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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2005-CA-001069-MR

DAVID SOMMERS

APPELLANT

APPEAL FROM FULTON CIRCUIT COURT
HONORABLE WILLIAM L. SHADOAN, JUDGE
ACTION NO. 93-CR-00074

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER AND KNOPF,¹ JUDGES; EMBERTON, SENIOR JUDGE.²

KNOPF, JUDGE: David Sommers appeals from an order of the Fulton Circuit Court denying his motions to set aside his conviction pursuant to RCr 11.42 and CR 60.02. He argues that the trial court erred by failing to provide funds for his expert at the evidentiary hearing, by refusing to allow his expert to testify

¹ This opinion was completed and concurred in prior to Judge William L. Knopf's retirement effective June 30, 2006. Release of the opinion was delayed by administrative handling.

² Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

by telephone, by denying his motion to recuse, and by denying his motions on substantive grounds. We find that the trial court properly complied with the prior remand orders of the Kentucky Supreme Court and this Court, and that the court did not clearly err or abuse its discretion in any of its rulings. Hence, we affirm.

The relevant facts of this action were set forth in this Court's prior opinion as follows:

On December 15, 1988, Sommers was indicted for the capital murder (Kentucky Revised Statute ((KRS) 507.020) of two sisters, Carrie and Stephanie VanMeter, who had been living with Sommers and his ex-wife. They were 13 and 11 years of age, respectively, at the time of their deaths. The charred remains of the girls had been found in Sommers's burned-out house on December 1, 1988. Forensic tests indicated that the deaths had not resulted from the fire or from smoke inhalation but rather from suffocation prior to the fire. Other physical evidence convinced arson investigators that the fire had been deliberately set. The Commonwealth hypothesized that Sommers had previously sexually abused the girls, that he killed them in order to silence them, and that he burned the house in an attempt to conceal the homicides and the physical evidence of the sexual abuse.

In October 1989, Sommers was convicted in McCracken Circuit Court of both counts of murder and was sentenced to 500 years on each count - to run consecutively. In September 1992, the Supreme Court reversed the convictions on the grounds that the trial judge had erred in failing to recuse himself and that he had further erred in failing to provide Sommers with funds needed to hire expert witnesses. See Sommers v.

Commonwealth, Ky., 843 S.W.2d 879 (1992). Sommers was tried for a second time in April 1995 in Fulton Circuit Court. He was again convicted of two counts of murder but received a sentence of life imprisonment without the possibility of parole for twenty-five years on each count. On October 2, 1997, the Supreme Court rendered an unpublished Opinion affirming the conviction and sentence. Sommers v. Commonwealth, 95-SC-393-MR.

On April 13, 1999, Sommers filed a motion to vacate his conviction pursuant to RCr 11.42. On May 13, 1999, without conducting an evidentiary hearing, the trial court entered an order denying his motion. Sommers thereafter filed motions to alter or to amend pursuant to Rules of Civil Procedure (CR) 59.05 and for additional findings of fact and conclusions of law pursuant to CR 59.07 and CR 52.02.³

The trial court denied the motion. On appeal, this Court rejected most of Sommers's allegations of ineffective assistance of counsel. However, this Court remanded for additional findings concerning the trial court's limitation of Sommers's arson expert. In particular, the Court questioned the trial court's decision to limit the expert's testimony, but recognized that this issue was beyond the scope of the court's review on a RCr 11.42 motion. The Court also held that Sommers's trial counsel had not been deficient in failing to anticipate the trial court's ruling in this regard. Nevertheless, the Court concluded "that an evidentiary hearing

³ Sommers v. Commonwealth, No. 1999-CA-001698-MR (Not-To-Be-Published Opinion Rendered January 19, 2001) at pp. 2-3.

is required to determine whether prejudice resulted from the absence of an arson expert at trial and whether the trial should have been postponed until compliance with the order of the Supreme Court was achieved."

On remand, Sommers moved the trial court to provide funds for an expert witness to testify regarding the cause of the fire. The trial court denied the motion. The court also denied Sommers's motion for funds to take the deposition testimony of the previous expert. Rather, the trial court directed Sommers to submit affidavits of his witnesses. Following these rulings, Sommers moved to recuse the trial judge, contending that they demonstrated a bias or predisposition against him. The trial court also denied this motion.

During the hearing on July 27, 2005, Sommers asked the court to allow his new arson expert, Dr. Gerald Hurst, to testify by telephone. The trial court denied this motion as well. Following the evidentiary hearing, the trial court entered findings of fact and conclusions of law denying Sommers's motion. For purposes of the motion, the trial court presumed that Sommers's arson experts would testify that the fire did not originate by arson. But since the jury did not find Sommers guilty of arson and did not consider arson as an aggravating factor to the murders, the trial court concluded

that Sommers did not suffer prejudice from any limitation on his expert's testimony or from the failure of the trial court to grant a continuance. The trial court also rejected Sommers's efforts to re-litigate issues which were addressed in his previous appeals, as well as a new issue which Sommers raised in a supplemental motion. This appeal followed.

RCr 11.42 is designed to permit a trial court an opportunity after entry of judgment to review its judgment and sentence for constitutional invalidity of the proceedings prior to judgment or in the sentence and judgment itself.⁴ It is not the purpose of RCr 11.42 to permit a convicted defendant to retry issues which could and should have been raised in the original proceeding or on direct appeal.⁵ Thus, as this Court recognized in its prior opinion, we cannot consider whether the trial court properly limited the testimony of Sommers's arson expert.

Based on this court's prior opinion, Sommers's collateral attack of his conviction is limited to a determination of whether he was unfairly prejudiced by the trial court's rulings limiting the testimony of his expert witness and by the trial court's subsequent refusal to grant a continuance

⁴ Commonwealth v. Wine, 694 S.W.2d 689, 694 (Ky. 1985).

⁵ Brown v. Commonwealth, 788 S.W.2d 500, 501 (Ky. 1990), Thacker v. Commonwealth, 476 S.W.2d 838, 839 (Ky. 1972).

to allow Sommers to obtain a new expert. It seems apparent that Sommers suffered some prejudice from these rulings. Since Sommers's expert was unable to testify concerning the cause of the fire, the Commonwealth's theory of the case was essentially unrefuted.

Nevertheless, in order to prevail on his RCr 11.42 motion, Sommers must establish that the trial court's ruling affected the outcome of the proceeding.⁶ As noted above, the trial court concluded that Sommers did not suffer substantial prejudice from the ruling because the jury did not convict him of arson and did not consider arson as an aggravator to the murders. The trial court's findings were supported by substantial evidence and were not clearly erroneous.

Sommers further contends that the trial court was required to provide additional funds to allow him to retain an arson expert for this RCr 11.42 motion. We disagree. In its initial order remanding for a new trial, the Supreme Court directed the trial court to provide Sommers with funds to hire an arson expert. While the trial court subsequently found that the expert which Sommers retained was not qualified to testify regarding the ultimate issue, the trial court had previously complied with the Supreme Court's order by providing Sommers

⁶ Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984); Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1985).

with funds to retain the expert. Sommers was not entitled to additional funds to hire an expert to pursue post-conviction relief under RCr 11.42.⁷

We do question the trial court's unwillingness to allow Sommers's expert to testify by telephone at the evidentiary hearing. However, the trial court gave Sommers the benefit of any doubt by presuming that Dr. Hurst would have testified that the fire did not originate by arson. The trial court also gave full consideration to Dr. Hurst's and Mr. Maloney's affidavits. The trial court simply concluded that their testimony would not have altered the outcome of the trial because of the other evidence showing that the girls were dead at the time the fire began. Thus, even if the trial court abused its discretion by refusing to allow Dr. Hurst to testify by telephone, his testimony would not have altered the trial court's conclusion to deny RCr 11.42 relief.

Sommers next argues that the trial judge erred by denying his motion to recuse. Sommers asserts that recusal was necessary because Judge Shadoan had previously demonstrated a bias against him by unreasonably limiting his expert's testimony and by denying his motions to fund his expert in this proceeding. Sommers suggests that this bias interfered with

⁷ Stopher v. Conliffe, 170 S.W.3d 307, 308-10 (Ky. 2005).

Judge Shadoan's ability to fairly consider the issues presented upon remand. KRS 26A.020(1) provides for pre-trial recusal of a judge upon showing of partiality. However, the trial court's adverse rulings, even if erroneous, do not provide a basis for finding bias. Furthermore, Sommers does not point to any extra-judicial statements by Judge Shadoan which would suggest bias or partiality against him. Finally, Judge Shadoan was not required to recuse himself based on the knowledge which he obtained in the course of his earlier participation in the same case.⁸

Sommers raises of number of issues which he previously raised both in his direct appeal and in his first RCr 11.42 appeal. To the extent that these issues were litigated and addressed in the prior appeals, Sommers is precluded from presenting them again in this appeal.⁹

Finally, Sommers contends that the trial court erred by denying his CR 60.02 motion without a hearing. Following the prior opinion by this Court, Sommers filed a supplemental motion pursuant to CR 60.02 asserting that he was entitled to relief

⁸ Marlowe v. Commonwealth, 709 S.W.2d 424, 428 (Ky. 1986) See also Liteky v. United States, 510 U.S. 540, 550-51, 114 S. Ct. 1147, 1155, 127 L. Ed. 2d 474 (1994). "The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task."

⁹ Commonwealth v. Tamme, 83 S.W.3d 465, 468 (Ky. 2002).

from the judgment based upon newly discovered evidence. He supported the motion with memoranda prepared by two paralegals from the Department of Public Advocacy who examined the tissue samples. The paralegals stated that they found discrepancies in the chain of custody documentation of the samples. They also stated that the lung tissue samples appeared to have soot on them, which would contradict the testimony of the Commonwealth's expert at trial. Based on this evidence, Sommers argues that he was entitled to a hearing to determine if this newly discovered evidence would have altered the outcome of the trial.

The trial court rejected Sommers's motion, finding that the paralegals were not qualified to express an expert opinion concerning the condition of the tissue samples. We agree. The prosecution's suppression of evidence favorable to the accused constitutes a violation of due process regardless of the good or bad faith of the prosecution.¹⁰ But in order for newly discovered evidence to support a motion for new trial it must be of such decisive value or force that it would, with reasonable certainty, have changed the verdict or that it would probably change the result if a new trial should be granted.¹¹ Sommers offers no evidence showing that the tissue samples were

¹⁰ Brady v. Maryland, 373 U.S. 83, 87 S. Ct 1194, 1196-97, 10 L. Ed. 2d 215 (1963).

¹¹ Commonwealth v. Spaulding, 991 S.W.2d 651, 654 (Ky. 1999).

improperly withheld from him at the trial. Moreover, the paralegals' unsworn opinions were not sufficient to alter the outcome of the prior trial. Consequently, the trial court did not err by denying the motion.

Accordingly, the order of the Fulton Circuit Court denying Sommers's RCr 11.42 and CR 60.02 motions are affirmed.

ALL CONCUR.

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