

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

NO. 2010-CA-000645-MR

MARK D. BAIZE

APPELLANT

v. APPEAL FROM OHIO CIRCUIT COURT  
HONORABLE RONNIE C. DORTCH, JUDGE  
ACTION NO. 03-CR-00229

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, THOMPSON, AND VANMETER, JUDGES.

VANMETER, JUDGE: Mark D. Baize appeals *pro se* from an order of the Ohio Circuit Court denying his motion for post-conviction relief pursuant to CR<sup>1</sup> 60.02.

For the following reasons, we affirm.

In December 2003, Baize was charged by the Ohio Circuit Court Grand Jury in an eight-count indictment for the following: (1) theft by unlawful taking (anhydrous ammonia), (2) fleeing or evading police in the second degree, (3)

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<sup>1</sup> Kentucky Rules of Civil Procedure.

criminal trespass in the third degree, (4) possession of a prescription controlled substance not in original container, (5) criminal mischief in the third degree, (6) criminal mischief in the third degree, (7) possession of anhydrous ammonia in an unapproved container with intent to manufacture methamphetamine, and (8) persistent felony offender (PFO) in the first degree. The Commonwealth tendered to Baize the following offer on a plea of guilty: counts 2, 3, 4, 5, and 6 would be dismissed; count 1 would be amended to attempted theft by unlawful taking with intent to manufacture methamphetamine, with a recommended sentence of 10 years; count 7, with a recommended sentence of 5 years; and count 8, with a total recommended sentence of 15 years. Baize accepted the Commonwealth's offer, pled guilty, and the trial court entered judgment and sentenced Baize in accordance with the Commonwealth's recommendations. Baize did not directly appeal his conviction or the sentence imposed.

In 2007, Baize filed a motion to vacate his sentence pursuant to RCr<sup>2</sup> 11.42, raising numerous claims of ineffective assistance of trial counsel. The trial court denied his motion and a panel of this court affirmed the trial court's decision.<sup>3</sup> While the appeal of the trial court's denial of his RCr 11.42 motion was pending, Baize moved to withdraw his guilty plea pursuant to RCr 8.10, which the trial court denied. Baize appealed the trial court's decision, yet later moved to dismiss that appeal, which was granted by a panel of this court.<sup>4</sup>

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<sup>2</sup> Kentucky Rules of Criminal Procedure.

<sup>3</sup> *Baize v. Commonwealth*, No. 2008-CA-000139-MR (Ky. Nov. 26, 2008).

<sup>4</sup> *Baize v. Commonwealth*, No. 2008-CA-002226-MR (Ky. Feb. 24, 2010).

In 2009, Baize filed the underlying motion to vacate his judgment of conviction pursuant to CR 60.02. Included in his CR 60.02 motion are arguments he raised in his motion for RCr 11.42 relief, namely improper amendment of the indictment and imposition of an illegal sentence. The trial court denied his motion. This appeal followed.

We review the denial of a CR 60.02 motion for an abuse of discretion. *Brown v. Commonwealth*, 932 S.W.2d 359, 361 (Ky. 1996); *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky.App. 2000). Relief under CR 60.02 is limited to the following circumstances:

- 1) The first three grounds specified in the rule [ (a) mistake, inadvertence, surprise or excusable neglect, (b) newly discovered evidence, (c) perjury] are limited to application for relief “not more than one year after the judgment.”
- 2) The additional specified grounds for relief are (a) fraud, (b) the judgment is void, vacated in another case, satisfied and released, or otherwise no longer equitable, or (c) other reasons of an “extraordinary nature” justifying relief. These grounds are specific and explicit. **Claims alleging that convictions were obtained in violation of constitutionally protected rights do not fit any of these grounds except the last one, “any other reason of an extraordinary nature justifying relief.”**

*Gross v. Commonwealth*, 648 S.W.2d 853, 857 (Ky. 1983) (emphasis added).

Relief under CR 60.02 is “for relief that is not available by direct appeal and not available under RCr 11.42.” *Id.* at 856. The structure in Kentucky for attacking the final judgment of a trial court is first to proceed on direct appeal, then under RCr 11.42, raising any ground of which the defendant is aware, or

should be aware, during the period of time when this remedy is available, and thereafter under CR 60.02. *Id.* Final disposition of an RCr 11.42 motion “shall conclude all issues that could reasonably have been presented in the same proceeding.” RCr 11.42(3). In other words, “[t]he language of RCr 11.42 forecloses the defendant from raising any questions under CR 60.02 which are ‘issues that could reasonably have been presented’ by RCr 11.42 proceedings.” *Gross*, 648 S.W.2d at 857.

In this case, Baize claims his constitutional rights were violated as a result of the trial court allowing the Commonwealth to amend his indictment to a more serious crime without first holding a hearing pursuant to RCr 6.16. Baize points out that Count 1 of the indictment charged him with theft by unlawful taking (a Class D felony), yet the Commonwealth’s offer amended Count 1 to attempted theft by unlawful taking with intent to manufacture methamphetamine (a Class B felony). Baize further argues the trial court imposed an illegal sentence on Count 1; he directs us to the judgment entered by the trial court, adjudicating him guilty of attempted theft by unlawful taking (anhydrous ammonia), which he emphasizes is a Class A misdemeanor. Baize contends the 10-year sentence imposed on Count 1 exceeds the statutory maximum penalty for Class A misdemeanors.

Claims alleging that convictions were obtained in violation of constitutionally protected rights may justify relief under CR 60.02 if reasons of an “extraordinary nature” exist. *Gross*, 648 S.W.2d at 857. However, before reaching the merits of Baize’s claims, we note that procedurally, the arguments

Baize presents in his CR 60.02 motion are ones that could and should have been raised on direct appeal or in his motion for RCr 11.42 relief. Baize does not provide any explanation as to why he failed to avail himself of the opportunity to directly appeal his conviction and sentence. Moreover, his previous challenge of his conviction and sentence in his RCr 11.42 motion raised both of the issues he presents in the underlying CR 60.02 motion. Because these issues were previously presented and resolved, Baize is precluded from raising them again in a motion for CR 60.02 relief.

The order of the Ohio Circuit Court is affirmed.

ALL CONCUR.

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