that “requiring counsel to review trial transcripts of

an unrelated criminal case [(Waldrige's case)] far exceed[ed] 'reasonable professional assistance.'" The trial court further found that Appellant was not prejudiced by trial counsel's performance. Therefore, the court denied Appellant's requested relief under RCr 11.42.

Regarding the CR 60.02 motion based on the affidavit of Waldrige, the court held that a hearing was unnecessary because of the inherent unreliability of Waldrige's recantation. The court pointed to the fact that Waldrige did not recant until counsel for Appellant interviewed him in prison in 2016. It noted that Appellant had previously assaulted Waldrige and that Appellant had been recently denied a hearing before the parole board that would likely result in his imprisonment until his death. The court held that Waldrige's affidavit was unreliable.

Following the trial court's denial, Appellant filed this appeal. After being determined that a person with means would not pursue the matter on appeal, the Department of Public Advocacy was permitted to withdraw as counsel for Appellant on appeal. Therefore, Appellant's brief on appeal was filed *pro se*.

Before addressing the merits of Appellant's appeal, we first note Appellant's failure to comply with the rules governing appellate procedure. CR 76.12 requires an Appellant's brief to contain "ample supportive references to the record and citations of authority pertinent to each issue of law and which shall

contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.” CR 76.12(4)(c)(v). Appellant’s brief contained no references to the record and failed to include a statement showing whether and how the issue on appeal was properly preserved for appellate review. We note, however, that because the Department of Public Advocacy withdrew from the case, Appellant is proceeding *pro se* while incarcerated. The preservation of errors of the trial court, if any, are preserved in writing and easily referenceable in this matter. Therefore, despite Appellant’s shortcomings in complying with CR 76.12, we will proceed with an analysis of the issues raised in his brief.

Appellant raises a number of arguments on appeal, all of which can be distilled into two categories: first, those arguments relating to the effect of the information contained in the Stewart letter, including as it relates to the protections extended by *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); and second, the effect of the affidavit filed in this matter by Waldrige. Appellant argues that the court below should have held evidentiary hearings on these issues. We address each of these issues in turn.

We first examine Appellant’s claims pursuant to RCr 11.42. Generally, claims grounded upon RCr 11.42 must be brought “within three years after the judgment becomes final.” RCr 11.42(10); *Commonwealth v. Carneal*,

274 S.W.3d 420, 426 (Ky. 2008). One of the exceptions to this general rule applies where it is shown “that the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence.” RCr 11.42(10)(a).

Appellant claimed, in a supplemental filing filed with the lower court in January 2017, that he had received the Stewart letter at some point “between 2004 and 2005.” The Stewart letter included the information that he claims should grant him relief today. Namely, that an Assistant Commonwealth’s Attorney thought Mr. Waldrige was of poor character and Mr. Waldrige had testified at an unrelated trial in which he was the defendant that he had been physically pressured to testify against Appellant. Appellant’s motions were filed well past the three years from when he had knowledge of this information. Therefore, his claims as to ineffective assistance of counsel and/or a *Brady* violation pursuant to RCr 11.42 are time-barred and consideration of the merits of those claims is unnecessary.

Next, we must analyze Appellant’s contentions in regard to his CR 60.02 motion supported by Waldrige’s 2016 affidavit. In this affidavit, Waldrige recants the testimony he offered at Appellant’s trial. Appellant contends that an evidentiary hearing should have been held on this issue.

At the outset, we note that relief may be granted under CR 60.02(f) for any reason of an extraordinary nature justifying relief. The burden of proof in a

CR 60.02 motion “falls squarely on the movant to ‘affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.’” *Foley v. Commonwealth*, 425 S.W.3d 880, 885 (Ky. 2014) (citations omitted). It is to “be utilized only in extraordinary situations when relief is not available on direct appeal or under RCr 11.42.” *Id.* at 884 (citation omitted).

The trial court denied Appellant’s CR 60.02 motion. In denying relief, the trial court relied on *Taylor v. Commonwealth*, 175 S.W.3d 68 (Ky. 2005), for the proposition that recanted testimony is unreliable and, therefore, afforded very little weight. The trial court also noted that Waldrige only changed his testimony after counsel for Appellant interviewed him in prison in 2016; that Waldrige had previously been assaulted by Appellant; and that Appellant, not Waldrige, had recently been denied parole, which would likely result in Appellant’s imprisonment until death. The trial court, therefore, determined that Waldrige was an “unreliable witness whose testimony carrie[d] little weight,” and held that a hearing was not necessary to make a determination as to reliability. The court did not base its decision on a legal basis that the affidavit was insufficient on its face to allow for relief, nor did the court below state the record refuted the contents therein.

Despite the potential unreliability of Waldrige's testimony, it was nonetheless necessary in this matter for the trial court to hold an evidentiary hearing prior to determining that it categorically did not believe it. Waldrige's testimony that Appellant confessed to the murder of Helm was the Commonwealth's most significant evidence of Appellant's guilt. The confession was not recorded, so there is no tangible evidence to contradict the statement contained in Waldrige's affidavit that no confession was given to Waldrige. Waldrige testified in the past, after the trial of Appellant, that he was physically pressured into testifying at that trial. Finally, the fact that Waldrige was assaulted by Appellant while in prison would seem to make his most recent statement more reliable as opposed to less reliable. One would certainly believe that Waldrige would harbor ill feelings about being assaulted and would desire to keep Appellant in prison for life, if for no other reason than that, if and when Waldrige is released, he would not have the chance to assault him again.

If a movant under CR 60.02 affirmatively alleges "facts which, if true, justify vacating the judgment and further allege[s] special circumstances that justify CR 60.02 relief" he is entitled to an evidentiary hearing. *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). The trial court in this matter did not analyze the allegations as if they were true but denied the motion holding the allegations not to be credible. The issue of credibility necessitated an

evidentiary hearing if the motion's factual allegations justified vacating the judgment.

In summary, to the extent Appellant alleges he is entitled to relief pursuant to RCr 11.42 because his plea should be vacated due to errors of trial counsel or exculpatory evidence, we affirm the trial court's denial of Appellant's motion. However, as to Appellant's CR 60.02 motion, in regard to the 2016 affidavit of George Waldrige, we hold that the trial court erred in deciding he was not credible without an evidentiary hearing. The court below must determine, first, whether the contents of the Waldrige affidavit entitle Appellant to relief on its face pursuant to CR 60.02 in light of the record of the case. If so, the court is then to conduct an evidentiary hearing to determine the veracity of the contents of the affidavit. Therefore, the judgment of the Oldham Circuit Court is reversed and remanded insofar as it denied Appellant relief under CR 60.02 based on the Waldrige affidavit. We remand that issue to the Oldham Circuit Court for proceedings in accordance with this opinion. We affirm the decision of the Oldham Circuit Court in all other respects.

ALL CONCUR.

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