

RENDERED: DECEMBER 14, 2018; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2016-CA-001209-MR

EVERETT NORMAN

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT  
HONORABLE EDDY COLEMAN, JUDGE  
ACTION NO. 12-CR-00135

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON, D. LAMBERT, AND SMALLWOOD, JUDGES.

LAMBERT, D., JUDGE: Everett Norman brings this appeal from an order of the Pike Circuit Court denying his motion for post-conviction relief pursuant to Rule 60.02 of the Kentucky Rules of Civil Procedure (“CR”). Having reviewed the record, we determine the trial court properly concluded the allegations of error fell outside the scope of CR 60.02 and denied the motion. Accordingly, we affirm.

## I. FACTUAL AND PROCEDURAL HISTORY

Norman was convicted at trial of manslaughter in the second degree for the death of Jessie Church. The jury recommended, and the trial court imposed, a sentence of ten years to serve. He filed a timely appeal of the conviction, which the Court affirmed in an unpublished opinion rendered on November 14, 2014. *Norman v. Commonwealth*, 2013-CA-000961-MR, 2014 WL 6389970 (Ky. App. Nov. 14, 2014).

He subsequently filed a *pro se* motion for post-conviction relief pursuant to CR 60.02. Therein, he asserted several errors by the trial court occurring during his trial and contended the fact that he did not understand the impact of those alleged errors entitled him to relief. The trial court denied the motion, and this appeal followed.

At the outset, we note that the brief authored by appointed counsel on behalf of Norman was filed pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and counsel sought (and was granted) leave to withdraw simultaneously to its filing. Despite having been granted leave to do so, Norman did not file a *pro se* supplemental brief or hire alternate counsel to proceed on his behalf within the sixty days allotted. The matter became ripe for ruling after the expiration of that period.

## II. ANALYSIS

### A. STANDARD OF REVIEW

A motion for relief from judgment pursuant to CR 60.02 typically comprises the third and final step in the criminal post-conviction process, taken after a direct appeal and a motion for relief pursuant to Rule 11.42 of the Kentucky Rules of Criminal Procedure (“RCr”). CR 60.02 permits courts to correct errors made apparent by certain facts arising after the entry of judgment and which no other procedural avenue exists to correct. *Gross v. Commonwealth*, 648 S.W.2d 853, 888 (Ky. 1983). CR 60.02 does not afford a convicted defendant “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) (quoting RCr 11.42(3)). By the very terms of the rule, CR 60.02 relief amounts to an extraordinary remedy, reserved for situations “when a substantial miscarriage of justice will result from the effect of the final judgment.” *Wilson v. Commonwealth*, 403 S.W.2d 710, 712 (Ky. 1966). Appellate courts review trial court rulings regarding CR 60.02 motions for abuse of discretion. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000).

**B. THE TRIAL COURT PROPERLY CONCLUDED THAT THE ERRORS ALLEGED BY NORMAN FALL OUTSIDE THE SCOPE OF CR 60.02.**

In his motion to the trial court, Norman asserted four errors. First, he alleged that Jason Merlo, the investigating officer, failed to preserve the crime scene by allegedly moving certain objects to photographically document the scene. Second, he argues that the trial court improperly instructed the jury to disregard a portion of the testimony of witness, Brandi Coleman, rather than ordering a mistrial. Third, he contends that Merlo's crime scene photos amounted to falsified evidence due to his allegedly moving certain objects within the crime scene before taking them. Finally, he argued that the recorded statement of an unavailable witness, Jesse Collins, should not have been played for the jury, due to Norman's inability to cross-examine the witness.

Norman did not contend in his motion that newly discovered evidence brought these issues to light, which, if true, might entitle him to relief under CR 60.02(b). Rather, Norman argued that he should be entitled to relief because he did not understand the effect of these issues at the time. In his own words: "events which transpired during the trial of which, at the time, Movant was not cognizant of, due to his limited knowledge of the laws of the Commonwealth of Kentucky."

The facts underlying these allegations do not become newly discovered evidence simply due to Norman's newfound understanding of their

impact. A review of the record reveals that Norman knew of each of these issues, at the time of the trial. He provided testimony discussing the content and challenging the veracity of the photographs. The record at trial indicates a portion of Coleman's testimony was stricken and the court instructed the jury to disregard it due to Fifth Amendment issues related to Coleman arising during her testimony.<sup>1</sup> Norman also provided trial testimony challenging Collins' statement.

Moreover, the issues Norman raises in his motion, and his counsel begrudgingly reasserts on his behalf in the brief, are allegations of trial error. The record, as noted above, undisputedly established his knowledge of those issues at the time of trial. Norman should have raised them in his direct appeal. His failure to do so in his direct appeal waived those issues and barred him from asserting them in later proceedings. *See, e.g., Osborne v. Payne*, 31 S.W.3d 911, 916 (Ky. 2000). The trial court properly concluded they fell outside the scope of CR 60.02's ground for relief.

Norman's motion and the instant appeal seek to relitigate issues which could have—and should have—been addressed in his direct appeal. For that reason, his motion falls outside the scope of CR 60.02 review and is procedurally defective. The trial court committed no error in its summary denial.

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<sup>1</sup> Coleman's disregarded remarks neither incriminated nor exculpated Norman.

### III. CONCLUSION

Having reviewed the record and finding no error, the judgment of the Pike Circuit Court is affirmed.

ALL CONCUR.

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