

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2018-CA-001193-MR

DANIEL K. NEWMAN

APPELLANT

v.

APPEAL FROM GRANT CIRCUIT COURT  
HONORABLE R. LESLIE KNIGHT, JUDGE  
ACTION NO. 09-CR-00042

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON, KRAMER, AND K. THOMPSON, JUDGES.

KRAMER, JUDGE: Daniel K. Newman appeals from the Grant Circuit Court's order denying his motion to set aside, correct, or amend judgment pursuant to Kentucky Rule of Civil Procedure (CR) 60.02. Upon review, we affirm.

Newman was convicted in 2010 of two counts of first-degree sodomy under Kentucky Revised Statute (KRS) 510.070(1)(a) and one count of attempted first-degree sexual abuse under KRS 510.110(1)(b). Newman received two life sentences for the sodomy convictions as Class A felonies.

Newman appealed his conviction and sentence to the Kentucky Supreme Court, which affirmed his conviction but vacated his Class A sodomy sentences. Because Newman was convicted of two counts of sodomy under the forcible compulsion theory – Class B felonies under KRS 510.070(2) unless a victim is under twelve years old or seriously physically injured – he should have been sentenced under the Class B felony range. Thus, the Court vacated his sodomy sentences and remanded his case to the circuit court for resentencing of the sodomy convictions as Class B felonies. *See Newman v. Commonwealth*, 366 S.W.3d 435 (Ky. 2012). During the subsequent penalty phase, Newman received a twenty-year sentence for each count of first-degree sodomy to run consecutively for forty years.

Initially Newman appealed the resentencing judgment to the Kentucky Supreme Court but later moved the Court to dismiss his appeal, which the Court granted. Thereafter, Newman filed a Kentucky Rule of Criminal Procedure (RCr) 11.42 motion in the Grant Circuit Court, claiming ineffective assistance of trial and appellate counsel. The circuit court denied Newman's motion. He appealed to this Court, which affirmed the circuit court's denial of his RCr 11.42 motion. *Newman v. Commonwealth*, No. 2015-CA-001057-MR, 2017 WL 2705404 (Ky. App. June 23, 2017).

Subsequently, Newman moved the circuit court to proceed *in forma pauperis*, set aside his conviction pursuant to CR 60.02, and, pursuant to KRS 422.285, permit further DNA testing of the victim's gray underwear for traces of Newman's fecal matter. At trial, the victim's underwear tested positive for Newman's DNA. Without an evidentiary hearing, the circuit court granted Newman's *in forma pauperis* motion but denied his CR 60.02 motion. This appeal followed.

Newman contends the circuit court erroneously denied his CR 60.02 motion. In its order, the circuit court found Newman's motion lacked merit because the claim asserted could have been brought in either Newman's direct appeal or his RCr 11.42 motion. We agree with the circuit court's ruling squarely on procedural grounds without reaching the merit of Newman's CR 60.02 claim.

Application of CR 60.02 to criminal proceedings pursuant to RCr 13.04 "allows CR 60.02 motions to be used by criminal defendants to present additional issues *not specifically available* through direct appeals or RCr 11.42 motions." *Baze v. Commonwealth*, 276 S.W.3d 761, 765 (Ky. 2008) (emphasis added) (citing *Gross v. Commonwealth*, 648 S.W.2d 853, 856) (Ky. 1983)). "CR 60.02 is *not* intended to provide relief for grounds that could be attacked through direct appeals or collateral motions such as grounds under RCr 11.42." *Meece v. Commonwealth*, 529 S.W.3d 281, 285 (Ky. 2017).

Here, the victim's underwear was evidence presented at trial. Two samples cut from the underwear were tested by Kentucky State Police Forensic Laboratories for comparison with buccal DNA samples from Newman and the victim. Both tests indicated the presence of a mixture of DNA from Newman and the victim. *See Newman*, 366 S.W.3d at 439.

The claim that fecal matter DNA forensics was not performed was known, or should have been known, by Newman during his prior requests for relief. He could have raised his argument for further DNA testing either on direct appeal to the Kentucky Supreme Court or to this Court in his subsequent RCr 11.42 motion. Because Newman failed to raise this issue in prior requests for relief, he is procedurally barred from doing so in a CR 60.02 motion. The circuit court did not err in denying Newman's CR 60.02 motion.

For the foregoing reasons, we affirm the Grant Circuit Court's order denying Newman relief pursuant to CR 60.02.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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