

RENDERED: MARCH 22, 2019; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2018-CA-000973-MR

CHRISTOPHER SMITH

APPELLANT

v. APPEAL FROM HARLAN CIRCUIT COURT  
HONORABLE KENT HENDRICKSON, JUDGE  
ACTION NO. 10-CR-00006

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: TAYLOR, K. THOMPSON, AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: Christopher Smith, *pro se*, appeals from an order of the Harlan Circuit Court denying his motion to alter and or amend final judgment and sentence pursuant to Kentucky Rules of Civil Procedure (CR) 60.02(f) and Kentucky Rules of Criminal Procedure (RCr) 10.26. Appellant argues that the Circuit Court erred in denying him an evidentiary hearing, that his plea was not knowingly or intelligently made, and that the Commonwealth or the circuit court

improperly failed to allow certain testimony and to conduct a competency hearing. For the reasons stated below, we find no error and affirm the order on appeal.

On October 7, 2011, a judgment was entered reflecting Appellant's guilty plea on charges of capital murder, attempted murder, first-degree wanton endangerment and unlawful imprisonment. Appellant was sentenced to a concurrent sentence of life in prison.

On December 11, 2012, Appellant filed a motion to vacate sentence and judgment pursuant to RCr 11.42. The Harlan Circuit Court denied the motion, and the matter was affirmed on appeal to a panel of this Court by opinion rendered on April 25, 2014, case number 2013-CA-000645. The Kentucky Supreme Court denied discretionary review on December 10, 2014.

On April 19, 2018, Appellant filed a motion to alter and or amend final judgment based on CR 60.02(f) and RCr 10.26. After considering the motion, the Harlan Circuit Court rendered an order on May 24, 2018, denying the relief sought. In support of the order, the court determined that Appellant failed to advance any reason of an extraordinary nature justifying relief as required by CR 60.02(f). Further, it found that CR 60.02 was not an available remedy for issues which should have been brought or were brought either on direct appeal or via RCr 11.42. The court went on to conclude that insofar as the motion purported to be

one for a new trial under RCr 10.26,<sup>1</sup> it was not brought in a timely manner and no good cause was shown for extending the deadline under the rule. Finally, the court determined that the memorandum in support of the motion was in reality an ineffective assistance of counsel argument, which was barred as successive by operation of RCr 11.42 and the supportive case law. This appeal followed.

Appellant first argues that his guilty plea was not made knowingly or intelligently. He contends that his trial counsel failed to fully investigate the case, and improperly failed to raise the defense of extreme emotional disturbance as a mitigating factor. Appellant also maintains that counsel should have asserted at trial that the death of the victim was not intentional, and that the Harlan Circuit Court erred in failing to conduct an evidentiary hearing on this matter.

As noted by the trial court, Appellant has already fully litigated an RCr 11.42 motion, which was resolved by a panel of this Court in 2014.<sup>2</sup> CR 60.02 may not be employed to relitigate issues which should have been raised, or were already raised, on direct appeal, in an RCr 11.42 proceeding, or in a prior CR 60.02 motion. *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997).

Because Appellant's argument on this issue was previously raised before the

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<sup>1</sup> Appellant's motion cited the palpable error rule set out in RCr 10.26, which provides that a party may raise palpable error "on motion for a new trial." Though Appellant was not expressly seeking a new trial, the Harlan Circuit Court addressed the "new trial" provision of RCr 10.06 in the course of resolving Appellant's RCr 10.26 motion.

<sup>2</sup> *Smith v. Commonwealth*, 2013-CA-000645-MR, 2014 WL 1685931 (Ky. App. April 25, 2014).

Harlan Circuit Court and resolved on appeal to this Court, it runs afoul of *McQueen*, and the Harlan Circuit Court properly so found. For the same reason, Appellant was not entitled to an evidentiary hearing. RCr 11.42(5) requires a hearing only “[i]f the answer raises a material issue of fact that cannot be determined on the face of the record[.]” As the record amply demonstrates that no material issue of fact exists, the circuit court properly disposed of this issue without a hearing.

Appellant’s remaining arguments are an amalgam of allegations that the Commonwealth – as opposed to the circuit court – 1) improperly failed to allow into evidence the testimony of Appellant’s son that Melissa Clark and the victim kept hitting the brakes in their vehicle in front of the Appellant, and 2) improperly failed to evaluate Appellant’s competency. Interspersed in these arguments are his claims that the circuit court should have instructed the grand jury on the lesser included offense of manslaughter, and that his due process rights were violated.

In disposing of these arguments, the Harlan Circuit Court denied Appellant’s motions as untimely under RCr 10.26 and CR 60.02(f). A motion for new trial must be brought within five days after the verdict, or when based on newly discovered evidence within one year, or at a later time if for good cause shown if the court so permits. RCr 10.06. Appellant did not raise the motion

within five days after the verdict, nor offer newly discovered evidence nor good cause. A CR 60.02(f) motion must be brought within one year of the judgment, absent a “reason of extraordinary nature justifying relief.” CR 60.02(f). Appellant did not file the motion within one year nor advanced a reason of extraordinary nature, and accordingly the motion was untimely. Additionally, Appellant’s claim that his son was improperly barred from testifying and that it was error not to evaluate his competency are new issues raised for the first time on appeal. As a general rule, we may not consider any new claim not raised and resolved by the trial court. *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), *overruled on other grounds by Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010).

Having closely examined the record and the law, we find no basis for reversing the order of the Harlan Circuit Court. Appellant’s RCr 11.42 motion was previously raised and resolved; therefore, any new arguments relating to ineffective assistance of counsel are successive and improper. Additionally, his RCr 10.26 and CR 60.02 motions were untimely and otherwise not supported by the law.

For the foregoing reasons, we affirm the order of the Harlan Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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