

**IMPORTANT NOTICE**  
**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***

RENDERED: APRIL 21, 2005  
NOT TO BE PUBLISHED

**Supreme Court of Kentucky**

**FINAL**

2003-SC-0671-TG

DATE 5-12-05 Elia G. Brown DC

BRENDA HUMPHREY

APPELLANT

V.

APPEAL FROM KENTON CIRCUIT COURT  
HONORABLE STEVEN R. JAEGER, JUDGE  
1987-CR-0166

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

2003-SC-0672-TG

GREGORY WILSON

APPELLANT

V.

APPEAL FROM KENTON CIRCUIT COURT  
HONORABLE STEVEN R. JAEGER, JUDGE  
1987-CR-0166

COMMONWEALTH OF KENTUCKY

APPELLEE

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

These appeals are from the findings of fact, conclusions of law and judgment entered by the Kenton Circuit Court that overruled the motion of Humphrey for relief pursuant to CR 60.02 and overruled the motion of Wilson to intervene. The circuit

judge also determined that the motion of Wilson for immediate and full access to the file, exhibits and videotape court records was moot.

The following questions are presented by Humphrey for our review: 1) whether the relationship between Humphrey and former circuit judge James Gilliece interfered with her attorney-client relationship with trial counsel and denied her a fair trial; 2) whether she was competent to consent to the sexual conduct and whether the misconduct by Gilliece fraudulently affected the legal process in her case; and 3) whether the passage of time bears on her claims in this matter. Wilson presents this question for our review: whether the current circuit judge erred when he denied his request to intervene in the post-conviction proceedings.

Together, Humphrey and Wilson kidnapped a female victim at knifepoint outside of her home in Covington in 1987. She was placed in the backseat of a car driven by Humphrey and robbed, raped and murdered. Her naked corpse was later dumped in a thicket in Indiana. Wilson and Humphrey then went on a shopping spree with the victim's credit cards.

Humphrey and Wilson were tried jointly and the Commonwealth sought the death penalty for the both of them. The jury convicted Humphrey of capital kidnapping, facilitation of murder, first-degree robbery, facilitation of first-degree rape and criminal conspiracy. She was sentenced to life in prison without the possibility of parole for twenty-five years on the capital kidnapping charge and an enhanced fifty years on the other charges after she pled guilty to being a first-degree persistent felony offender. Wilson was convicted of capital kidnapping, capital murder, first-degree robbery, first-degree rape and criminal conspiracy. He was sentenced to death.

This Court affirmed Humphrey's convictions and sentences on direct appeal. Humphrey v. Commonwealth, 836 S.W.2d 865 (Ky. 1992). The Court of Appeals affirmed the denial of RCr 11.42 relief in an unpublished opinion rendered July 30, 1999. Humphrey v. Commonwealth, 98-CA-322-MR. This Court denied discretionary review by order entered May 10, 2000. Humphrey v. Commonwealth, 99-SC-772-D. Wilson's convictions and all of his sentences, except one of his two death sentences, were also affirmed by this Court. Wilson v. Commonwealth, 836 S.W.2d 872 (Ky. 1992), *cert. denied*, Wilson v. Kentucky, 507 U.S. 1034, 113 S.Ct. 1857, 123 L.Ed.2d 479 (1993). This Court affirmed the denial of his motion for RCr 11.42 relief. Wilson v. Commonwealth, 975 S.W.2d 901 (Ky. 1998), *cert. denied*, Wilson v. Kentucky, 526 U.S.1023, 119 S.Ct. 1263, 143 L.Ed.2d 359 (1999).

On May 4, 2001, almost nine years after this Court affirmed her judgment of conviction and nearly a year after the order denying discretionary review on her RCr 11.42 claim, Humphrey filed a motion for CR 60.02 relief in the Kenton County Circuit Court. At the core of the motion was an allegation of a sexual relationship that existed between Humphrey and then Kenton County Circuit Court Judge James Gilliece before, during and after her trial for the kidnapping, robbery, rape and murder of the female victim. Gilliece was not the trial judge in that case. Following a hearing, the current circuit judge, who was not a judge on the court at the time of the conduct involved, made extensive findings of fact and conclusions of law and denied the motion by Humphrey as well as the motion by Wilson to intervene. These appeals followed.

#### I. Brenda Humphrey

Humphrey argues that the illicit sexual relationship between her--an incarcerated defendant and a judicial officer, his written counsel to her about her case, and the fact

that during the 15 months before her capital trial she saw him weekly and saw her appointed attorney perhaps once every two or three months, destroyed her attorney/client relationship with trial counsel. She further contends that it deprived her of her only possible defense, rendered the trial result unreliable and violated her right to representation under the Sixth Amendment to the United States Constitution and Sections 7 and 11 of the Kentucky Constitution.

Appellate counsel claims that Humphrey was not competent to consent to sexual contact with a judicial officer while an incarcerated defendant pursuant to KRS 510.120, which does not permit incompetency to be waived by the defendant or counsel, and the off-record judicial misconduct fraudulently affected the legal process in this case in terms of CR 60.02(d) and violated the due process rights of the defendant under the Fifth and Fourteenth Amendments to the Federal Constitution and Sections 7 and 11 of the Kentucky Constitution. Counsel for Humphrey also complains that the extraordinary off-record judicial misconduct in terms of CR 60.02(f) that taints this trial record is not cured by the passage of time and violates not only due process but fundamental fairness and decency and shocks the conscience of the court and the world community.

We must acknowledge that Gilliece did have an improper personal and sexual relationship with Humphrey that began in 1985 and continued in some form until his death in 1993. The relationship was marked by sexual encounters in his chambers both before and after Humphrey's incarceration for the crimes against the female victim. After Humphrey's conviction and imprisonment, the relationship continued by correspondence and was often characterized by Gilliece sending her money and other items. There were over two-hundred and eighty letters authored by Gilliece to Humphrey. The letters are sexually explicit, gross and inappropriate.

Even though the misconduct by Gilliece was unacceptable, the CR 60.02 motion by Humphrey was untimely post-conviction action successive of her RCr 11.42 action. A defendant is required to avail herself of RCr 11.42 while in custody under sentence or on probation, parole or conditional discharge, as to any ground of which she is aware, or should be aware, during the period when this remedy is available to her. Gross v. Commonwealth, 648 S.W.2d 853 (Ky. 1983).

Here, post-conviction counsel for Humphrey admitted during the CR 60.02 hearing that she talked with the defendant about the letters and her relationship with Gilliece. Humphrey then agreed with her attorney's strategic decision not to include the affair with Gilliece in the original RCr 11.42 proceeding. Final disposition of the RCr 11.42 motion, or waiver of the opportunity to make it, shall conclude all issues that reasonably could have been presented in that proceeding. Gross. The language of RCr 11.42 forecloses the defendant from raising any questions under CR 60.02 which are issues that could have reasonably been presented by the RCr 11.42 proceedings. Gross.

Humphrey was not prevented from bringing these claims earlier because of duress, fear or any other cause. Gilliece has been dead since 1993. Accordingly, it is unnecessary for this Court to address the individual issues raised by Humphrey because her motion is procedurally barred. The motion by Humphrey for relief pursuant to RCr 60.02 was properly denied.

## II. Gregory Wilson

Wilson contends that it was error when his request to intervene in the post-conviction proceedings was denied, and that as a result, the fact-finding and legal conclusions lack reliability. We disagree. The motion by Wilson to intervene was

properly denied. Not only is his argument without merit, but he has no right to intervene in a matter that is procedurally barred. The current circuit judge exhaustively examined in painstaking detail all of the claims presented by Wilson as well as those of Humphrey. He also patiently and extensively reviewed the motion to reconsider filed by Wilson. Ultimately, the current circuit judge overruled the motion to reconsider, stating that the arguments were without merit and that insufficient reasons had been presented in support of the motion to intervene. We agree.

We are persuaded by the rationale employed in Whitmore v. Arkansas, 495 U.S. 149, 110 S.Ct. 1717, 109 L.Ed. 135 (1990), which holds that a condemned murderer does not have standing to intervene in litigation of another condemned murderer's case for the alleged purpose of protecting his own rights. This case involved a claim regarding the completeness of a proportionality review and the petition was dismissed for lack of jurisdiction. The legal authorities cited by Wilson are all civil law cases which predate Whitmore, supra.

The judgment of the circuit court is affirmed with respect to both Humphrey and Wilson.

All concur.

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