

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000851-MR

JOSEPH MARK BOURNE

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 04-CR-00053

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: ACREE AND TAYLOR, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Joseph Mark Bourne appeals from an order of the Boyle Circuit Court denying his motion for relief from his prison sentences pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. We affirm.

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Bourne pleaded guilty in 2005 to charges of unlawful transaction with a minor, possession of a firearm by a convicted felon, sodomy in the second degree, possession of drug paraphernalia, and trafficking in marijuana within 1,000 yards of a school. He was sentenced to serve six years for the firearm conviction, twelve months for possession of drug paraphernalia, and five years each on the remaining charges. All sentences were ordered to run concurrently for a total sentence of six years. The court entered the final judgment in May 2005.

In November 2005, Bourne filed a CR 60.02 motion to vacate the final judgment, alleging that he was entitled to parole eligibility after serving 20% of his sentence. The circuit court denied the motion, and Bourne did not file an appeal. Two months later, Bourne filed a Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to vacate the final judgment. The court denied that motion, and Bourne again did not appeal. Five months later, he filed a second RCr 11.42 motion. The circuit court also denied that motion, but this time Bourne appealed. This court affirmed that decision in our not to be published opinion in *Bourne v. Commonwealth*, 2007 WL 2012829 (Ky. App. 2007) (2006-CA-001555-MR).

On August 16, 2007, Bourne filed another CR 60.02 motion. The circuit court denied that motion by order entered on September 11, 2007. Then, on March 24, 2008, Bourne filed a motion for “Belated 60.02.” The court denied that motion by order entered March 26, 2008, treating it as a successive request for

post-conviction relief. On May 1, 2008, Bourne filed the current appeal seeking to have this court reverse the circuit court's order denying the "Belated 60.02" motion.

On December 1, 2008, Bourne filed a motion with this court requesting appointment of counsel. On January 12, 2009, he tendered a *pro se* brief that was returned to him as being deficient.

On January 21, 2009, this court directed the Department of Public Advocacy to evaluate the record using the guidelines set forth in KRS 31.110(2)(c) and to provide notification to the court concerning whether the Department intended to represent Bourne on appeal. On March 4, 2009, the Department filed a response indicating that according to its evaluation, this appeal is "not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense[.]" KRS 31.110(2)(c). The response further indicated that Bourne's request for appointment of counsel should be denied.

This court denied Bourne's motion for appointment of counsel by order on April 9, 2009, and provided 60 days from that date for Bourne to submit a *pro se* brief. On July 17, 2009, we granted Bourne an additional 20 days to file his brief. On July 30, 2009, a "Supplement Brief for Appeal" was received from Bourne and filed by our clerk. On August 4, 2009, Bourne again filed a motion for appointment of counsel. We denied that motion by order entered on August 26, 2009.

Bourne asserts in his Supplement Brief for Appeal that he has new evidence that the victim and two police officers provided conflicting testimony and evidence before the Boyle County Grand Jury concerning the location of the handgun found in his residence. Bourne states in his brief that the victim told one officer that the gun was at one location in the residence and then told the other officer that the gun was in a different location in the residence. He maintains that those three individuals caused the grand jury to render an indictment against him by giving untruthful testimony. In short, he states that the indictment was based on a lie and should have been dismissed for that reason.

“[N]o indictment shall be quashed or judgment of conviction reversed on the ground that there was not sufficient evidence before the grand jury to support the indictment.” RCr 5.10. As stated in *Russell v. Commonwealth*, 992 S.W.2d 871 (Ky. App. 1999), “[o]nce the defendant has been indicted, the issue of the sufficiency of the evidence is to be determined at trial.” *Id.* at 874.

However, “[a] court may utilize its supervisory power to dismiss an indictment where a prosecutor knowingly or intentionally presents false, misleading or perjured testimony to the grand jury that results in actual prejudice to the defendant.” *Commonwealth v. Baker*, 11 S.W.3d 585, 588 (Ky. App. 2000). In these types of cases, judicial intervention is confined to “cases of prejudicial misconduct, that is, to cases where the misconduct made a difference to the defendant.” *Id.* quoting *United States v. Roth*, 777 F.2d 1200, 1204 (7th Cir. 1985).

There are several reasons why we must affirm the circuit court's order. First, according to the *Baker* case, one requirement before an indictment based on perjured testimony must be dismissed is that the prosecutor must have knowingly or intentionally presented the misleading or perjured testimony to the grand jury. *Baker, supra*. Bourne did not allege in his motion that there was any such knowledge or intent on the prosecutor's part. Thus, the indictment was not subject to dismissal since Bourne did not contend that there was prosecutorial misconduct in connection with the alleged perjured testimony.

Second, Bourne has previously brought RCr 11.42 and CR 60.02 motions without mentioning anything about the indictment against him having been procured by perjured testimony. But, as noted by the circuit court in its order, Bourne stated in his motion that he discussed the alleged false statements with his attorney prior to entering his guilty plea. "CR 60.02 . . . is available only to raise issues which cannot be raised in other proceedings." *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). Bourne does not explain why he could not have raised this allegation in any of his earlier post-conviction motions.

Third, Bourne describes the alleged perjured testimony as a discrepancy in statements of the victim to police officers regarding the location of the gun in the residence. Bourne, however, has not explained how this alleged discrepancy in testimony amounted to lying or perjury. Assuming such a discrepancy exists, Bourne's remedy would have been to go to trial and impeach

the testimony of the witness with his prior inconsistent statement. Rather, Bourne elected to plead guilty to the charges.

For the foregoing reasons, the order of the Boyle Circuit Court denying Bourne's motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joseph Mark Bourne, *pro se*
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BRIEF FOR APPELLEE:

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