

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001985-MR

SUSAN JEAN KING

APPELLANT

v.

APPEAL FROM SPENCER CIRCUIT COURT
HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NOS. 07-CR-00004 AND 07-CR-00011

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; TAYLOR AND VANMETER, JUDGES.

TAYLOR, JUDGE: Susan Jean King brings this appeal from an October 5, 2012, Opinion and Order of the Spencer Circuit Court denying her Kentucky Rules of Civil Procedure (CR) 60.02 and Kentucky Rules of Criminal Procedure (RCr) 10.02 motions. We reverse and remand.

In November 1998, the body of Kyle Breeden was found in the Kentucky River near the town of Gratz, Kentucky. Breeden had been shot in the

head twice with .22 caliber magnum bullets, and his legs were bound with guitar amplifier cord. Kentucky State Police investigated Breeden's murder but were unable to solve the case.

Some eight years later, in May 2006, the investigation into Breeden's death was reopened by Kentucky State Police. King was ultimately indicted by a Spencer County Grand Jury for the murder of Breeden and for tampering with physical evidence.

The Commonwealth and King reached a plea agreement. Pursuant thereto, King entered a guilty plea under *North Carolina v. Alford*, 400 U.S. 25, 92 S. Ct. 160, 27 L. Ed. 2d 162 (1970) to second-degree manslaughter and to tampering with physical evidence. By an October 23, 2008, Judgment and Sentence on Plea of Guilty, the circuit court sentenced King to serve a total of ten-years' imprisonment.

Some four years later, on May 18, 2012, the Kentucky Innocence Project filed motions on behalf of King pursuant to CR 60.02 (b) or (f) and RCr 10.02(1) seeking to vacate the October 23, 2008, judgment and for a trial by jury. In support thereof, it was claimed that King was innocent of Breeden's murder and pointed to the newly discovered evidence of a recent confession of Richard Jarrell, Jr., to Breeden's murder.

The circuit court then conducted a two-day evidentiary hearing. In its October 5, 2012, Opinion and Order denying the motions, the circuit court

summarized Jarrell's confession as well as the facts and circumstances surrounding the confession:

On May 3, 2012, an individual by the name of Richard Jarrell (hereinafter "Jarrell") was arrested for attempted murder by the Louisville Metro Police Department (LMPD) in Jefferson County, Kentucky. Jarrell had fired a shotgun into the home of a confidential informant who works with the LMPD Narcotics unit. During his interrogation regarding the shooting incident, Jarrell requested that he be allowed to talk to a LMPD narcotics officer, the DEA, or the FBI, stating that he had information he could provide on numerous drug and homicide investigations. Jarrell's brother had been charged with federal drug charges in Arkansas, and Jarrell indicated that he wanted to provide information helpful to police in the hopes that this could help obtain leniency for his brother in the federal drug case. Jarrell told LMPD Narcotics Detective Barron Morgan during an interview, that he would confess to two Jefferson County murders and to a murder he had committed in Henry County. Detective Morgan contacted Homicide Detectives Scott Russ and Roy Stalvey, who interviewed Jarrell in the early hours of May 4, 2012.

In this interview, Jarrell confessed to murdering Breeden on October 26, 1998, Jarrell's 21st birthday. Jarrell provided a specific and detailed statement regarding the events leading up to the murder, the manner in which the murder was committed, and how he disposed of Breeden's body in the Kentucky River. Jarrell stated that he was aware that a woman had been convicted of Breeden's murder, and that she was currently incarcerated for the crime. Jarrell maintained his culpability for the Breeden murder to Detective Harwood on May 11, 2012, and when he was interviewed on May 15, 2012[,] by Detective Barron Morgan. Detective Morgan consulted his supervisor and the Jefferson County Commonwealth Attorney's office regarding Jarrell's confession for a crime that another person was currently incarcerated for committing. Detective Morgan was advised that he should contact the

Innocence Project with the Department for Public Advocacy, to provide them with the information obtained from Jarrell. The Court finds that Detective Morgan, and his supervisors at LMPD, should be commended for acting with integrity and in the interests of justice by swiftly conveying the information about Jarrell to the Innocence Project.

King's Motion for a New Trial was filed on May 18, 2012[,] with the Spencer Circuit Court. On June 21, 2012, Jarrell was interviewed by KSP Lt. Jeff Medley from Post 5, and in this interview Jarrell recanted his confession to the Breeden murder. Jarrell stated that he lied about committing the murder and that he was just trying to help his brother. Jarrell stated that he had obtained information about the Breeden murder from the internet about four or five years prior, and used that information in his confession. Lt. Medley interviewed Jarrell a second time on July 16, 2012. During the interview, Jarrell is heavily medicated and from his speech on the audio recording this is readily apparent. Jarrell states that he is "probably not with it" to the officer during the interview. Jarrell indicates that he has been diagnosed with schizophrenia and is taking medication for that condition. Jarrell reiterates that he lied about committing the Breeden murder and that he "guesses" he got the information about the case from the internet. Evidence at the hearing on King's motion indicated that Jarrell's brother's federal drug case had been settled at this juncture and any incentive to provide information about the Breeden murder is gone. The Court held an evidentiary hearing on July 19-20, 2012[,] on King's Motion for a New Trial. . . .

There is an audio recording of Jarrell's May 3-4, 2012[,] statements and the May 15, 2012[,] statement to Detective Morgan. A recording was made by Detective Harwood of his interview with Jarrell on May 11, 2012, however, the digital recorder was lost and the only information about his interview was established by Detective Harwood's testimony at the hearing and Jarrell's references to the interview in later interviews. There are also audio recordings of Lt. Medley's interviews with Jarrell on June 21, 2012[,] and July 16,

2012. All recordings were reviewed at the evidentiary hearing. Jarrell appeared at the evidentiary hearing before the Court, however, he asserted his Fifth Amendment rights and did not testify. Jarrell's attorney in the pending Jefferson County action for attempted murder, was present at the hearing, and informed the Court that he has questions regarding Jarrell's competency and will be seeking a competency evaluation in that action. Jarrell's attorney also indicated that Jarrell remains heavily medicated.

After the evidentiary hearing, the circuit court concluded that “[i]f King had a prior trial, rather than entered an *Alford* plea, . . . Jarrell's confession would be evidence that with reasonable certainty, change the verdict or probably change the result, if a new trial was granted.” The circuit court pointed out that Jarrell “was completely unknown to King, law enforcement, or the Commonwealth” prior to the confession. Nevertheless, the circuit court held that neither CR 60.02 nor RCr 10.02 provided relief to King as she pleaded guilty to the offenses. The circuit court concluded:

The defendant that proceeds to trial has a right to appeal that decision, has the right to contest the sufficiency of the evidence, a right to complain of palpable errors, and the right to request a new trial. An individual pleading guilty does not have these rights, and is informed when entering their plea that by doing so, they are waiving their right to appeal the matter to a higher court, waiving their right to a jury trial where the Commonwealth would have to prove the defendant's guilty beyond a reasonable doubt, waving the right to confront and cross-examine witnesses called to testify against them, and the right to produce evidence. The rights of defendants post-judgment vary broadly depending on whether a defendant chose to plead guilty or to proceed with a jury trial.

The Kentucky Innocence Project timely filed a notice of appeal from the order denying the CR 60.02 and RCr 10.02 motions and also filed King's brief in this appeal.

In appellant's brief, King contends that the circuit court erred by denying her motions pursuant to CR 60.02 (b), CR 60.02(f) and RCr 10.02 to vacate her October 23, 2008, judgment of imprisonment upon her guilty plea. King believes that Jarrell's confession to Breeden's murder constitutes newly discovered evidence that could have reasonably affected her decision to plead guilty and ultimately the outcome of the proceedings. King maintains that Jarrell's confession constitutes newly discovered evidence, thus entitling her to relief under CR 60.02(b), CR 60.02(f), and RCr 10.02. King also points out that Jarrell's confession was extremely accurate as to the circumstances of Breeden's murder and cites to the following facts in support thereof:

Jarrell's 21st birthday is October 26, 1977, and Jarrell stated he killed Breeden on his 21st birthday, which is the exact day Breeden disappeared.

Jarrell said Breeden stole twenty dollars from Jarrell the day before. Jarrell claimed Breeden spent the money on crack cocaine, as he caught Breeden smoking the crack at Breeden's trailer. This is consistent with the autopsy report findings, which indicate that Breeden had cocaine in his blood.

Jarrell claimed that on October 26, 1998, he picked Breeden up from his trailer in Shelbyville under the premise that the two would go get money from Jarrell's father in honor of his birthday and take drugs. Before leaving Shelbyville, Jarrell stated that they went to a "bank

or check cashing place" where Breeden received about \$200. This is consistent with the reports that indicate Breeden went to Kentucky Finance to obtain a loan/check for \$250, which he cashed later that same day.

Jarrell took Breeden to an abandoned house in Henry County to murder him. The house had a locked cattle gate blocking the driveway. Jarrell told Breeden that the gate was locked because his father was not home. Det. Tim Moore testified that he found this residence and took photographs of the house and the cattle gate.

The two men exited the car, and Jarrell took a .22 caliber revolver with him in the sleeve of his coat. This type of weapon can be used to fire .22 magnum bullets, which is the type of bullet recovered from Breeden's body.

When Breeden approached the gate to jump over it, Jarrell "blowed (sic) his f@#! brains out." Breeden fell to the ground, and Jarrell shot him a second time. Jarrell stated that he shot Breeden once near his ear and once in the back of the head. Both wounds are consistent with the autopsy report and the testimony of Dr. Davis, herein.

Jarrell stated that when he fired the two shots, his gun remained covered by his coat. During his testimony, Dr. Davis, the medical examiner who conducted the autopsy, stated that if something was physically between the victim and the gun, the wounds may not have stippling. When asked if this obstacle could have been a sleeve of a jacket, Dr. Davis opined that it would depend on the type of material and the caliber of the round.

Jarrell claimed Breeden "s#@! his pants" when he died. Dr. Davis testified that this is a common occurrence.

Jarrell believed that the bullets "stayed in" Breeden's head. Dr. Davis's autopsy report indicates that the bullets were non-exiting.

He tied the body with a guitar amplifier cord he said he "borrowed" from Breeden and the body was found with a guitar amplifier cord wrapped around the ankles.

Jarrell then drove to the Gratz Bridge and threw Breeden's body over the railing, and into the river. Breeden was found in the Kentucky River near the Gratz Bridge.

Jarrell remembered that Breeden was wearing blue jeans, "probably" a "raggedy" t-shirt, and white shoes. Jarrell did not think the t-shirt was still on Breeden when he dumped the body into the river because he had to "drag him a little ways." This exact description of his clothing, and in particular, that the body was found without a shirt, is corroborated by the description of the clothing discussed in the autopsy report and testified to by Dr. Davis.

In addition to the attempted murder that Jarrell committed on May 3, 2012, and Breeden's murder, Jarrell stated he committed two other murders in Louisville, and two other assaults with a deadly weapon involving a Russian man named "Mike" and Jasper Pollini. In addition Jarrell confessed to the home invasion, or Burglary 1st of Pollini's residence. He also recounted the attempted murder of two garbage men in Henry County. LMPD investigated the Pollini and Russian "Mike" and was able to generate a report regarding Pollini, detailing the accuracy of Jarrell's confession to this shooting.

Jarrell claimed he threw guns into McNeely Lake, along with seven or eight other guns and a PlayStation game he took when he committed the home invasion of Jasper Pollini. Both Russ and Medley testified that guns were found in the lake by LMPD divers.

In addition, KSP Post 5 contacted KSP Det. Steven Silfies to interview Jasper Pollini currently housed in the Kentucky State Penitentiary. Silfies reports that Pollini stated that a PlayStation game was stolen by the intruder who shot him in the arm.

King's Brief at 15-18 (citations omitted). Moreover, King points out that Breeden's body was found in the Kentucky River. Breeden was 5'8" tall and weighed 187 pounds; whereas, King weighs 108 pounds, and her left leg is amputated from the hip. King emphasizes it would have been physically impossible for her to have disposed of Breeden's body in the Kentucky River. In the CR 60.02 motion and RCr 10.02 motion, King is asserting her actual innocence of Breeden's murder and seeks relief based upon the newly discovered evidence of Jarrell's confession to the murder.

It is self-evident that the conviction of an innocent person offends both social norms of justice and the laws embodied in our Constitution.¹ In a society whose foundations were built upon the guarantee of justice to every citizen, the conviction of an innocent person represents a serious and egregious violation of such guarantee. When a person previously convicted of a crime by jury trial or guilty plea can demonstrate actual innocence with newly discovered evidence, it is constitutionally incumbent upon the state to provide a post-conviction procedure to vacate the judgment and grant a new trial.

In this Commonwealth, the proper post-conviction procedure to demonstrate actual innocence based upon newly discovered evidence is found in CR 60.02(b) or (f) and RCr 10.02. We recognize that King entered a guilty plea

¹ In particular, the conviction of an innocent person would violate the Eighth Amendment, Fifth Amendment and Fourteenth Amendment of the United States Constitution and Section 2 and Section 17 of the Kentucky Constitution. In *Herrera v. Collins*, 506 U.S. 390, 417, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1999), the Supreme Court recognized that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional" (Citation omitted.)

and did not have a jury trial. For this reason, the circuit court believed that King had no post-conviction remedy. However, the Kentucky Supreme Court has entertained both a CR 60.02 motion and an RCr 10.02 motion based upon newly discovered evidence where defendant had entered a guilty plea to the underlying offense. *See Com. v. Carneal*, 274 S.W.3d 420 (Ky. 2008). Considering the constitutional implications involved in a claim of actual innocence, a post-conviction procedure must be available through the courts, and in this Commonwealth, either CR 60.02 or RCr 10.02 may be utilized to provide same. Under the particular circumstances of this case, we believe CR 60.02 provides the more appropriate avenue of relief.

King specifically claims relief under CR 60.02(b) and (f) based upon the newly discovered evidence of Jarrell's confession. Under CR 60.02(b), a claimant may be entitled to relief based upon "newly discovered evidence by which due diligence could not have been discovered in time to move for a new trial under Rule 59.02." But, King is not entitled to relief under CR 60.02(b) as this subsection requires the motion to be filed "not more than one year after the judgment, . . . was entered." Rather, King must proceed and may proceed under CR 60.02(f). *See Foley v. Com.*, 425 S.W.3d 880 (Ky. 2014). Our Supreme Court has recognized that claims based upon newly discovered evidence may be maintained under CR 60.02(f) if such claims are time-barred under CR 60.02(b). *See Foley*, 425 S.W.3d 880.

Under CR 60.02(f), the “court may, upon such terms as are just, relieve a party . . . from its final judgment . . . upon . . . any other reason of an extraordinary nature justifying relief.” To prevail upon a claim of newly discovered evidence per CR 60.02(f), a claimant must demonstrate that the newly discovered evidence is “of such decisive value or force that it would, with reasonable certainty, have changed the verdict or that it would probably change the result.” *Foley*, 425 S.W.3d at 886 (quoting *Jennings v. Com.*, 380 S.W.2d 284, 285-86 (Ky. 1964)). Also, “newly discovered evidence is evidence that could not have been obtained at the time of trial through the exercise of reasonable diligence.” *Foley*, 425 S.W.3d at 887 (quoting *Com. v. Harris*, 250 S.W.3d 637, 642 (Ky. 2008)).

In its October 5, 2012, Opinion and Order denying King’s CR 60.02 motion, the circuit court concluded that “Jarrell was completely unknown to King, law enforcement, or the Commonwealth as having any connection to the murder of Breeden prior to his May 4th confession, and his alleged involvement could not have been discovered in the exercise of due diligence.” And, the circuit court recognized that “Jarrell’s confession would be evidence that with reasonable certainty, change the verdict or probably change the result.”

Based upon the circuit court’s conclusion that Jarrell’s confession constituted newly discovered evidence and that Jarrell’s confession with reasonable certainty would change the result of the proceeding, we hold that King has demonstrated entitlement to relief under CR 60.02(f). Accordingly, we reverse

the October 5, 2012, Opinion and Order denying Kings CR 60.02 motion and vacate the October 23, 2008, Judgment and Sentence on Plea of Guilty. We remand this case for a jury trial upon the indicted offenses of murder and of tampering with physical evidence.

For the foregoing reasons, the Opinion and Order of the Spencer Circuit Court is reversed and remanded for proceedings consistent with this opinion.

ALL CONCUR.

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