

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2008-CA-002301-MR

DAVID LEE LEWIS, JR.

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT  
HONORABLE JAMES L. BOWLING, JR., JUDGE  
ACTION NO. 93-CR-00001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: MOORE AND NICKELL, JUDGES; HARRIS,<sup>1</sup> SENIOR JUDGE.

MOORE, JUDGE: David Lee Lewis, Jr., appeals the Bell Circuit Court's order denying his second CR<sup>2</sup> 60.02 motion to vacate or set aside his conviction and sentence. After a careful review of the record, we affirm because the circuit court did not abuse its discretion when it denied Lewis's motion.

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<sup>1</sup> Senior Judge William R. Harris, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

<sup>2</sup> Kentucky Rule of Civil Procedure.

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

Following a jury trial, Lewis was convicted of murdering his wife. He was sentenced to serve life imprisonment. Lewis appealed, and the Kentucky Supreme Court affirmed the judgment against him.

Lewis moved to vacate, set aside, or correct his sentence, pursuant to RCr<sup>3</sup> 11.42. The circuit court denied his motion, and this Court affirmed the denial of that motion on appeal.

Lewis moved to file a successive RCr 11.42 motion, and the circuit court denied that motion. This Court affirmed that decision on appeal.

Lewis then filed his first CR 60.02 motion, which was denied by the circuit court. Lewis appealed, and this Court affirmed the circuit court's order. *See Lewis v. Commonwealth*, No. 2006-CA-001304, 2007 WL 2142702, \*1 (Ky. App. July 27, 2007) (unpublished).

Subsequently, Lewis filed his second CR 60.02 motion. The circuit court again denied the motion. Lewis now appeals, contending that the circuit court erred because: (a) new evidence shows that defense counsel had conflicting interests; (b) new evidence shows that Lewis placed a 9-1-1 telephone call; (c) two witnesses committed perjury; and (d) the circuit court should have granted Lewis an evidentiary hearing regarding his CR 60.02 motion.

## **II. STANDARD OF REVIEW**

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<sup>3</sup> Kentucky Rule of Criminal Procedure.

On appeal, we review the denial of a CR 60.02 motion for an abuse of discretion. “A movant is not entitled to a hearing on a CR 60.02 motion unless he affirmatively alleges facts which, if true, justify vacating the judgment and further allege[s] special circumstances that justify CR 60.02 relief.” *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000) (internal quotation marks omitted).

“Civil Rule 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could reasonably have been presented by direct appeal or RCr 11.42 proceedings.” *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997) (internal quotation marks omitted). Civil Rule 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.” *Id.*

### III. ANALYSIS

#### A. CLAIM REGARDING DEFENSE COUNSEL’S CONFLICT OF INTEREST

Lewis first alleges that he recently discovered that his trial attorney “actively represented conflicting interests in this case, thus subjecting . . . Lewis’[s] defense to substantial prejudice” because his trial counsel also represented the victim’s ex-husband in a custody proceeding weeks prior to the victim’s death. However, Lewis’s claim is purely speculative because the mere fact that the same attorney represented the victim’s ex-husband in a custody proceeding does not show that there was a conflict of interest.

Further, Lewis contends that there was an issue at trial as to how a bed was broken and by whom. The prosecution allegedly implied that the bed was broken during the murder, but Lewis argues that the victim's children had previously broken the bed. Lewis asserts that he asked his attorney to have the victim's children testify as to who broke the bed, but counsel refused to put the children on the stand on the basis of trial strategy. According to Lewis, his counsel said it would be poor trial strategy to put the children of the deceased on the witness stand. The circuit court agreed that the attorney's trial strategy was reasonable. Further, the circuit court noted that Lewis's claim that counsel had a conflict of interest because counsel "was representing the interests of the children and their father by refusing to call the children" was "absurd [because] with the mother dead, a custody dispute is something of a moot point."

We agree with the circuit court's conclusion that it was sound trial strategy for defense counsel to choose not to put the victim's children on the stand to testify during trial. Thus, the circuit court did not abuse its discretion in denying relief based on this claim.

## **B. CLAIM REGARDING NEW EVIDENCE OF 9-1-1 TELEPHONE CALL**

Lewis next asserts that there is new evidence he placed a 9-1-1 telephone call on the morning of his wife's death.<sup>4</sup> The evidence he is referring to is an affidavit for a search warrant that was prepared by Lieutenant Gregory Buell

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<sup>4</sup> Lewis contends that he recently discovered this evidence when his trial attorney relinquished his case file to Lewis after sixteen years. Thus, Lewis argues that he is bringing this CR 60.02(e) and (f) claim within a reasonable time, as required by CR 60.02.

which made reference to a telephone call placed by Lewis. Lewis contends that the affidavit states, in pertinent part, that

[t]his affiant was further informed by Officer Spike Jenkins, Middlesboro Police Officer, that he and ambulance personnel had responded to a call to 113 South 19th Street, Apartment #2, and been informed by David Lewis that Sheila Lewis had stabbed herself at the above described premises, Apt. #2, 113 South 19th Street, Middlesboro, Bell County, Ky., the residence of David and Sheila Lewis.

Lewis alleges that he recently was given access to his file from his trial attorney and that this affidavit, which he found in his file, therefore constitutes new evidence that he placed a 9-1-1 telephone call. Lewis argues that the affidavit is exculpatory in nature because it revealed that Lewis told the person who answered the telephone call that his wife had just stabbed herself. Thus, Lewis contends that the Commonwealth and its agents “obviously destroyed or secreted the [9-1-1] tape and that, whatever the scenario, [Lewis] was denied disclosure of exculpatory evidence.” It is apparent he does not believe the assertions of the Bell County Commonwealth’s Attorney’s Office that incoming 9-1-1 telephone calls were not recorded by the Middlesboro Police Department. Lewis has no foundation on which the Court can rely for a finding of falsity of the Commonwealth’s Attorney’s claims.

Lewis fails to note that the Buell affidavit was in his file and was possessed by his defense counsel at the time of trial, so there was no failure on the

Commonwealth's part to disclose the affidavit. Further, as noted by the circuit court,

[t]he affidavit in no way suggests that it is any more likely that [Lewis] either called [9-1-1], or that such a tape ever existed. Therefore, the Court is left with [Lewis's] unsubstantiated claims that the only possible explanation for what happened to the mythical [9-1-1] tape is that the Prosecution or its agents destroyed it.

The circuit court then concluded that there was no county-wide conspiracy to frame Lewis and that the alleged 9-1-1 tape "simply never existed." Regardless, even if the tape did exist, the telephone call alone does not prove Lewis's innocence or that the judgment should be vacated.

Because we agree with the circuit court that Lewis's claim is based wholly on speculation, we find that the court did not abuse its discretion in denying CR 60.02 relief based on this claim.

### **C. CLAIM REGARDING PERJURY OF TWO WITNESSES**

Lewis next claims that Captain Wendell Proctor of the Middlesboro Police Department and prosecution witness Steve Washam both committed perjury.

Regarding Lewis's claim that Captain Proctor lied to the grand jury concerning who called to have an ambulance dispatched to the crime scene, the circuit court found that Lewis's allegation that he possessed "documented proof that he placed the [9-1-1] call" rather than someone else to be without merit. The court concluded "no such proof exists."

As for Lewis's assertion that Captain Proctor lied by saying that Captain Proctor was at the hospital, the circuit court noted that

[t]he Captain consistently referred to the actions of the officers under his command by beginning his statements with "we" and [Lewis] claims that this is a false representation that the Captain was present at all times. While [Lewis] may not use colloquialisms to refer to a group of people to which he may belong, the Court must remind him that others do and the Captain was most likely merely using a turn of phrase.

We find that the circuit court did not abuse its discretion in denying Lewis's claims concerning Captain Proctor on the merits.

Lewis also claims that prosecution witness Steve Washam committed perjury by claiming he called for assistance the morning of the murder. Lewis contends that the alleged 9-1-1 telephone call shows that he, rather than Washam, was the person who called 9-1-1. However, as noted by the circuit court, no proof of a 9-1-1 telephone call exists. Thus, the circuit court did not abuse its discretion in denying relief for this claim.

#### **D. CLAIM REGARDING EVIDENTIARY HEARING**

Finally, Lewis asserts that the circuit court should have granted him an evidentiary hearing on his CR 60.02 claims. "A movant is not entitled to a hearing on a CR 60.02 motion unless he affirmatively alleges facts which, if true, justify vacating the judgment and further allege[s] special circumstances that justify CR 60.02 relief." *White*, 32 S.W.3d at 86. Because Lewis asserted no such

facts, the circuit court did not err in failing to hold an evidentiary hearing in this matter.

Accordingly, the order of the Bell Circuit Court is affirmed.

ALL CONCUR.

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