

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000595-MR

JIMMY DEAN CORNETTE, JR.

APPELLANT

v. APPEAL FROM MARTIN CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 10-CR-00116

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, CHIEF JUDGE; JONES AND LAMBERT, JUDGES.

JONES, JUDGE: In June of 2011, the Appellant, Jimmy Dean Cornette, Jr., was convicted of murder and sentenced to life in prison by the Martin Circuit Court.

Approximately eight years later, Cornette filed a motion requesting the Martin Circuit Court to vacate his conviction and sentence pursuant to CR¹ 60.02 and

¹ Kentucky Rules of Civil Procedure.

RCr² 10.02 and 10.06. Cornette argued that he was entitled to relief because three of the witnesses who testified at his trial submitted affidavits stating their testimony was perjured, and another witness made a “secret deal” with the Commonwealth that Cornette did not know about at the time of his trial. The circuit court determined Cornette did not file his motion within a “reasonable time” and denied him relief without an evidentiary hearing. Cornette now appeals claiming the circuit court abused its discretion. Having reviewed the record in conjunction with all applicable legal authority, we AFFIRM.

I. BACKGROUND

The circuit court entered its original judgment of conviction and sentence on June 21, 2011. Cornette appealed to the Kentucky Supreme Court as a matter of right. In its opinion affirming, the Court summarized the proof introduced during Cornette’s jury trial as follows:

On June 23, 2002, Patrick Blackburn was discovered unconscious in the backseat of his car. The vehicle was lodged against a tree, preventing it from going down the side of a small hill. Blackburn suffered severe, blunt force trauma to the head and died four days later. His death was declared a homicide.

For eight years, the crime went unsolved, partly because the car in which Blackburn was found contained no valuable physical evidence. However, in 2010, [Cornette] was indicted for Blackburn’s murder, along

² Kentucky Rules of Criminal Procedure.

with David Jude and Jerry Stepp. The three men were tried separately.

The Commonwealth's evidence at trial established that Blackburn was a cocaine user who had purchased the drug on credit from [Cornette] shortly before his death. [Cornette] became increasingly angry as the debt remained unpaid for some time. The victim's brother witnessed [Cornette] threatening physical harm to Blackburn if he was not repaid.

Days later, Blackburn and his wife encountered [Cornette's] uncle, who informed Blackburn that David Jude had cocaine to sell. Blackburn contacted Jude to purchase the cocaine. [Cornette] learned of this and was infuriated that Blackburn was buying more cocaine instead of repaying his debt. Again, witnesses overheard [Cornette] threaten to kill and "whip" Blackburn.

Evidently unaware of these threats, Blackburn went to property belonging to [Cornette's] father to obtain cocaine from Jude. [Cornette], Jude, and Stepp were present. There was testimony that, among others, [Cornette's] wife and sister were also present.

Blackburn was viciously attacked when he arrived. Stepp testified that [Cornette] and Jude together assaulted Blackburn as soon as he exited his vehicle. Jude, however, testified that Stepp was not present at the time and that his friend, Paul Gibson, had participated in the attack. After the fight, [Cornette] ran over Blackburn's head with an ATV and then loaded the victim into the trunk of Blackburn's car. [Cornette] drove the victim's car while Stepp and Jude followed in a van. They moved Blackburn to the backseat of the car and pushed it over a hill.

In defense, [Cornette's] mother and sister testified that they were with him on the night Blackburn was attacked. Further, the defense theorized that a man named James

Harless killed Blackburn. Harless was the ex-husband of Blackburn's wife, Darlene. Darlene and Harless were still involved in a romantic relationship, even after her subsequent marriage to Blackburn. For this reason, the relationship between Harless and Blackburn had long been acrimonious.

Harless's then-wife, Barbara, told police that on the night Blackburn was attacked, Harless had left the house for several hours. This contradicted Harless's own statements to police that he had been home the entire evening, except for a thirty-minute period. The defense also presented testimony that, after Blackburn's death, Harless and Darlene reconciled. In response to this theory, the Commonwealth presented testimony that Harless was in Pike County on the night Blackburn was killed. Harless suffered a stroke in 2009 which apparently resulted in severe memory loss, rendering him unable to testify at [Cornette's] trial.

Cornette v. Commonwealth, 2011-SC-000479-MR, 2013 WL 658127 at *1 (Ky. Feb. 21, 2013).

On February 5, 2018, almost five full years after the Kentucky Supreme Court affirmed his conviction and sentence, Cornette filed a motion for relief from judgment and requested a new trial claiming the prosecution hid a pending plea deal with its last witness, Billy Perry, and that three of its earlier witnesses lied when they testified.

In support of his claim that Perry had a secret deal with the Commonwealth, Cornette submitted a court docket sheet. The docket sheet filed

by Cornette, however, was a docket sheet for his own case, not the docket sheet for Perry's separate criminal case.

Cornette submitted affidavits from the three witnesses he claimed lied at his trial. Karen Cornette, his uncle's wife, signed her affidavit on March 30, 2017. It states:

To: Whom it may concern:

I Karen Cornette of my own free will. I have not been promised anything nor have I been threatened to make this statement.

I Karen Cornette lied at Jimmy Dean Cornette, Jr.'s trial in June 2011. Jimmy Jr. never told me about what happened to Calvin Blackburn. Jimmy Jr. has never told me he knew anything about Calvin getting beat up. I am trying to make things rite [sic] now that I have had years to think about it.

Darrell Mathew Mills, a friend of Cornette, signed his affidavit on May 12, 2017. It states:

I Darrell Mathew Mills lied at Jimmy Dean Cornette, Jr.'s trial in June 2011. I never heard Jr. talking on phone or in person about Calvin Blackburn. Jimmy Dean Cornette, Jr. never told me that Calvin owed him money for drugs. I was never at Jimmy Cornette Sr. home on June 2002. Jimmy Jr. has never told me anything about Calvin getting beat up or how it happened or that he had anything to do with it. Thank you.

I have not been promised anything nor have I been threatened in any way to give this statement.

Cornette's uncle, Donald Ray Cornette, signed his affidavit on May 17, 2017. It states:

I Donald Ray Cornette make this statement of my own free will. I have not been promised anything nor have I been threaten [sic] in any way.

I Donald R. Cornette lied at Jimmy Jr. Cornette trial on June 21, 2002. Jimmy Kr. Was not cuzing [sic] and never said he was going to kill Calvin Blackburn or that Calvin was a rat.

In response, the Commonwealth argued Cornette's entire motion was untimely. Additionally, with respect to his claim regarding Perry's plea agreement, the Commonwealth stated that while Perry did have criminal charges pending at the time of Cornette's trial, the plea deal he entered into with the Commonwealth was not made until after Cornette's trial and was not in exchange for his testimony at Cornette's trial.

The circuit court denied Cornette's motion as not timely filed under CR 60.02. It explained that a motion relating to "newly discovered evidence" must to be filed within one year of judgment, but Cornette's motion was not filed until almost eight years after his trial. The circuit court further noted that Cornette's motion, even if considered under CR 60.02(f), was still untimely because it was not filed within "a reasonable period of time." This appeal followed.

II. STANDARD OF REVIEW

"We review the denial of a CR 60.02 motion for an abuse of discretion." *Diaz v. Commonwealth*, 479 S.W.3d 90, 92 (Ky. App. 2015). "The test for abuse of discretion is whether the trial judge's decision was arbitrary,

unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). “The burden of proof in a CR 60.02 proceeding 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 and internal quotation marks omitted). “[W]e will affirm the lower court’s decision unless there is a showing of some ‘flagrant miscarriage of justice.’” *Id.* at 886 (quoting *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983)).

III. ANALYSIS

A. Perjured Testimony

Pursuant to CR 60.02, a motion for relief from judgment based on allegations of newly discovered evidence or perjury “shall be made . . . not more than one year after the judgment . . . was entered” RCr 10.06(1) provides that a motion for a new trial based on 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.” These rules would seem to automatically foreclose Cornette’s motion to the extent it is predicated on the perjured testimony of witnesses at his trial. In *Commonwealth v. Spaulding*, 991 S.W.2d 651, 657 (Ky. 1999), however, the Kentucky Supreme Court held that “[a] criminal conviction based on perjured

testimony can be a reason of an extraordinary nature justifying relief pursuant to CR 60.02(f) and subject to the reasonable time limitation of the rule.” A defendant seeking CR 60.02(f) relief based on the alleged falsity of trial testimony must establish: (1) that a reasonable certainty exists as to the falsity of the testimony; and (2) the conviction probably would not have resulted had the truth been known before. *Id.*

The circuit court did not consider the additional requirements of certainty of falsity and probability of a different outcome because it concluded that Cornette had not established that he sought relief within a “reasonable time.” Cornette argues this was in error because he filed his motion shortly after receiving the affidavits. While this is true, Cornette failed to offer any explanation for the delay in obtaining the affidavits. He does not indicate that the witnesses were difficult to locate, unwilling to talk to him or his counsel, or that they were afraid to come forward. While the witnesses state that they lied during Cornette’s trial, they do not explain why they lie or why after so many years they decided to come

forward.³ In the absence of any explanation for the delay, the circuit court properly denied Cornette's motion as not being filed within a reasonable time.⁴

B. Plea Deal

Cornette claims that Perry, an important witness for the Commonwealth at trial, had a secret plea agreement that was not disclosed to him prior to his trial. Plea agreements based on trial testimony are relevant and can be used to impeach a witness's credibility. The problem for Cornette, however, is that he has failed to put forth any evidence that such a plea agreement actually existed, and even if it did exist why it took him so long to discover it. Given that Perry's separate criminal case is a matter of public record, there is no reason that Cornette could not have discovered the fact that Perry entered into a plea several years before he filed the instant motion.⁵ As such, the circuit court did not abuse its discretion when it refused to take up this issue on the basis that it was not timely.

³ Additionally, the affidavits are insufficient to show that the prior testimony was indeed perjured. "It is not enough merely to show that a prosecuting witness has subsequently made contradictory statements or that he is willing to swear that his testimony upon the trial was false, for his later oath is no more binding than his former one." *Anderson v. Buchanan*, 292 Ky. 810, 168 S.W.2d 48, 53 (1943).

⁴ It was unnecessary for circuit court to hold an evidentiary before determining the timeliness of Cornette's motion. See *Foley v. Commonwealth*, 425 S.W.3d 880, 884 (Ky. 2014) ("An evidentiary hearing is not required to assess the reasonable time restriction inherent in CR 60.02 motions because this determination is left to the discretion of the trial court.").

⁵The fact that Perry entered into a plea after Cornette's trial is not dispositive of whether he had a deal with the Commonwealth with respect to his testimony. Even if Cornette's motion had been timely, he would have had to put forth some proof to support his allegation that the plea Perry

IV. CONCLUSION

For the foregoing reasons, we affirm the Martin Circuit Court's order denying relief under CR 60.02.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Michael L. Goodwin
Louisville, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Jeffrey A. Cross
Assistant Attorney General
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entered into after Cornette's trial was predicated on his agreeing to testify against Cornette. There is nothing in the record that supports this inference.