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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001668-MR

FLOYD SCHAMBON — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 89-CR-00636

COMMONWEALTH OF KENTUCKY — APPELLEE

NO. 2015-CA-001806-MR

BARBARA SCHAMBON — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 89-CR-00635

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: J. LAMBERT, STUMBO, AND TAYLOR, JUDGES.

LAMBERT, J., JUDGE: Floyd and Barbara Schambon appeal from the Warren Circuit Court's denial of their Kentucky Rules of Civil Procedure (CR) 60.02 motions for relief. On appeal, they argue that the trial court erred when, after an evidentiary hearing, it found that a new trial was not warranted based on the recanted testimony of a trial witness and when it found that the motion was untimely. For the following reasons, we affirm.

In June 1990, a Jefferson County jury convicted the Schambons of eight counts of first-degree sodomy, three counts of first-degree criminal abuse, twenty-one counts of second-degree sodomy, and twenty-eight counts of second-degree animal cruelty. Barbara was also convicted of one count of incest. The sodomy, criminal abuse, and incest charges arose from acts the Schambons committed on their four children: thirteen-year-old C.S.; ten-year-old E.S.; eight-year-old A.S.; and five-year-old R.S. The convictions for these charges rested almost entirely on the testimonies of C.S. and R.S. The animal cruelty charges arose from appellants' mistreatment of a large number of animals found at their residence.[1] Each appellant was sentenced to a total of eighty-five years' imprisonment. Final judgments were entered July 19, 1990.

[1] The disturbing facts surrounding all of the charges are set out in detail in the Kentucky Supreme Court's decision on direct appeal. *Schambon v. Commonwealth,* 821 S.W.2d 804 (Ky. 1991).

On direct appeal to the Supreme Court of Kentucky, the Schambons argued that the trial court erred by trying them jointly, by trying the animal cruelty and sex offenses together, by admitting certain evidence, by denying their motion for a directed verdict on the sex offenses, and by permitting the prosecutor to make improper arguments. The Court rejected each of the arguments and affirmed their convictions and sentences.

On April 3, 2006, the Schambons filed their motions, pursuant to CR 60.02, that are the subject of this appeal. In those motions, the Schambons claimed, among other things, that they were entitled to relief based on 1) A.S.'s and E.S.'s statements that no sexual abuse occurred; 2) C.S. recanting his claims of sexual abuse and acknowledging that he influenced his younger brother, R.S., to make the false claims; 3) a 2003 affidavit from the children's guardian *ad litem* in which he stated that C.S. told him prior to trial that he had not been abused; 4) the results of a polygraph test revealing that neither Floyd nor Barbara was being deceptive when asked whether they had any sexual contact with R.S.; 5) a report by Dr. Eric Y. Drogin concluding that deficiencies in the 1989 forensic interview with R.S. "cast significant doubt" on R.S.'s responses and his subsequent testimony; and 6) an affidavit from Dr. Ralph Underwager concluding that the 1989 forensic interview with R.S. was flawed.

The trial court denied the Schambons' motions without an evidentiary hearing. On appeal, a panel of this Court reversed the trial court's denial of the Schambons' request for an evidentiary hearing, vacated its order denying relief

under CR 60.02, and remanded the matter to the trial court for an evidentiary hearing. In reversing, this Court determined that the affidavit submitted by C.S. as part of the Schambons' motion, while not contradicting the testimony he gave at trial, contradicted a report C.S. had written and was questioned about at trial. Thus, we held that "[C.S.]'s affidavit sufficiently contradicts his trial testimony and raises an issue of fact that merits an evidentiary hearing." *Schambon v. Commonwealth*, 2010 WL 4025871 at *8 (2009-CA-000793-MR & 2009-CA-000794-MR) (Ky. App. Oct. 15, 2010). We further found that the trial court "prematurely determined that the motions were not timely[,]" and that the Schambons should be "permitted to present, through testimony at the evidentiary hearing, the reasons for delay." *Id*. at *9.

On October 18, 2013, the trial court conducted an evidentiary hearing and heard testimony from the Schambons' former attorneys as well as testimony from C.S. and two expert witnesses, Dr. Drogin and Dr. Keith Lyle, who testified to flaws in the forensic interview. The guardian *ad litem* testified via deposition.

After hearing the testimony, the trial court on September 24, 2015, entered an order denying the Schambons' motions. Therein, the trial court once again found that the motions had not been filed within a reasonable time. Further, the court found that the motions lacked merit. This appeal followed.

"The standard of review of an appeal involving a CR 60.02 motion is whether the trial court abused its discretion." *White v. Commonwealth,* 32 S.W.3d 83, 86 (Ky. App. 2000); *see also Kurtsinger v. Bd. of Trustees of Ky. Ret. Sys.,* 90

S.W.3d 454, 456 (Ky. 2002); *Brown v. Commonwealth,* 932 S.W.2d 359, 362 (Ky. 1996). To amount to an abuse of discretion, the trial court's decision must be "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Clark v. Commonwealth,* 223 S.W.3d 90, 95 (Ky. 2007) (quoting *Commonwealth v. English,* 993 S.W.2d 941, 945 (Ky. 1999)). "Absent some flagrant miscarriage of justice an [appellate] court should respect the trial court's exercise of discretion[.]" *Gross v. Commonwealth,* 648 S.W.2d 853, 858 (Ky. 1983).

Relief may be granted under CR 60.02(f) for any reason of an extraordinary nature justifying relief. A CR 60.02(f) motion, however, must be made within a reasonable time. *See* CR 60.02 and *Gross*, 648 S.W.2d at 858.

The Schambons assert that the trial court erred when it found that the delay in filing their motion was not justified and that they were not entitled to relief. "What constitutes a reasonable time in which to move to vacate a judgment under CR 60.02 is a matter that addresses itself to the discretion of the trial court." *Gross v. Commonwealth,* 648 S.W.2d at 858. In *Gross*, the Supreme Court of Kentucky held that the trial court did not abuse its discretion when it found that five years did not constitute a reasonable time under the purview of CR 60.02. *Id*. We disagree with the Schambons' argument that the trial court abused its discretion in determining that their motions had not been brought within a reasonable time.

The Schambons were tried and found guilty by a jury in 1990. The evidence shows that the Schambons knew of C.S.'s recantation as early as 1994. On March

2, 1994, one of the Schambons' post-conviction attorneys wrote a letter to the children's guardian *ad litem*, in which the defense attorney made specific references to C.S.'s recantation. The letter stated the following:

> On February 10, 1994, I had the opportunity to meet with [C.S.] in person at the Valley Institute in Owensboro, Kentucky. As you indicated in your correspondence to Mr. Kirwan, [C.S.] indeed wanted to exonerate his parents from any of the wrongdoing that they were accused of regarding the sexual abuse charges for which they were convicted in Warren Circuit Court.
>
> As you know, recantation testimony is not looked upon with much favor in this jurisdiction. From talking with [C.S.], I believe his information in and of itself would not be persuasive under the existing case law since not all of the charges involved him. Moreover, they would not, in my opinion, conclusively refute the testimony of his younger brother, [R.S.], in this matter.

Additionally, in 2003, the guardian *ad litem* executed an affidavit stating in part that, prior to trial, C.S. had informed him that he had not been abused, that he had deceived law enforcement, and that he had influenced R.S.

At the evidentiary hearing, two of the Schambons' post-conviction attorneys explained in detail their theories of the case and their strategy in coming to the conclusion that they should delay filing a CR 60.02 motion. One attorney testified that they had attempted to obtain a recantation from R.S., but were rebuffed by R.S.'s foster parents. Numerous attempts were made over the years to contact R.S. However, in 2003 it became clear to the attorneys that R.S. was unwilling to recant his testimony.

In 2004, R.S. deployed to Iraq. Post-conviction counsel testified that he did not want to use the trial court's subpoena power to keep R.S. from being deployed. He admitted that this was a strategic choice in hopes of avoiding animosity from the Court. When R.S. returned from Iraq in 2006, the Schambons finally filed their CR 60.02 motions. When they filed their motions, they were in essentially the same position as they were in 1994 when the defense attorney wrote his letter to the guardian *ad litem*.

At the evidentiary hearing, the Schambons argued that they diligently pursued their rights in presenting their claim of innocence but faced many obstacles in pursuing those claims, including difficulty maintaining contact with C.S., difficulty securing the cooperation of R.S., and R.S.'s deployment to Iraq. Thus, they argued, the delay in filing their claim was justified. The trial court disagreed, and once again held that the Schambons' CR 60.02 motion was untimely filed. Presumably, the trial court was not persuaded by the Schambons' explanation for the more than decade long delay.

The Schambons knew of C.S.'s recantation in 1994, and there has been no change in law or facts relevant to their conviction since then. None of the obstacles that the Schambons pointed out actually prevented them from bringing their claim in 1994, when they first learned of C.S.'s recantation. In fact, one of the Schambons' post-conviction attorneys admitted at the evidentiary hearing that the CR 60.02 action could have been filed much earlier.

Like the trial court, we too find the Schambons' explanation insufficient to justify the long delay. Waiting in hopes that another witness might recant his testimony is not an acceptable reason to delay the filing of a CR 60.02 motion for more than twelve years after discovery of the fact on which the motion is based. To hold such would extend the reasonable time limitations period indefinitely. The trial court did not abuse its discretion when it found that the Schambons' motion was untimely.

Alternatively, the Schambons argue that they are entitled to equitable tolling. They claim that since they have diligently pursued their rights to appeal, and only due to extraordinary circumstances were they prevented from filing their motion sooner, they should be entitled to this relief.

In *Roach v. Commonwealth*, 384 S.W.3d 131, 139 (Ky. 2012), the Kentucky Supreme Court adopted the United States Supreme Court's formulation for evaluating equitable tolling claims as expressed in *Holland v. Florida*, 560 U.S. 631, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010). Under this test, "a petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Id*., 560 U.S. at 649, 130 S.Ct. at 2562, (quoting *Pace v. DiGuglielmo,* 544 U.S. 408, 418, 125 S.Ct. 1807, 1814, 161 L.Ed.2d 669 (2005)) (internal quotation marks omitted). The Schambons assert that their reliance upon their post-conviction counsel and counsel's failure to file the motion within a reasonable time is an extraordinary circumstance that this Court should take into

consideration in determining whether equitable tolling is warranted. However, "[a]ttorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the postconviction context where prisoners have no constitutional right to counsel." *Lawrence v. Florida*, 549 U.S. 327, 336–37, 127 S.Ct. 1079, 1085, 166 L.Ed.2d 924 (2007) (internal citation omitted). Because the Schambons do not allege any additional circumstance that would rise to the extraordinary level required for equitable tolling, it is not warranted.

Even if the Schambons' claim had been filed within a reasonable period of time, they would not be entitled to relief under CR 60.02. When "mere recantation of testimony" is involved, the granting of a new trial is only justified "in extraordinary and unusual circumstances[.]" *Thacker v. Commonwealth*, 453 S.W.2d 566, 568 (Ky. 1970). Recanting testimony should be "viewed with suspicion[,]" *id*., and "given very little weight." *Hensley v. Commonwealth*, 488 S.W.2d 338, 339 (Ky. 1972). Statements recanting testimony

> will form the basis for a new trial only when the court is satisfied of their truth; the trial judge is in the best position to make the determination because he has observed the witnesses and can often discern and assay the incidents, the influences and the motives that prompted the recantation; and his rejection of the recanting testimony will not lightly be set aside by an appellate court.

Thacker, 453 S.W.2d at 568.

After the evidentiary hearing at which C.S. testified that he was not sexually abused and told R.S. to fabricate stories of sexual abuse, and at which two experts

testified that R.S. was poorly interviewed, the trial court denied the Schambons' motions. In its written order, the trial court commented: "At its very core, movants' entire theory for relief from judgment is that C.S. made the accusations up and R.S. believed it. The jury discredited that theory 25 years ago."

We find it clear from the trial court's comments that it gave C.S.'s recantation very little weight. Furthermore, the court concluded that C.S.'s recantation was not so material that it would probably have produced a different result. Given the deference we show trial judges when they are tasked with deciding whether a new trial is warranted based on recantation testimony, we cannot say that the court abused its discretion. We also find no merit in the Schambons' argument that the trial court's disregard of the expert testimony constituted an abuse of discretion.

For the foregoing reasons, the Warren Circuit Court's order denying the Schambons' motions for CR 60.02 relief is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Amy Robinson Staples
Meredith Krause
Assistant Public Advocates
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Jason B. Moore
Assistant Attorney General
Frankfort, Kentucky