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NOT TO BE PUBLISHED

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

NO. 2019-CA-000503-MR

JERRY WINSTEAD

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT  
HONORABLE JOSEPH CASTLEN, JUDGE  
ACTION NO. 05-CR-00120

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: JONES, KRAMER, AND TAYLOR, JUDGES.

KRAMER, JUDGE: Jerry Winstead was convicted in 2007 of the murder and robbery of Richard Roberts. He was sentenced to life without the possibility of parole for the murder and twenty years for the robbery, to run concurrently. He now appeals the denial of his second post-conviction motion. This motion was

filed pursuant to Kentucky Rule of Civil Procedure (CR) 60.02(f). We affirm the circuit court.<sup>1</sup>

The relevant factual and procedural history of this matter is set forth in *Winstead v. Commonwealth*, 283 S.W.3d 678, 681-82 (Ky. 2009):

Roberts's sister Samantha discovered Roberts's body lying on his bedroom floor near his opened safe at approximately 1:00 pm on January 22, 2005. She had talked to him on the phone about an hour before. He had been shot one time in the neck and was pronounced dead at the scene. The police investigation soon focused on Winstead. He and Roberts both lived on Crittenden Street in Owensboro, near each other, and the police learned that the nineteen year-old [sic] Roberts had engaged in selling street-level amounts of marijuana and that Winstead had been one of his regular customers. Winstead was aware that Roberts kept the proceeds of his drug dealing in the bedroom safe and had remarked to several acquaintances that he knew of a near-by drug dealer who would be easy to rob. Just prior to the shooting, Roberts had amassed in excess of \$3,000.00. The police also learned that Winstead had been unemployed for several weeks before the crime, that just before the crime he faced imminent eviction from the residence he shared with his half-sister and step-father, and that immediately after the crime he had paid cash for a new apartment and had gone on a cash-financed shopping spree amounting to at least \$2,000.00. Following Winstead's arrest, the police searched his residence and found an old suitcase containing a pair of jeans and a pair of gym shoes. On the jeans and on one

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<sup>1</sup> Winstead also argued to the circuit court that he was illegally sentenced to serve the robbery sentence consecutively with the life sentence without parole pursuant to CR 60.02(e). The circuit court found that while it would be impermissible for the two sentences to run consecutively, Winstead's, in fact, did not. That holding of the circuit court is not appealed by Winstead.

of the shoes were spots of blood, which DNA analysis established was consistent with Roberts's DNA. The police also seized a .357 magnum caliber handgun that belonged to Winstead's step-father and to which Winstead had had access. The gun also bore a spot of Roberts's blood, and ballistics testing showed that bullet fragments removed from Roberts's body and discovered at the scene could have been fired from that gun.

Winstead was arrested on January 27, 2005 and was interrogated that evening. He denied any involvement in the shooting or the theft until detectives confronted him with their discovery of the apparently bloodied clothing. When Winstead denied knowing how the clothes had gotten into the suitcase, the detectives threatened to arrest his half-sister as the only other person who could have put them there. Winstead then claimed to have been visiting at Roberts's apartment the day of shooting when a person he did not recognize arrived and went with Roberts to the bedroom. A short time later he heard a gunshot and ran to the bedroom, where he nearly tripped over Roberts's prone body and found the stranger taking money from the safe. When the stranger threatened to shoot him, too, Winstead punched him so hard that the stranger fell and was knocked unconscious when his head hit the safe. Winstead then grabbed a portion of the money—about \$1,300.00 he claimed—and ran home, where it was he who put the blood spattered clothes into the suitcase. The video recording of Winstead's interrogation was played at trial. The Commonwealth argued that while much of Winstead's statement was obviously untrue, it did place Winstead at the scene and in possession of the bloodied clothes and that together with the evidence summarized above it proved that Winstead had killed Roberts in the course of robbing him.

Winstead testified on his own behalf and denied having had anything to do with the killing or the theft. He claimed that he was with his half-sister at the time of

the shooting. The money for his new apartment and for his shopping spree had come from his own drug dealing, he asserted, and his statement to the police in which he placed himself at the scene and admitted concealing the blood-spotted clothes, was a pure fabrication meant only to remove suspicion from his half-sister and to prevent her arrest. In fact, he claimed, he did not know how the clothes had gotten into the suitcase, but noted that his step-father had also had access to the suitcase and the gun. His half-sister corroborated his claims that they had been together when the crime occurred and that they had raised money for their new apartment by selling crack cocaine.

. . . [T]he jury found Winstead guilty of both murder and robbery, whereupon the Commonwealth argued that because Winstead's crime was an aggravated killing—a killing in furtherance of a robbery—it warranted the death penalty. The jury recommended instead, however, that Winstead be sentenced to life without parole, and that, as noted, is the sentence the trial court imposed.

After the Kentucky Supreme Court upheld Winstead's conviction, he filed a motion for relief under RCr<sup>2</sup> 11.42. Winstead was denied relief by the circuit court because the motion was untimely, and he appealed. This Court affirmed the circuit court.<sup>3</sup>

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

<sup>3</sup> See *Winstead v. Commonwealth*, No. 2014-CA-001723-MR, 2016 WL 1178576, at \*1 (Ky. App. Mar. 25, 2016). Winstead's motion was filed more than four years post-conviction, in contravention of RCr 11.42(10).

Winstead now seeks relief under CR 60.02(f).<sup>4</sup> Specifically, Winstead argues the Commonwealth withheld the results of fingerprint analysis on the murder weapon (*i.e.*, the .357 magnum caliber handgun). Winstead asserts that he received a report from the Kentucky State Police (KSP) dated October 12, 2018, which revealed that the latent fingerprint lifted from the gun did not match his fingerprint. He argues that this information was withheld from him in contravention of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). In *Brady*, the United States Supreme Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady*, 373 U.S. at 87, 83 S. Ct. 1196-97.

We review the denial of a CR 60.02 motion under an abuse of discretion standard. *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996). The test for abuse of discretion is whether the trial court’s decision was “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). We affirm the lower court’s decision unless there is a showing of some “flagrant miscarriage of justice[.]” *Gross v.*

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<sup>4</sup> CR 60.02(f) states that “[o]n motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding” for any reason “of an extraordinary nature justifying relief.”

*Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983). Because the record before us completely refutes Winstead's claims, we affirm the circuit court.

Although Winstead's RCr 11.42 motion was not decided on the merits by the circuit court nor this Court, we note that in his accompanying affidavit dated August 27, 2013, Winstead states

In September 2005, I advised my attorney of a lab test result that revealed DNA *and a latent print not belonging to me was found on the alleged murder weapon*. These matters were also never looked into. It was also not mentioned with any significance at my trial.

(Emphasis added.)

By Winstead's own statement, he had access to fingerprint analysis at the time of trial which showed that the latent print lifted from the murder weapon did not match his own.

Furthermore, there was significant testimony at trial regarding the gun and the fingerprints. For example, Tabitha Bullock testified she was employed in the laboratory at KSP, and her duties included screening evidence at the time of the murder. She received the gun, along with other evidence. She screened the gun for the presence of blood. After the test showed a presumptive positive for the presence of blood, she swabbed the gun and sent the swabs for DNA analysis. The gun was then sent to Paul Dorman in the forensic latent unit at KSP for fingerprint analysis. Mr. Dorman testified regarding the methodology he employed to detect

and lift one fingerprint from the gun. The fingerprint was compared to Winstead's and was not a match. Mr. Dorman was unable to identify to whom the fingerprint belonged when he entered it into the Automated Fingerprint Identification System (AFIS).

Winstead's counsel reiterated that the fingerprint found on the gun did not match Winstead's. In closing arguments, counsel told the jury

Paul Dorman from the Kentucky State Police lifted a good fingerprint off of that .357. He told you how—spraying, glue, he went through the whole procedure. Of the fingerprint that was on that .357 magnum, there was no match in the AFIS. More importantly, there was no match to Jerry Winstead. None. And did they look for anybody else? No other fingerprints were taken.

We agree with the circuit court that there was simply no *Brady* violation in this case, despite Winstead's assertions to the contrary.

“*Brady* only applies to ‘the discovery, *after trial*, of information which had been known to the prosecution but *unknown to the defense*.’” *Bowling v. Commonwealth*, 80 S.W.3d 405, 410 (Ky. 2002) (emphasis in original) (quoting *United States v. Agurs*, 427 U.S. 97, 103, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976)). Consequently, when such information is disclosed at trial and the defense actively cross-examines on it, there is no *Brady* violation. *Nunley v. Commonwealth*, 393 S.W.3d 9, 13 (Ky. 2013).

. . . . “*Brady* does not give a defendant a second chance after trial once he becomes dissatisfied with the outcome if he had a chance at trial to address the evidence complained of.” *Id.*

*Commonwealth v. Parrish*, 471 S.W.3d 694, 698 (Ky. 2015). Winstead’s counsel was able to actively cross-examine both Tabitha Bullock and Paul Dorman regarding the gun and the fingerprints. Winstead acknowledged he had access to the fingerprint analysis in September 2005 when he filed his motion pursuant to RCr 11.42. The supplemental report provided by KSP to Winstead dated October 12, 2018, contains the same information that was elicited from the testimony of Tabitha Bullock and Paul Dorman.

Accordingly, the circuit court did not abuse its discretion in denying Winstead’s motion for relief under CR 60.02. We therefore affirm the Daviess Circuit Court.

ALL CONCUR.

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