

RENDERED: AUGUST 31, 2018; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2017-CA-000278-MR

PAUL HURT

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE AUDRA ECKERLE, JUDGE  
ACTION NO. 00-CR-000487

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, CHIEF JUDGE; JOHNSON AND NICKELL, JUDGES.

JOHNSON, JUDGE: Paul Hurt appeals an order of the Jefferson Circuit Court denying his motion to set aside his conviction for sexually assaulting his minor stepdaughter. After reviewing the record in conjunction with the applicable legal authorities, we affirm the order of the Jefferson Circuit Court.

## BACKGROUND

This matter has a lengthy history in the court system. Hurt's six-year-old stepdaughter accused him of sexually abusing her on an ongoing basis between September 1999 through January 2000. The victim reported the abuse to her stepmother, L.F., who contacted the police. After the police investigated the allegations, Hurt was arrested and indicted. Following a four-day trial, the jury returned a verdict convicting Hurt of three counts of sodomy in the first degree<sup>1</sup> and two counts of sexual abuse in the first degree.<sup>2</sup> The jury recommended a sentence of life imprisonment on each count of sodomy to run concurrently with each other, and five years on each count of sexual abuse, to run concurrently with the life sentences. In accordance with the jury verdict and its sentencing recommendation, the trial court entered judgment sentencing Hurt to life imprisonment.

Hurt appealed his conviction to the Kentucky Supreme Court as a matter of right pursuant to Ky. Const. § 110(2)(b),<sup>3</sup> alleging that the trial court

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<sup>1</sup> Kentucky Revised Statutes ("KRS") 510.070, a Class A felony pursuant to the victim's age.

<sup>2</sup> KRS 510.110, a Class C felony pursuant to the victim's age. We note that in the verdict forms tendered to the jury, the punishment range indicated was 1-5 years in accordance with a Class D felony penalty range.

<sup>3</sup> "Appeals from a judgment of the Circuit Court imposing a sentence of death or life imprisonment or imprisonment for twenty years or more shall be taken directly to the Supreme Court. In all other cases, criminal and civil, the Supreme Court shall exercise appellate jurisdiction as provided by its rules."

erred in finding the victim competent to testify at trial and denying both his motions for a directed verdict and his motion for a judgment notwithstanding the verdict. He also argued that prosecutorial misconduct on the part of the Commonwealth's Attorney in closing argument was so egregious as to warrant a new trial. In a memorandum opinion rendered in October 2003,<sup>4</sup> the Supreme Court of Kentucky unanimously upheld Hurt's conviction, finding no reversible error in any of his contentions for reversal.

On December 20, 2004, Hurt filed a Kentucky Rules of Criminal Procedure ("RCr") 11.42 motion asserting various grounds to support his contention that his trial counsel was ineffective. In July 2005, the trial court denied Hurt's motion without conducting an evidentiary hearing. Hurt then appealed the denial of his post-trial motion to this Court, which affirmed on the basis that Hurt's ineffective assistance claims were conclusively refuted by the record.<sup>5</sup> On September 12, 2007, the Kentucky Supreme Court entered an order granting Hurt's motion for discretionary review, vacating the opinion of the Court of Appeals and that of the trial court, and remanding the case to the trial court with

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<sup>4</sup> *Hurt v. Commonwealth*, No. 2002-SC-0209-MR, 2003 WL 22417232 (Ky. Oct. 23, 2003).

<sup>5</sup> *Hurt v. Commonwealth*, No. 2005-CA-001590-MR, 2007 WL 1192081 (Ky. App. Apr. 13, 2007).

directions to conduct an evidentiary hearing prior to ruling on the motion to vacate sentence.<sup>6</sup>

On remand, the trial court held an evidentiary hearing and on January 19, 2010, entered an opinion and order once again denying Hurt's motion. Despite having asserted other grounds before the trial court, in his appeal to this Court Hurt alleged only that his trial counsel was ineffective in "fail[ing] to properly investigate and prepare for the Commonwealth's case, especially the testimony of Dr. Sally Perlman." *Hurt v. Commonwealth*, No. 2010-CA-000343-MR, 2011 WL 3516299, at \*1 (Ky. App. Aug. 12, 2011). We affirmed the decision of the trial court on the basis that, given the graphic nature of the child victim's testimony, Hurt was unable to show prejudice by his counsel's allegedly deficient performance. *Id.* at \*5-6.

After his retirement, Judge Stephen K. Mershon, the original trial judge in the matter, began corresponding with Hurt in prison. Judge Mershon became convinced that Hurt was innocent in this matter and, in an effort to obtain Hurt's release, Judge Mershon contacted the victim and assisted her in writing a letter to Governor Steven Beshear seeking a pardon or commutation for Hurt. That effort failed.

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<sup>6</sup> *Hurt v. Commonwealth*, 2007-SC-0332-DG (Ky. Sept. 12, 2007).

With the assistance of Judge Mershon, on May 15, 2015, Hurt filed a motion to set aside judgment pursuant to Kentucky Rules of Civil Procedure (“CR”) 60.02(f) and a motion to reopen his previous RCr 11.42 proceedings. The trial court held an evidentiary hearing at which the victim testified and recanted her prior testimony that Hurt had been the perpetrator of the crimes against her. Following the evidentiary hearing, the trial court issued a lengthy opinion and order concluding that the victim’s recantation was inconsistent over time, that it was a “shifting account,” and that it was “no more likely to be true than false.” As a result, the trial court denied Hurt’s motion to set aside his conviction. The trial court initially declined to address his RCr 11.42 contentions.

Hurt then filed a motion to reconsider and modify the order denying his CR 60.02 and RCr 11.42 motions. With minor, inconsequential modifications, the trial court denied the motion to reconsider. It did, however, address Hurt’s RCr 11.42 allegations but, again, denied relief.

This appeal followed.

### **STANDARD OF REVIEW**

“[W]e review the denial of a CR 60.02 motion for an abuse of discretion.” *Partin v. Commonwealth*, 337 S.W.3d 639, 640 (Ky. App. 2010).

“The test for abuse of discretion is whether the trial court’s decision was ‘arbitrary, unreasonable, unfair, or unsupported by sound legal principles.’” *Id.* (quoting

*Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)). “CR 60.02 relief is discretionary. The rule provides that the court ‘*may*, upon such terms as are just, relieve a party from its final judgment . . . .’” *Gross v. Commonwealth*, 648 S.W.2d 853, 857 (Ky. 1983). Absent a “flagrant miscarriage of justice[,]” we will affirm the trial court. *Id.* at 858.

### ANALYSIS

In this appeal, Hurt argues that: 1) the trial court erred in failing to grant his CR 60.02 motion on the basis of the victim’s recantation of her previous testimony; and 2) the trial court erred in failing to rule on several ineffective assistance claims against his trial and appellate counsel which individually or collectively require vacating the judgment.

Hurt’s primary focus in both arguments is that the victim’s recantation of her trial testimony entitles him to relief under both CR 60.20 and RCr 11.42. Recanted testimony has historically been viewed with skepticism by our courts: “[w]e affirm that it is not enough merely to show that a prosecuting witness has subsequently made contradictory statements or that he is willing to swear that his testimony upon the trial was false, for his later oath is no more binding than his former one.” *Anderson v. Buchanan*, 292 Ky. 810, 168 S.W.2d 48, 53 (1943). More recently, our Supreme Court explained not only the inherent perils of

recanted testimony, but also the deference with which an appellate court should view the trial court's findings:

[T]here are special rules for situations of recanted testimony. The general rules are that recanting testimony is viewed with suspicion; mere recantation of testimony does not alone require the granting of a new trial; only in extraordinary and unusual circumstances will a new trial be granted because of recanting statements; such statements will form the basis for a new trial only when the court is satisfied of their truth; the trial judge is in the best position to make the determination because he has observed the witnesses and can often discern and assay the incidents, the influences and the motives that prompted the recantation; and his rejection of the recanting testimony will not lightly be set aside by an appellate court.

*Thacker v. Commonwealth*, 453 S.W.2d 566, 568 (Ky. 1970).

In its May 19, 2016 order, the trial court set out a comprehensive discussion and analysis of the evidentiary hearing, focusing in particular on the victim's new, conflicting testimony. After explaining in detail the factors central to its decision, the trial court ultimately found the victim's new testimony to be lacking in credibility:

[The Commonwealth] contends that Judge Mershon altered [the victim's] memory, and by using judicial coercion and intimidation, that he overcame her, causing her to claim falsely that she had lied a[t] trial.

....

The victim is clearly not credible currently, as she has gone back and forth numerous times about the alleged

events. She steadfastly maintained her account for 15 years. The circumstantial evidence of her ability to describe sexually explicit events at an extremely young age, her sexual behavior at a very young age, promiscuity, harming animals, depression, defiance, health problems, and fits of rage, all corroborate her claims of sexual abuse, as does her anger at becoming aware the case would be re-opened.

While she has now recanted her trial testimony, she has not consistently adhered to the most recent version of events. Her shifting accounts as of late do not give the Court confidence that her recantation was accurate. It is no more likely to be true than false, given her clear feelings of guilt about losing family relations and concerning the lengthy incarceration of someone who has been close to her. It was only brought about by the highly unusual circumstance of the formerly sitting Judge confronting her directly and privately. Even with his involvement, it took quite some time to get the Victim to say Hurt did not commit the crimes, as opposed to her earlier expressions of forgiveness of him for his unlawful abuse. She only did so after securing assistance for her [step]father on an expungement.

The trial court carefully considered the victim's new testimony in light of the surrounding evidence, from the initial investigation up until the most recent evidentiary hearing. As part of its analysis, the trial court found that the victim's account of the allegations had shifted more than once after maintaining her prior account for 15 years. The trial court found that the circumstantial evidence surrounding the victim at the time the initial charges were levied all indicated that she had been sexually abused. Further, the court expressed concern about the "highly unusual circumstance" of Judge Mershon inserting himself into



the matter and contacting the victim directly. The trial court was also concerned that the victim only recanted her former testimony after receiving assistance from Judge Mershon with an attempt to obtain an expungement for her stepfather's criminal conviction.

The trial court, which was in the best position to “observe[] the witnesses[,]” “discern and assay the incidents,” and “the influences and the motives that prompted the recantation[,]” undertook a thorough analysis of the victim's recantation, weighed the associated evidence, and was not satisfied that the recantation was truthful as required by the holding in *Thacker*. 453 S.W.2d at 568. Like the court in *Thacker*, we perceive no basis upon which we might disturb the well-reasoned decision of the trial judge in denying Hurt's motion for a new trial, “which decision involved factors particularly in h[er] province to weigh.” *Id.* at 569.

Upon finding that the victim's recantation lacked credibility, the trial court denied Hurt's motion for CR 60.02 relief, concluding that “there is no basis for even a reasonable likelihood of a different result at trial when the recantation lacks credibility.” Nothing in the opinion of the trial court could be construed as “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Partin*, 337 S.W.3d at 640 (citation omitted). Perceiving no flagrant miscarriage of

justice, we affirm the trial court's denial of the motion to set aside under CR 60.02.

*Gross, supra.*

Next, we turn to Hurt's claims of ineffective assistance of trial and appellate counsel and his contention that the trial court erred in failing to reopen his prior RCr 11.42 proceedings and rule on his current arguments. The issues upon which Hurt predicates error at the trial court level center on trial counsel's failure to challenge unconstitutional jury instructions and misconduct by the prosecutor during cross-examination, as well as trial counsel having filed a deficient motion for new trial or judgment notwithstanding the verdict. Hurt's allegations concerning ineffective assistance at the appellate level focus upon appellate counsel's failure to raise the issues of deficient jury instructions and the alleged misconduct of the prosecutor during cross-examination of Hurt. As discussed below, an examination of the record and the prior proceedings demonstrates that Hurt was not denied any legal process owed to him.

When Hurt appealed to our Court for the second time following the evidentiary hearing ordered by the Kentucky Supreme Court, we stated:

We first note that Hurt raised various claims of the ineffective assistance of trial counsel in the circuit court. However, the only claim he raises on appeal is his allegation that he received ineffective assistance of trial counsel and his due process rights were violated when counsel failed to properly investigate and prepare for the Commonwealth's case, especially the testimony of Dr. Sally Perlman. Specifically, Hurt contends that his

counsel rendered ineffective assistance by failing to consult a forensic expert and by failing to challenge the admissibility of Dr. Perlman's opinions on the basis that she was not qualified to testify as an expert on the child's behavior. Because Hurt's remaining claims that he asserted in the circuit court were not raised in his appellate brief, those claims are deemed waived on appeal.

*Hurt*, 2011 WL 3516299 at \*1. The Kentucky Supreme Court denied discretionary review and the decision of this Court became final on June 20, 2012. "An RCr 11.42 motion 'shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding.'" RCr 11.42(3). This provision has been held to bar successive RCr 11.42 motions." *Sanders v. Commonwealth*, 339 S.W.3d 427, 438 (Ky. 2011).

Each of the allegations concerning the ineffective performance of Hurt's trial and appellate counsel could have reasonably been presented in Hurt's prior RCr 11.42 proceedings, which were previously rejected or definitively deemed waived by this Court. Given Hurt's extensive appellate litigation in both direct and post-conviction appeals, we, as well as the trial court, are precluded by the plain language of RCr 11.42(3) from considering the claims Hurt advances in this current RCr 11.42 appeal.

Furthermore, under RCr 11.42(10), "[a]ny motion under this rule shall be filed within three years after the judgment becomes final," unless the motion

alleges and the movant proves one of several specifically enumerated exceptions to the limitations period. Hurt has neither alleged nor proven any of the factors which would allow him to avoid the three-year period. As noted previously, Hurt's conviction became final with the issuance of the opinion of the Kentucky Supreme Court in October 2003. His attempts to raise additional ineffective assistance claims in this latest proceeding are conclusively foreclosed by the plain language of the rule.

Finally, Hurt argues that he was entitled to reopen his prior RCr 11.42 motion in order to take the victim's new testimony into consideration. Hurt maintains that even if the victim's testimony was insufficient to warrant relief under CR 60.02, it is still a factor in the prejudice analysis for purposes of RCr 11.42 relief. Clearly, the victim's recantation could not have been a factor in any rulings in his previous RCr 11.42 proceedings because it was not before the court at that juncture. As the recantation had not yet occurred, it had no impact on Hurt's claims that his counsel was ineffective. The victim's recantation of her initial testimony was not part of the official record until the evidentiary hearing which is the subject of the instant matter. The CR 60.02 proceeding provided Hurt with all the due process to which he was entitled regarding the victim's recanted testimony, a recantation the trial court found lacking in candor or believability. There was no error.

## CONCLUSION

Based upon the foregoing, we affirm the order of the Jefferson Circuit Court.

ALL CONCUR.

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