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RENDERED: NOVEMBER 22, 2006
NOT TO BE PUBLISHED

# Supreme Court of Kentucky

FINAL

DATE Feb 22, 07 E.D.C. Grant D.C.

2005-SC-0371-MR

VINCENT C. STOPHER — APPELLANT

V.

ON APPEAL FROM THE JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
CRIMINAL NO. 97-CR-615

COMMONWEALTH OF KENTUCKY — APPELLEE

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

This appeal is from a decision of the circuit judge which denied post-conviction motions based on RCr 11.42, RCr 10.02, RCr 10.06 and CR 60.02. Stopher challenges his convictions for capital murder, four counts of assault in the third degree and wanton endangerment. He was originally sentenced to death. On direct appeal, this Court upheld the convictions and sentence. Stopher v. Commonwealth, 57 S.W.3d 787 (Ky. 2001).

The questions presented are (1) whether Stopher had ineffective assistance of counsel, (2) whether there was alleged prosecutorial misconduct, (3) whether a juror was biased, (4) whether the circuit court erred in denying discovery requests, and (5) whether there was cumulative error.

Stopher contends that defense counsel provided ineffective assistance: (a) by not submitting his complete medical records (b) by not calling particular witnesses, (c) by not introducing the substance of an individual's statement when that individual refused to testify, (d) by not obtaining a witness's SSI records, (e) by not knowing the complete background of a witness, (f) by not introducing testimony concerning police interrogation procedures, and (g) by not introducing more mitigating evidence.

Stopher argues that there was prosecutorial misconduct based on allegations of: (a) suborned perjury, (b) suppressed impeachment evidence, (c) failure to obtain SSI records, (d) failure to learn of allegedly favorable police treatment of a witness, and (e) three witnesses' subsequent affidavits.

In March of 1997, a Jefferson County deputy sheriff responded to a report of a disturbance at the residence of Stopher. When Stopher saw the deputy, he uttered a series of obscenities and immediately attacked the deputy. He was able to obtain the officer's handgun and shot him in the face. The deputy died of this wound. A witness to the murder was then confronted by Stopher who pulled the trigger of the weapon, but it jammed. Other officers arrived on the scene and Stopher vigorously resisted arrest. During that struggle, he grabbed the gun of another officer and attempted to fire it but was unsuccessful. During the struggle that occurred incident to the arrest, Stopher had to be hit on the head before he would release the weapon. His wounds were consistent with resisting arrest. As he was being loaded into the ambulance, he told an officer "I hope that cop dies." Upon the completion of evidence, the original case was submitted to the jury which rendered a judgment of conviction.

On appeal this Court upheld the jury verdict. Almost a year later, Stopher sought post-conviction relief in the circuit court. The circuit judge denied the motion after almost

three years of continued attempts to amend the various motions. The denial was based on evidence in the record. No evidentiary hearing was conducted. Upon an adverse decision, Stopher filed his appeal.

I. Standard of Review for RCr 11.42

The arguments presented by Stopher arise from allegedly newly discovered evidence or perjured testimony. Neither of those grounds may serve as the basis for a motion for RCr 11.42. Pursuant to that rule, the movant has the burden of establishing convincingly that he was deprived of some substantial right which would justify the extraordinary relief provided by a post-conviction proceeding. This Court has repeatedly stated that a direct appeal issue may not be relitigated merely by repeating it as an argument for ineffective assistance of trial counsel. Hodge v. Commonwealth, 116 S.W.3d 463 (Ky. 2003); Haight v. Commonwealth, 41 S.W.3d 436 (Ky. 2001); Baze v. Commonwealth, 23 S.W.3d 619 (Ky. 2000). Such a motion must set out all facts necessary to establish an alleged constitutional violation. The court will not presume the facts omitted from the motion established the existence of any such violation. Sanders v. Commonwealth, 889 S.W.3d 380 (Ky. 2002). It is well settled that any relief provided by the rule is not a substitute for appeal and does not permit review of alleged trial errors which do not rise to a denial of due process. Smith v. Commonwealth, 412 S.W.2d 256 (Ky. 1967). Post-trial, ex parte, juror affidavits are not a basis for an RCr 11.42 motion; Haight, supra; Taylor v. Commonwealth, 63 S.W.3d 151 (Ky. 2001).

In this case, Stopher has claimed seven different instances of ineffective assistance of counsel. We will consider separate claims together but will give each individual numbers and attention.

RCr 11.42 is not to be used as a vehicle to raise issues which could have been raised on direct appeal. Brown v. Commonwealth, 788 S.W.2d 500 (Ky. 1990). Issues that have been previously raised on direct appeal are not proper when simply presented in the form of ineffective assistance of counsel. The rule is intended to provide a vehicle to review an erroneous judgment when the reasons requiring review are not available on direct appeal. See Gross v. Commonwealth, 648 S.W.2d 853 (Ky. 1983). The rule requires that convincing evidence be presented that a person has been deprived of a substantial right. It is the denial of due process that is the principal focus of the rule and the extraordinary relief sought. Smith, supra.

II. Investigation of Medical Records

Stopher argues that his defense counsel was ineffective by not interviewing witnesses and identifying exculpatory evidence. He now claims that his counsel should have investigated evidence about the size of the pupils of his eyes. Pupil size can sometimes be an indication of intoxication. Evidence presented during the trial showed Stopher was lucid, engaged in reasonable conversation and seemed oriented to time and place. Defense counsel did not obtain the medical records. One hospital record did mention the pupil size but that was contradicted by another report just several minutes later. There were additional factors besides intoxication that could have contributed to any change in pupil size. Defense counsel avoided what could have been confusing and contradictory evidence presented to the jury as part of a very reasonable trial strategy. There was no error. The pupil size at the time of the admission to the hospital did not require further investigation.

The trial judge carefully examined this question and ordered briefing on the materiality of the information about pupil size. The circuit judge determined that defense counsel did not act ineffectively by not obtaining medical records.

III. Intoxication Witnesses

Stopher contends that his counsel should have called a number of witnesses to bolster his intoxication defense. Hindsight and second guessing a trial decision does not fulfill the requirements of RCr 11.42. See Foley v. Commonwealth, 17 S.W.3d 878 (Ky. 2000). Stopher does not claim that counsel was deficient by not knowing of the witnesses but rather simply disagrees with the trial strategy that was employed. See Hodge, supra. There was no error or any abuse of discretion.

IV. Snodgrass Statement

Stopher asserts that his trial counsel should have introduced the substance of the witness Snodgrass's statement through the defense investigator. This is simply a restatement of a previously presented issue in the guise of RCr 11.42 relief. It would appear that Stopher is claiming that his defense counsel failed to question a witness regarding statements made out of court and offered for the truth of the matters asserted. He claims that the substance of the Snodgrass testimony would have established that Stopher was on an LSD trip at the time of the murder. The witness never saw Stopher take the drugs but according to Stopher, "He knew it anyway." The jury was aware of Stopher's activity before he killed the deputy, including the alleged drug use. It was not error in the original case and is still not error. There is potential for confusion which would have undermined the defense from this kind of strategy. This issue is mere speculation and second guessing of the defense trial strategy. There was no error.

## V. Social Security Disability Records

Stopher complains that his counsel was ineffective for failing to obtain a release in order to be able to present a witness named Porter's social security disability records. That very same issue was previously addressed by this Court and found to be without merit. Stopher, supra. It is well settled that one cannot convert an issue presented on direct appeal into a claim for ineffective assistance of counsel in order to relitigate the issue as a collateral attack. Hodge, supra. The argument presented here is insufficient to establish any ineffective assistance of counsel. There was no error when this Court addressed this issue previously and we remain convinced of that decision now. There was no error.

## VI. Investigation of Witness Powell

Stopher argues that his trial counsel did not adequately investigate or present his defense in that he did not obtain the criminal record of Powell. He claims that it was error on the part of his counsel not to obtain Powell's 1997 misdemeanor charges or determine the reason why Powell had his parole revoked. Stopher believes that this information would have persuaded the jury to reach a different verdict. Powell testified in an orange prison jumpsuit. The trial judge correctly concluded that the jury could effectively weigh his credibility. We find no reason to disturb such a conclusion. The failure of counsel to present marginally useful evidence did not change the outcome of this trial. Stopher received a fair trial and this error, even if it was error, is totally insufficient to require any reversal.

## VII. Police Interrogation Procedures

Stopher contends that his defense counsel improperly failed to introduce evidence showing that there was a lack of interrogation records to demonstrate that he was too intoxicated to be questioned. Again, the value of this evidence is purely speculative. When examining allegations of ineffective cross-examination based solely on speculative statements, this Court has not indulged in second guessing trial counsel. See Taylor, supra. A careful examination of the record demonstrates that defense counsel employed a technically sound trial strategy in cross-examining the police witnesses. The trial judge correctly determined that Stopher did not present specific facts to justify relief in this proceeding. See Lucas v. Commonwealth, 465 S.W.2d 267 (Ky. 1971).

## VIII. Mitigation Witnesses

Stopher alleges that his counsel was ineffective because of a failure to present three witnesses in mitigation during the penalty phase of the trial. Stopher believes that three long-time acquaintances of his would have been able to convince the jury that the person who killed the deputy was an outstanding member of the community. This is an issue that was originally presented on direct appeal and is merely disguised as a new issue for the purposes of RCr 11.42. There is no error.

## IX. Brady Issues

Stopher presents two issues where he claims that the prosecution did not provide evidence required pursuant to Brady v. Maryland, 373 U.S. 83 (1963). In that case, the United States Supreme Court held that the federal due process clause required the state prosecution to disclose to defense counsel any evidence favorable to the defense. Failure to disclose such evidence is reversible error, however, only when there is a

reasonable probability that had it been disclosed, the result would have been different. United States v. Bagley, 473 U.S. 667 (1985). The evidence so presented must be favorable to the defendant. It must have been suppressed by the prosecution and there must be a showing of prejudice sufficient to establish a reasonable probability that the result would have been different. See Strickler v. Greene, 527 U.S. 263 (1999).

Here, Stopher claims that the prosecution deliberately withheld information regarding a witness named Bishop who had offered to testify against another person in an unrelated case. This matter was presented on direct appeal and as previously noted will not be reviewed simply because it is restated as a collateral attack. Stopher had full access to the record and the history of the witness. The prosecution did not engage in any Brady type misconduct.

Stopher next maintains a claim regarding information about a witness named Powell. This too was previously brought to the attention of this Court on direct appeal and is not now appropriate under RCr 11.42. There was no error when we first examined the merits of these claims and there is still no error at this time.

X. Witness Recantation

Next Stopher argues that he is entitled to relief pursuant to RCr 10.02 and CR 60.02 because three witnesses, Porter, Powell and Hamilton have recanted their trial testimony. All three have now signed affidavits stating that Stopher was extremely intoxicated at the time the crime was committed. The trial judge correctly determined that this alleged new evidence was insufficient to require a new trial. We find no reason to substitute our view of the facts for those of the trial judge in the absence of a showing of an abuse of discretion. There was no such abuse. See Foley v. Commonwealth, supra.

It has long been held that a decision as to whether to grant a new trial based on newly discovered evidence is largely within the discretion of the trial judge and the standard of review is whether there has been an abuse of discretion. The grant of a new trial is not required when the grounds are newly discovered evidence which is merely cumulative or impeaching in nature. See Epperson v. Commonwealth, 809 S.W.2d 835 (Ky. 1990). The recanted testimony of any trial witness is viewed with suspicion and does not normally require the granting of a new trial. Hensley v. Commonwealth, 488 S.W.2d 338 (Ky. 1961). The trial judge is always considered to be in the best position to evaluate and determine the influences and motives that prompt any recantation. Thacker v. Commonwealth, 453 S.W.2d 566 (Ky. 1970); Taylor v. Commonwealth, 175 S.W.3d 68 (Ky. 2005). It is not enough to merely show that a witness made contradictory statements after the verdict. Anderson v. Buchanan, 292 Ky. 810, 168 S.W.2d 48 (1943).

XI. Relief Under CR 60.02

In a criminal case, CR 60.02 relief may be obtained only when it is not available by direct appeal or by RCr 11.42. The rule may be used only once a defendant has availed himself of his right to direct appeal and sought relief under RCr 11.42. CR 60.02 is not a separate method of appeal to be pursued in addition to other remedies. McQueen v. Commonwealth, 948 S.W.2d 415 (Ky. 1997). A defendant is foreclosed from raising any questions under CR 60.02 which are matters that could have reasonably been presented in an RCr 11.42 proceeding. Gross, supra.

Here, the three witnesses named by Stopher did not recant their testimony. The affidavit presented by Hamilton states that on the day of the murder, Powell and Stopher were both extremely high on drugs and "very stoned." At trial she testified that Stopher

looked "mad," "angry" and "crazy." She clarified her testimony by stating that when she said that Stopher looked "crazy," she meant he looked "pissed-off, angry." She testified that the day of the murder was the first time she had ever seen Stopher.

The affidavit of Powell was to the effect that he testified truthfully at the Stopher trial, but that if anyone got the impression from his testimony that either Stopher or Powell were not intoxicated because of LSD they were mistaken. Powell testified that he and Stopher each voluntarily took two hits of LSD within a period of two or three hours on the morning of the killing.

The affidavit of Porter stated that Stopher appeared to be on drugs at the time of the murder and that he was out of his mind.

The trial judge determined that only Hamilton claimed to have recanted and found that the affidavits of all three witnesses matched their trial testimony and that no new evidence had been presented.

A new trial is justified only if the trial judge believes that a recantation is true. A new trial will be granted only on newly discovered evidence if it is apparent that a different result would have been reached by the jury at trial if the new evidence had been available. The trial judge is always in the best position to evaluate the credibility of such witnesses. Here, the trial judge properly concluded that the affidavits were consistent with the testimony and that the alleged new evidence in the affidavits was merely cumulative of the trial testimony of the affiants. Thus, a new trial was not necessary. Epperson, supra. The trial judge did not abuse his discretion by denying the motion under either RCr 10.02 or CR 60.02.

## XII. Prosecutorial Misconduct Claims

Stopher argues that his conviction may rest on false or perjured testimony. He cites instances of prosecutorial misconduct, two involving the active suborning of perjury and one alleging that the prosecution subverted the truth-seeking process.

False or perjured testimony is not a ground for relief under RCr 11.42. Hargrove v. Commonwealth, 396 S.W.2d 75 (Ky. 1965). Such testimony will not be grounds for relief even with an affidavit that dramatically contradicts the testimony at trial. Fields v. Commonwealth, 408 S.W.2d 638 (Ky. 1966).

The allegations regarding witness Bishop were raised on direct appeal. The trial judge here refused to reconsider the arguments because they had been the subject of a direct appeal which was rejected. This contention is the same as presented on direct appeal where Stopher accused the witness of acting as a government agent.

In order to demonstrate prosecutorial misconduct, Stopher must show that 1) the statement was actually false; 2) the statement was material, and 3) the prosecution knew it was false. Commonwealth v. Spaulding, 991 S.W.2d 651 (Ky. 1999), citing United States v. Lochmondy, 890 F.2d 817 (6th Cir. 1989). Stopher's presentation here does not meet any of these requirements.

The Commonwealth did not suborn perjury of witness Hamilton. Stopher complains that the prosecution procured false testimony from Hamilton. He alleges that the various affidavits from Hamilton indicate that the lead prosecutor urged her to lie at trial and "told her to lie at trial regarding her cousin's intoxication." The careful review of the record indicates that Stopher obtained a variety of inconsistent affidavits from Hamilton. The first was notarized on April 30, 2002, and states that Stopher and Powell were both extremely high on drugs and "very stoned." She further states that Powell

was "really paranoid" and that Stopher "did not know what he was doing." There is no mention of suborned perjury.

On May 7, 2002, Hamilton swore that Powell was "severely hallucinating" and that she was told by "a lawyer with glasses not to say Kevin was having bad hallucinations...." On June 18, 2002, Hamilton swore that she met with the prosecutor and went over her testimony and later met with the defense and told them that Powell was "severely hallucinating."

The trial judge stated that Hamilton was on the stand for approximately 38 minutes and that she never said that Powell did not have hallucinations, was not stoned or was not high. Hamilton clearly indicated that Powell was hallucinating by testifying that Powell saw an orange tractor trailer that she did not see. She simply denied making up the alleged statements to defense counsel. The trial judge concluded that any allegations that there was suborned perjury were contradicted by the testimony given.

The prosecution did not subvert the truth seeking process regarding the Social Security records of Porter. This argument is similar to one made earlier in regard to Porter and the records. We have reviewed this claim and find that there is no error. The Commonwealth, in its brief, classifies this as a possible prosecutorial misconduct claim but we find there is no error no matter how you consider it.

XIII. Juror Misconduct

Stopher challenges the verdict on the basis of any affidavit obtained from Juror 479. The juror stated that she became aware when she saw a picture of the victim during trial that she may have had an unpleasant encounter with him. She did not disclose the nature of her encounter and she does not claim that she knew that she had previously encountered the victim during voir dire. Stopher claims that although the juror

did not recognize the importance of the voir dire inquiries until she saw the picture of the victim at trial, she ultimately gave incorrect answers to the questions. Stopher had a right to exercise peremptory challenges intelligently as well as his right to an impartial jury and that was compromised. He claims that whether intentionally or inadvertently, the harm lies in the falsity of the information. Here, the juror gave inaccurate answers and a correct response would have provided the defendant with a valid basis for challenging for cause.

Stopher also contends that he was entitled to a hearing to prove actual bias. Here, the information withheld by the juror that she had a negative encounter with a victim would not give Stopher a basis to challenge for cause. A remote or speculative influence on a juror does not affect the right of peremptory challenge. Crutcher v. Hicks, 257 S.W.2d 539 (Ky. 1953).

Here, the motion of Stopher was simply restated in a motion brought in 2005 pursuant to CR 15.01. That motion was denied by the trial judge who cited RCr 10.04 which states that a juror cannot be examined to establish a ground for a new trial except to establish that the verdict was made by lot. Nothing in Bowling v. Commonwealth, 168 S.W.3d 2 (Ky. 2005) or RCr 10.04 restricts the rule in the manner in which Stopher argues.

In Tanner v. United States, 483 U.S. 107 (1987), the U.S. Supreme Court found that no evidentiary hearing was required to address allegations of drug use by a juror. The Court cited the interest of protecting juror deliberations from intrusive inquiry along with recognition of the significant procedural safeguards in place to reveal any juror misconduct before a verdict is rendered.

## XIV. Cumulative Error

Stopher claims cumulative error. However, we note that the previous claims of error are without merit, and thus there is no basis for cumulative error in this case. See Woodall v. Commonwealth, 63 S.W.2d 104 (Ky. 2001).

## XV. Post Conviction Discovery

Stopher complains that he made two discovery motions, neither of which was granted. The first motion asks for copies of all of his medical records that were in possession of the Commonwealth as well as any exculpatory information regarding deals or promises made with Powell, Bishop or Hamilton. He also sought any information the prosecution had regarding the Social Security records of Porter.

The second motion was a general one based on Imbler v. Pachtman, 424 U.S. 409 (1976), which requires the prosecutor to inform the appropriate authorities of any after acquired information that cast doubt on the correctness of a conviction.

Discovery is not an entitlement in a post conviction proceeding. Sanborn, supra; Haight, supra; Foley, supra. See also, Sanders v. Commonwealth, 89 S.W.3d 380 (Ky. 2002). It is well settled that any attempt to find new and beneficial information is not allowed in post-conviction proceedings pursuant to RCr 11.42. There was no error on the part of the trial judge and no abuse of discretion.

Stopher received a fundamentally fair trial and an equally fair consideration of his post-conviction motions brought pursuant to RCr 11.42, RCr 10.02, RCr 10.06, and CR 60.02. He was deprived of no state or federal constitutional right.

The decision of the circuit judge in denying the motions is affirmed.

All concur.

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