IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: MAY 23, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000297-MR

ERIC LLOYD HERMANSEN — APPELLANT

V.

ON APPEAL FROM GALLATIN CIRCUIT COURT
HONORABLE ANTHONY W. FROHLICH, JUDGE
NO. 96-CR-00013

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Eric Lloyd Hermansen appeals from an April 9, 2012 judgment of the Gallatin Circuit Court convicting him of murder and sentencing him to life imprisonment. The April 9, 2012 judgment corrected an original July 7, 1997 judgment—which convicted Appellant of murder and two counts of wanton endangerment—to eliminate reference to the two convictions of wanton endangerment which had been reversed and were subsequently expunged. This Court rejects Appellant's argument that the corrected judgment entitles him to a new direct appeal on the murder charge and, hence, affirms.

On July 22, 1996, a Gallatin County, Kentucky grand jury returned indictments charging Appellant with one count of murder[1] (for causing the death of Harry Jones) and two counts of first-degree wanton endangerment[2]

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[1] Indictment No. 96-CR-00013.

[2] Indictment No. 96-CR-00012.

(for shooting at Jason and Naomi Vonborken). A jury trial was conducted in the Gallatin Circuit Court on May 19-21, 1997. The facts surrounding the charges, as previously summarized by this Court in Appellant's direct appeal, are as follows:

> The facts of this case as presented by the Commonwealth are truly gut-wrenching and seem pulled from the screen of a tragic film. Appellant's girlfriend, Lisa Riley, was in the process of leaving Appellant and moving back in with her ex-husband, Harry Jones. In a rage, Appellant drove to Jones's house in Glenco [sic], Gallatin County. On the way to Glenco [sic], Appellant was angered by a pick-up truck which pulled out in front of him. Slowing to a near halt, Appellant hit the rear bumper of the vehicle, occupied by Jason and Naomi Vonbokern. He then pulled in front of their truck and fired a gun in their direction, in the process blowing out the right rear window of his own car. Luckily, the Vonbokerns were unharmed.
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> A short time later, Appellant arrived at Jones's house, pulled into the driveway, and pulled an assault rifle from the back seat of his car. Lisa Riley's daughter, Maria Gregory, was standing in the driveway at that time, helping Riley move her belongings in to Jones's house. According to Gregory, after Appellant pulled out his gun, he shouted "I'm going to get you," then began shooting at Jones. He then got back into his car and sped away.
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> Kentucky State Police Officer Fred Scroggins was taking an accident report nearby. When he heard the gunshots, he jumped in his car and drove towards the sound. As he neared the victim's home, a man jumped in front of his car to get him to stop. The man, a friend of the victim, told the officer Jones had been shot and asked for help. As Officer Scroggins walked to the back of Jones's house, he noticed a pool of blood. He entered the house and found Jones kneeling on the floor with his left hand on the floor and his right hand holding his own intestines. He was gasping for air. The floor was completely covered in blood. When Scroggins asked Jones what had happened, Jones told him Appellant had shot him. Moments later, Jones stopped breathing and had no pulse.
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> Appellant was apprehended soon thereafter. He admitted shooting Jones, but claimed he did so under extreme emotional distress.

Hermansen v. Commonwealth, No. 1997-SC-000605-MR, slip op. at 1-2 (Ky. Sept. 28, 2000).

The jury found Appellant guilty on all counts. In a judgment entered on July 7, 1997, the trial court sentenced Appellant to life imprisonment for the murder conviction, and five years on each count of wanton endangerment.

Appellant appealed his convictions and sentence to this Court as a matter of right. In an unpublished opinion rendered September 28, 2000, we affirmed the murder conviction, but reversed the wanton endangerment convictions, on grounds that the Commonwealth did not present sufficient evidence to establish that venue was proper. *Id.* In so holding, this Court observed that the Commonwealth presented no evidence that the Vonbokerns were endangered in Gallatin County, as required by the jury instructions. *Id.*, slip op. at 8. Appellant's Petition for Rehearing was denied on December 21, 2000.

Appellant filed motions in the circuit court under RCr 11.42 and CR 60.02,[3] arguing that a number of grounds entitled him to a new trial, including that his trial counsel was ineffective, that his conviction was based on perjured grand jury and trial testimony, and that he could prove his shots did not kill Jones. The trial court denied the motions, and the Court of Appeals affirmed, holding that Appellant's substantive claims should have been brought via direct appeal, were not alleged to be newly discovered, and, therefore, were not proper under CR 60.02. *Hermansen v. Commonwealth*, No. 2002-CA-000853-

[3] Appellant has filed a number of unsuccessful actions challenging his conviction in federal court as well, none of which are relevant to our decision herein.

MR, 2003 WL 21361761 (Ky. App. June 13, 2003). Appellant's ineffective assistance claim was rejected as well. *Id.* On August 18, 2004, we denied Appellant's motion for discretionary review.

Thereafter, Appellant filed an original action in this Court, styled as a writ, alleging errors in the jury instructions given in his 1997 trial. *Hermansen v. Commonwealth*, No. 2004-SC-001132-OA, 2005 WL 387438 (Ky. February 17, 2005). He argued that the trial court's combined "intentional/wanton murder" instruction and extreme emotional disturbance instruction were erroneous. *Id.* at *1. This Court denied relief, noting that Appellant's trial and conviction had been reviewed both on direct appeal and in his RCr 11.42 motion and appeal therefrom, and that his claims of error were not proper for an original action before this Court. *Id.*

On October 25, 2007, Appellant filed a motion to expunge the wanton endangerment charges and convictions from his record. *Hermansen v. Commonwealth*, No. 2008-CA-001038-MR, 2009 WL 723056, at *1 (Ky. App. March 20, 2009). The Commonwealth failed to object, and the motion was granted by the Gallatin Circuit Court on January 7, 2008. *Id.*

On March 31, 2008, Appellant filed a motion with the circuit court to specifically apply its expungement order to the Attorney General's office. *Id.* Upon receiving the expungement directives from the circuit court, the Attorney General's office moved the court to reconsider the expungement, claiming that it did not meet the criteria of the expungement statute, KRS 431.076. *Id.* On April 25, 2008, the circuit court granted the Attorney General's motion and set aside its January 7, 2008 expungement order. *Id.*

The Court of Appeals reversed, holding that the wanton endangerment charges were eligible for expungement. The Court of Appeals concluded that this Court's reversal of the wanton endangerment convictions on direct appeal, albeit on venue grounds, was tantamount to a dismissal with prejudice or a directed verdict under the facts of the case.[4] Accordingly, the Court of Appeals held that Appellant was entitled to expungement of the charges pursuant to KRS 431.076, reversed the April 25, 2008 order of the Gallatin Circuit Court, and remanded the matter with instructions for the circuit court to enter an order of expungement for the two wanton endangerment charges and convictions in Case No. 96-CR-00012. *Id.*

The original July 7, 1997 final judgment had consolidated the two circuit court cases, Case Nos. 96-CR-00013 (murder conviction) and 96-CR-00012 (wanton endangerment convictions). On March 14, 2012, Appellant moved the Gallatin Circuit Court to enter a new judgment in Case No. 96-CR-00013 to reflect the expungement of Case No. 96-CR-00012. The Commonwealth did not oppose the motion. On April 9, 2012, the circuit court—noting that the Court of Appeals had ordered Case No. 96-CR-00012 to be expunged—granted Appellant's motion, and entered a new Final Judgment and Sentence of Imprisonment in Case No. 96-CR-00013 omitting any reference to Case No. 96-

[4] The Court of Appeals cited this Court's holding that "the Commonwealth presented absolutely no evidence that the Vonbokerns were endangered in Gallatin County."*Hermansen v. Commonwealth*, No. 2008-CA-001038-MR, 2009 WL 723056, at *2 (Ky. App. March 20, 2009) (quoting *Hermansen*, No. 1997-SC-000605-MR, slip. op. at 8). Recognizing that KRS 505.030(2) bars reprosecution of charges when "[t]he former prosecution resulted in a determination by the court that there was insufficient evidence to warrant a conviction," the Court of Appeals held that our decision amounted to a dismissal with prejudice of the wanton endangerment charges. *Id.*

CR-00012. Accordingly, the April 9, 2012 final judgment reflects only the murder conviction and corresponding life sentence. Appellant filed a notice of appeal from the April 9, 2012 judgment. This appeal followed.

On appeal, Appellant, proceeding *pro se*, believes that the entry of the new final judgment grants him a new direct appeal under Section 115 of the Kentucky Constitution. Accordingly, he attempts to raise three issues for review: (1) that the trial court abused its discretion when it refused to grant a directed verdict on the murder charge because the Commonwealth failed to prove the absence of extreme emotional disturbance; (2) that the trial court abused its discretion when it refused to grant a directed verdict on the murder charge on grounds that the Commonwealth failed to prove beyond a reasonable doubt that the rounds fired by Appellant caused the death of Harry Jones; and (3) that the trial court's combined wanton/intentional jury instruction deprived him of his right to a unanimous verdict.

Appellant is incorrect, however, in claiming he is entitled to a new appeal. The trial court's entry of a new judgment to comply with the directive of the Court of Appeals that the wanton endangerment charges be expunged does not entitle Appellant to a new direct appeal of his murder conviction. The "new" judgment was really no more than a corrected judgment entered to comply with the Court of Appeals' mandate, which did not affect the murder conviction and sentence in any way.

Appellant is now attempting to relitigate issues which could and should have been raised on direct appeal of the murder conviction. This Court will not review his claims, as

> [t]he law of the case doctrine holds that an appeal settles all errors that were or might have been relied upon. *Sowders v. Coleman*, 223 Ky. 633, 4 S.W.2d 731 (1928). It is intended to prevent defendants from endlessly litigating the same issue in appeal after appeal and also to prevent a dissatisfied party from presenting piecemeal issues to the appellate courts so that no decision is ever final. *Commonwealth v. Tamme*, 83 S.W.3d 465, 468 (Ky. 2002).

Bowling v. Commonwealth, 377 S.W.3d 529, 539 (Ky. 2012). Appellant has already had the direct appeal of his murder conviction to which he was entitled under Section 115 of the Kentucky Constitution. He is not entitled to a second direct appeal. Accordingly, this Court affirms the final judgment and sentence of the Gallatin Circuit Court entered on April 9, 2012.

All sitting. All concur.

APPELLANT:

Eric Lloyd Hermansen, *pro se*

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