

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-000544-MR

TERRY RUNYON

APPELLANT

v. APPEAL FROM ESTILL CIRCUIT COURT  
HONORABLE WILLIAM W. TRUDE, JUDGE  
ACTION NO. 05-CR-00007

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON, LAMBERT, AND WINE, JUDGES.

DIXON, JUDGE: Terry Runyon, *pro se*, appeals from an order of the Estill Circuit Court that denied his motion to set aside his guilty plea pursuant to CR 60.02(f). Finding no error, we affirm.

In March 2005, Runyon was indicted on charges of complicity to murder, complicity to robbery first-degree, and complicity to tampering with

physical evidence arising from the March 2004, murder of his father-in-law at a gas station in Irvine, Kentucky.<sup>1</sup> In March 2006, the Commonwealth dismissed the complicity to robbery charge in exchange for Runyon's plea of guilty to the remaining charges. Thereafter, Runyon was sentenced to twenty years' imprisonment consistent with the plea agreement. In April 2007, Runyon sought post-conviction relief pursuant to RCr 11.42. The trial court denied RCr 11.42 relief and that decision was affirmed by a panel of this Court.<sup>2</sup>

In January 2009, Runyon moved to set aside his conviction pursuant to CR 60.02(f), alleging that his guilty plea was involuntary because, at the time of his plea, he was unaware that evidence existed which proved alternative perpetrators actually committed the crimes. The trial court denied Runyon's motion without a hearing, and this appeal followed.

Runyon alleges that he received a copy of his legal file from the Department of Public Advocacy, and a secretary advised him she found some of the paperwork behind a desk.<sup>3</sup> The file contained police interviews with individuals who named alternative perpetrators for the murder. Runyon alleges he did not know that other suspects were named, and if he had known this information, he would not have pled guilty. Runyon also asserts that, because the

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<sup>1</sup> Runyon's wife at the time was also indicted for the same offenses relating to her father's murder. She ultimately pled guilty to facilitation to robbery and complicity to tampering with physical evidence.

<sup>2</sup> *Runyon v. Commonwealth*, 2007-CA-002207-MR (Oct. 24, 2008).

<sup>3</sup> Runyon asserts that the secretary advised him that his trial counsel was no longer with DPA.

documents were allegedly mislaid in the DPA office, his trial counsel could have also been unaware of the alternative perpetrators. Runyon believes the trial court erred by denying his CR 60.02 motion without an evidentiary hearing.

“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). “CR 60.02 is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings.” *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). Finally, “[b]efore the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.” *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983).

This Court has previously reviewed the voluntariness of Runyon’s guilty plea. The Commonwealth points out, in Runyon’s prior RCr 11.42 appeal to this Court, he similarly argued his trial counsel was ineffective for failing to introduce exculpatory evidence, consisting of three statements implicating alternative perpetrators. Further, we note there is no allegation that the Commonwealth wrongfully withheld this discovery, and the paperwork was located in trial counsel’s file. These facts, coupled with Runyon’s similar allegations in his RCr 11.42 appeal indicate he could have addressed this issue in a prior proceeding. In light of the extraordinary nature of CR 60.02(f), we conclude

Runyon's claim is without merit. Accordingly, the trial court did not abuse its discretion by denying Runyon's motion without an evidentiary hearing.

For the reasons stated herein, the order of the Estill Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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