

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

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Supreme Court of Kentucky

2014-SC-000478-MR

ROBERT CARL FOLEY

APPELLANT

V. ON APPEAL FROM MADISON CIRCUIT COURT
HONORABLE THOMAS P. JONES, JUDGE
NO. 93-CR-00070

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Robert Carl Foley was accused of murdering four individuals in 1989. In 1994, a circuit court jury convicted him of those crimes and sentenced him to four death sentences. We affirmed the resulting judgment in 1997.¹

Foley now seeks to set aside that judgment on a theory of newly-discovered evidence under Kentucky Rules of Civil Procedure (CR) 60.02, or, alternatively, under Kentucky Rules of Criminal Procedure (RCr) 10.02, because of three newly acquired affidavits from individuals claiming to have seen one of Foley's victims alive the day after Foley supposedly murdered him. The trial court denied his motion, and Foley now appeals to this Court as a

¹ See *Foley v. Commonwealth*, 953 S.W.2d 924 (Ky. 1997).

matter of right.² Because his motion was not timely filed and justice does not demand granting him relief, we affirm the ruling below.

I. FACTUAL AND PROCEDURAL BACKGROUND.

In 1989, Foley received four death sentences for his convictions for the intentional killings of Lillian Contino, Calvin Reynolds, Kim Bowersock, and Jerry McMillan. The Commonwealth theorized the murders were related to Foley's alleged involvement in trafficking marijuana and moonshine whiskey. The convictions were largely attained through eyewitness testimony from two individuals who were present for the killings and whom Foley intentionally chose to spare to intimidate them into helping him cover up the scene. Foley continually maintained his innocence, even after this Court affirmed the judgment on direct matter-of-right appeal.

In 2012, Foley filed motions to set aside this judgment under either CR 60.02 or RCr 10.02 because he believed that newly acquired evidence would exonerate him. Specifically, he produced three affidavits from individuals claiming to have seen one of Foley's victims—Calvin Reynolds—alive the day after the murder. Even further, one witness claims to have seen someone else murder Reynolds.

The first affiant, Charles Goins, claims to have seen Reynolds the day after Foley allegedly shot and killed him. Goins claims he went to the home of David Gross—someone Foley offers as an alternate perpetrator for the killings—

² Ky. Const. § 110(2)(b).

and saw Reynolds sitting on the front porch. Goins was accompanied by another friend, who purchased marijuana from Reynolds while at the Gross home. Gross warned the men that they should not conduct this business in the area because of heightened police activity following recent shootings. Goins claims that as he was backing his truck up to leave, he saw Gross turn with a pistol and shoot Reynolds in the right side of the head.

The second affiant can corroborate Goins's story, to the extent he saw Reynolds alive after he was supposedly killed. Joe White says he was passing by the Gross property and spotted Reynolds standing in the road hours after he was supposedly shot. The third and final affiant, Charles Nantz, confirms seeing Reynolds the next day and goes even further, claiming to have also seen McMillan, Contino, and Bowersock alive as well.

Goins's affidavit was signed and sworn in July 2005, White's affidavit was signed and sworn in June 2004, and Nantz's affidavit was executed in May 2009. Foley filed his motion for a new trial supported by these affidavits in 2012.

The trial court denied Foley's motion, in part, because "There is nothing in any of the three affidavits to explain why an event that was witnessed in 1989, brought to light in 1991, and ultimately tried in 1994, resulted in sworn affidavits as late as 2004, 2005, and 2009, which accompanied a Motion filed in 2012." The trial court found that the affidavits were insufficient and not credible based on their untimeliness and the lack of explanation why they were

presented so long after Foley's highly publicized trial. So Foley appealed to this Court.

II. ANALYSIS.

This case comes to us on matter-of-right appeal from the trial court's denial of Foley's CR 60.02 and RCr 10.02 motions premised under a theory of newly discovered evidence. We review the trial court's ruling under the abuse-of-discretion standard.³ So we will not interfere with the trial court's ruling unless we find that the decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles."⁴

The Kentucky Rules of Civil Procedure indeed extend trial courts the discretion to relieve a party of a final judgment, upon such terms the trial court deems just. And CR 60.02 recognizes that "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02 [within ten days of the entry of final judgment]" is an adequate reason to grant relief.⁵ But the rule makes clear this is not an open-ended invitation. Instead, parties moving the trial court under this rule must do so within a "reasonable time," and theories based on new evidence are precluded if brought "more than one year after the judgment, order, or proceeding was entered or taken."⁶ The rule offers no exception to this one-year

³ See *Brown v. Commonwealth*, 932 S.W.2d 359, 361 (Ky. 1996).

⁴ *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

⁵ CR 60.02.

⁶ *Id.*

requirement. It is clear that Foley's motion was filed significantly after the one-year entry of final judgment in 1997. So we agree with the trial court that Kentucky's civil rules offer Foley no relief.

As for Kentucky's Rule of Criminal Procedure, RCr10.02 exists largely as CR 60.02's criminal-case counterpart. The rule states that upon a defendant's motion, the trial 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."⁷ But unlike the civil rule, RCr10.02 affords slightly more flexibility in its understanding of a timely motion. RCr 10.06 declares that "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.*" Again, Foley clearly did not file his motion within one year of the entry of final judgment against him. So this analysis is totally dependent upon the trial court's discretion and whether "good cause so permits" in granting this request.

In this Court's precedent, we have held that even if a motion under RCr 10.02 is timely filed, a defendant is only entitled to relief if the new evidence would "with reasonable certainty change the verdict."⁸ Indeed, "Newly discovered evidence must be of such decisive value or force that it would, with reasonable certainty, change the verdict or that it would probably change the

⁷ RCr 10.02.

⁸ *Collins v. Commonwealth*, 951 S.W.2d 569, 576 (Ky. 1997).

result if a new trial should be granted.”⁹ The trial court here was unconvinced the three proffered affidavits would reasonably alter Foley’s outcome, and we must now determine whether the trial court abused its discretion by reaching this conclusion.

At the outset, we certainly recognize that, if taken as true, this evidence could potentially do a great deal to exonerate Foley of at least the murder of Calvin Reynolds—if not all four victims. All three affiants claim to have seen Reynolds alive after the Commonwealth contends he was brutally murdered by Foley; and one affiant supposedly saw all four victims alive after that fateful 1989 day. But this analysis, as the trial court rightly understood, goes beyond the face-value substance, and a more thorough analysis of the totality of the surrounding circumstances must be considered as well. And with that in mind, we cannot conclude the trial court abused its discretion in denying Foley a new trial.

The trial court was right to question the timing of this newly discovered evidence. Foley and the affiants have been unable to offer any explanation for why this highly consequential information comes to light twenty years after the murders occurred. Simply put, Foley has failed to show cause—failed to present a legally sufficient reason—why he is entitled a new trial.

The affidavits are riddled with inconsistencies, and the affiants themselves are of questionable credibility. Two of the three affiants are

⁹ *Id.*

convicted criminals who withheld these statements from law enforcement for decades, and Foley has failed to adequately identify his third affiant. While this information, if admissible, would no doubt help Foley's case, we are inclined to dismiss any persuasive value this testimony would have with a jury. We cannot say with any reasonable certainty that this would have changed the result of his trial. So we agree with the trial court's ruling, and we hold it did not abuse its discretion denying Foley a new trial.

III. CONCLUSION.

For the foregoing reasons, we affirm the trial court's ruling that Foley is not entitled to a new trial based on newly-discovered evidence.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Euva Denean Blandford
Meggan Elizabeth Smith
Margaret Anne Ivie
Robert C. Garrison
Assistant Public Advocate
Department of Public Advocacy

COUNSEL FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

David Wayne Barr
Assistant Attorney General