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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001857-MR
AND
NO. 2004-CA-000562-MR

LONNIE HARRIS — APPELLANT

v.

APPEALS FROM CASEY CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 00-CR-00059

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART;
REVERSING AND REMANDING IN PART

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; McANULTY, JUDGE; MILLER, SENIOR JUDGE.[1]

McANULTY, JUDGE: In these combined appeals, Lonnie Harris argues that he should be granted a new trial following his conviction in the Casey Circuit Court. Harris was convicted of burglary in the first degree and theft by unlawful taking

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

following a jury trial. He was sentenced to twenty years imprisonment. His conviction was affirmed by the Kentucky Supreme Court (2001-SC-0171-MR, August 22, 2002). Subsequently, Harris argued in a motion pursuant to CR 60.02, filed December 13, 2002, that he is entitled to a new trial on the grounds of newly discovered evidence under CR 60.02(b), and fraud (CR 60.02(d)), a void judgment (CR 60.02(e)), or other reason of extraordinary nature (CR 60.02(f)). He additionally claimed a right to relief based on newly discovered evidence pursuant to CR 60.02(b). Harris also filed a motion pursuant to RCr 11.42 claiming a right to relief because his counsel rendered ineffective assistance in the court below.

The trial court denied both the CR 60.02 and RCr 11.42 motions. We affirm the trial court's finding that counsel's assistance was not ineffective. However, we agree with Harris that the trial court abused its discretion in failing to grant a new trial under CR 60.02(f). Thus, we reverse and remand.

Harris was indicted on charges of complicity to burglary in the first degree and complicity to theft by unlawful taking. At trial, the facts presented were that on the night of August 28, 2000, Jackie Carman visited Owolene Elmore at Elmore's home. According to Ms. Elmore's testimony, at some point that evening Carman's teenage daughter, Teena, and Michael Holt stopped by Ms. Elmore's house to borrow Carman's car. Ms.

Elmore later drove Carman home, and did not return to her house that night. The next day, Ms. Elmore discovered that someone had "messed up" her house, and that two handguns and $520 were missing.

Harris did not testify at the trial. Additional evidence consisted of Teena Carman's testimony, under a contempt order,[2] in which she stated that she fell asleep and did not know who had taken what from Ms. Elmore's house. She testified that after they all left the Elmore residence both Harris and Holt had possession of the guns and money.

HOLT'S TESTIMONY AT TRIAL

Holt testified at trial after entering into a plea agreement with the Commonwealth to testify in return for a five year sentence on the charges. When he testified, however, he stated he could not remember the events that took place after he went with Teena to Ms. Elmore's house that night. He testified that Ms. Elmore, Ms. Carman, Teena and Harris came and picked him up, but he did not know what time it was, but it was dark. He said that they went to Ms. Elmore's house, but he did not

[2] Teena Carman was offered immunity by the Commonwealth in return for testifying. She refused the offer of immunity, but acquiesced after the trial court held that she would be held in contempt for refusing to testify. Harris argued in his direct appeal that it was error for the trial court to require her testimony. The Supreme Court held that neither a prosecutor nor trial court in Kentucky has inherent power to grant immunity to a witness, and the trial court erred in using its contempt powers to compel Teena's testimony. However, the Court held that while the trial court violated Teena's constitutional right not to testify, Harris's constitutional rights were not violated thereby. Consequently, Harris had no standing to assert a claim. (Opinion, pp 5-9).

know how long they were there. He said it could have been hours or it could have been a half hour. He stated that they were all intoxicated, and that he had been taking pills. He said he left in Teena's mother's car.

A typical response from Holt came when asked who left. Holt answered, "I suppose it was me, Lonnie and Teena. They may have been somebody else and it may not have been them two. I could not tell you for sure." He said he thought they went to Harris's house. When asked how long it took them to drive to Harris's house, Holt responded, "I don't know. Me being drunk I probably drove all around the country." He said he thought they stayed at Harris's house until 7:30 a.m., but added, "I wouldn't say nothing for sure."

He denied knowing whether he returned to Ms. Elmore's house that night or the next morning. When pressed about this, Holt said he had no memory of it but knew that he had said that on tape. The Commonwealth then referred Holt to a statement he gave the sheriff on the day following the theft. Holt testified that he knew he had said certain things on tape, but he did not remember any of what was said. The Commonwealth asked him if what he said on the tape would be true. Holt responded:

> Me drunk and eating pills, and, no, I was probably doing some other stuff, a little coke. You know, I ain't going to lie about it really, it could have been and it may not have been. You know, I might have told him

> what he wanted to hear, and might have said what was the truth, and I might not have.

The Commonwealth's Attorney asked Holt if he recalled whether he had been at Ms. Elmore's house later that night when she wasn't present. Holt stated, "No. Which again, I ain't gonna say that I wasn't there. I really cannot, I'm being honest with you, I cannot tell you if I was or not."

The Commonwealth played the taped statement in which Holt stated that he stayed the night at Lonnie Harris's house, and went to Teena's mother's house. He stated on tape that he took the money from Ms. Elmore's house and Harris found the guns. He stated that he sold the guns to a man named William Luttrell. He said that he had dropped off Teena and Lonnie before proceeding to Luttrell's house. Holt stated that he took "part of" the money and he traded the guns for cocaine. After the tape was played, the Commonwealth's Attorney asked Holt if he had told the truth. He responded, "I don't really, I can't remember." When asked who took the money and guns out of Ms. Elmore's house, Holt responded, "I really don't know. All I know is what's said on that tape."

Harris cross-examined the witness, but did not ask about the events of that night. Instead, the questions primarily concerned the plea bargain Holt made with the

Commonwealth, and with the fact Holt's mother paid Ms. Elmore $1000 restitution on Holt's behalf.

HOLT'S TESTIMONY AT THE LUTTRELL TRIAL

The first argument for CR 60.02 relief arose from Holt's subsequent testimony in a separate but related trial after Harris was convicted. William Luttrell was tried March 23, 2001, on drug charges (No. 00-CR-0061), eleven weeks after Harris's trial and after Holt was sentenced. The charges arose as a result of Holt's statement to police that on the night of the burglary he exchanged the guns and money with Luttrell for cocaine.

In support of his new trial motion pursuant to CR 60.02, Harris attached a transcript of Holt's testimony from the Luttrell trial to his memorandum. Holt gave testimony in which he expressed an extremely improved ability to remember the events of the night of the Elmore burglary. Holt testified in Luttrell's trial that he lied in certain parts of the statement he gave the sheriff because he believed he could get a favorable deal from the prosecution by implicating others in Casey County. He said he told some lies to make "his story more believable." Holt asserted, nevertheless, that his testimony in Luttrell's trial was the truth. Luttrell was acquitted of the charges by the jury.

Harris claims a right to relief due to Holt's change of testimony. Civil Rule 60.02 replaces the abolished "writ of coram nobis," and authorizes the type of relief formerly available by means of the writ. Harris v. Commonwealth, 296 S.W.2d 700, 702 (Ky. 1956). The writ of coram nobis was "an extraordinary and residual remedy to correct or vacate a judgment upon facts or grounds, not appearing on the face of the record and not available by appeal or otherwise, which were discovered after the rendition of the judgment without fault of the party seeking relief." Id. at 701. With respect to relief from a criminal judgment, the remedy was available to obtain a new trial on a showing of conditions which established that the original trial was tantamount to none at all because a miscarriage of justice had effectually deprived the defendant of life or property without due process of law. Id. at 702.

CR 60.02 does not extend the scope of the remedy nor add additional grounds of relief. Id. A criminal judgment may be set aside only in extraordinary and emergency cases where the showing made is of such a conclusive character as to indicate the verdict most probably would not have been rendered and there is a strong probability of a miscarriage of justice. Id.

Harris argues his conviction should be set aside and a new trial granted since Holt subsequently revealed that he lied in his testimony in Harris's trial, and said that he falsified

facts in the statement he gave to police. Harris argues that the trial court abused its discretion in failing to grant a new trial.

A conviction which was based on perjury (unknown to the prosecutor) may be a violation of due process, and as such it is subject to the reasonable time limitation of CR 60.02(f). Commonwealth v. Spaulding, 991 S.W.2d 651, 655 (Ky. 1999). For the 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." Id., (quoting Ferguson v. Commonwealth, 373 S.W.2d 729, 730 (Ky. 1963)). In addition, the defendant has the burden of showing within a reasonable certainty that perjured testimony was in fact introduced against him at trial. Id.

Holt claimed a sweeping failure of memory during Harris's trial. However, at the later Luttrell trial Holt was able to recall and give details about events that he claimed no memory of at the Harris trial. Moreover, he did not claim sudden memory improvement, but admitted at the Luttrell trial that he had been untruthful. This evidence was material since Holt was a witness to and participant in the crimes at issue. Thus, we agree that Harris established the fact that Holt did

not testify truthfully at Harris's trial within a reasonable certainty.

The next part of the test is whether the evidence is of such decisive value or force that it would probably change the result if a new trial should be granted. We agree that it was. As it turned out, the Commonwealth's case depended almost entirely on the tape recorded statement from Holt. There was no other direct evidence tying Harris to the burglary charge. The only other potential witness to the night's events, Teena Carman, testified that she did not know who took the property at Ms. Elmore's home because she was asleep. She stated that she could not recall what Harris and Holt had said to her later about who was responsible for the burglary. Although she testified that she saw both defendants holding the guns later that night, that fact only went toward establishing the theft, and not the burglary offense.

The Commonwealth pointed out at trial that Teena Carman said that Holt carried her out of the Elmore house with both hands, thus implying that he could not have also carried the guns and money at the same time. However, this was merely circumstantial evidence, since Holt could have carried the weapons out and gone back to get Carman. Without the testimony of Holt, the case would not have been sufficient to send to the jury.

The Commonwealth counters that the recanted testimony of a witness is generally regarded as suspect and will not require a new trial, citing Hensley v. Commonwealth, 488 S.W.2d 338 (Ky. 1972). In this case, however, we do not have simply a recantation, but an instance where testimony in a particular trial was shown to be false. Thus, a greater degree of certainty attaches than with an unverifiable recantation. While the general rule is that newly discovered evidence which is only impeaching in nature will not justify a new trial, the rule is to be "cautiously applied" and when the discovered evidence is of such compelling weight that it probably would have induced the jury to reach a different verdict a new trial will be granted. McGregor v. Commonwealth, 253 S.W.2d 624 (Ky. 1952). Where it appears that there might be a miscarriage of justice if a new trial were not granted, the courts have not been reluctant to grant one. Mullins v. Commonwealth, 375 S.W.2d 832 (Ky. 1964).

Holt's credibility was an important issue in this case since the evidence which came from Holt was the only evidence implicating Harris in the burglary. For the jury to know that Holt was lying on the stand about his ability to recall the events of the crimes, it would with certainty have impugned Holt's version. In addition, his admission that he gave a "story" in which he was willing to accuse another to try to get

himself a better deal called into question the statements he made incriminating Harris. Thus, knowledge of Holt's deceptions would have affected the jury's determinations as to guilt and sentencing in the case.

In addition, Harris was effectively precluded from adequately cross-examining Holt, since Holt consistently disclaimed any memory of events on which he could have been cross-examined. This additionally supports the idea that a new trial is necessary to avoid a miscarriage of justice. Furthermore, we believe to reach any other conclusion would be to countenance Holt's perjury in this case. Therefore, we remand for a new trial on the charges due to extraordinary circumstances under CR 60.02(f).

SUBSEQUENT STATEMENT FROM MS. ELMORE

Harris's other CR 60.02 claim is that he provided decisive newly discovered evidence. He cites a statement allegedly attested to by Ms. Elmore in which she states that Harris was a guest in her home on the night of the burglary, and that she expected him and the others to return to her home that night, and that they were "welcome" to return. Harris argues that this "newly discovered evidence" shows that the element of entering or unlawfully remaining in the building was not present.

This claim is not grounds for relief under CR 60.02. CR 60.02(b) requires that newly discovered evidence be that which "by due diligence could not have been discovered in time to move for a new trial under Rule 59.02" -- that is, ten days after the entry of judgment. The Commonwealth correctly asserts that the statement was evidence which could have been discovered prior to trial. Ms. Elmore testified at trial and Harris had the opportunity to ask her about the issue. The Commonwealth observes that if Harris was a welcome guest in Ms. Elmore's home, he would have been privy to this information and should have thought to raise the issue at trial. Without question, this evidence was known or should have been known at the time of trial, and does not support a motion based on newly discovered evidence.

In addition, although the Commonwealth does not argue it, we do not believe the motion was timely as to this ground. CR 60.02 states that motions based on newly discovered evidence must be brought not more than one year after the judgment was entered. The judgment was final in this case on February 26, 2001, and this motion was brought December 13, 2002.

INEFFECTIVE ASSISTANCE OF COUNSEL UNDER RCR 11.42

Finally, Harris also alleges that his counsel was ineffective. His contention as to this allegation was that his trial counsel should have discovered that Ms. Elmore regarded

him as a "guest" in her home, since that fact called into question the illegal entry element of the burglary charge. A defendant's claim that counsel's assistance was so defective as to require reversal of conviction requires that the defendant show first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

We do not agree that Harris has shown that his attorney failed to investigate. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 669, 104 S. Ct. at 2065. At the time of trial, Ms. Elmore was the prosecuting witness who had reported the burglary to police. Furthermore, she testified at trial that her house had been "broken into" and denied that Harris had been present at her house earlier in the evening. It was reasonable trial strategy not to ask the prosecuting witness whether Harris was welcome in her home when she had indicated by her direct testimony that she had not invited him there. There is no showing that trial counsel was unprepared for cross-

examining this witness. We find no indication of ineffective assistance of counsel.

CONCLUSION

For the foregoing reasons, we conclude that the trial court erred in denying the CR 60.02 motion on grounds of extraordinary relief. We reverse appellant's conviction and remand for a new trial. We affirm the denial of the RCr 11.42 motion.

ALL CONCUR.

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