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Supreme Court of Kentucky

2019-SC-0278-DG

COMMONWEALTH OF KENTUCKY APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
NO. 2017-CA-1520
KENTON CIRCUIT COURT NO. 11-CR-00648-001

MIKEL CRUMES APPELLEE

OPINION OF THE COURT BY JUSTICE HUGHES

REVERSING

The primary question presented in this appeal is whether Appellee Mikel Crumes is entitled to a new trial given the co-defendant's recantation of his testimony incriminating Crumes. In 2012, Crumes was convicted of robbing and being complicit in the 2011 murder of Dre'Shawn Hammond. The evidence against Crumes included co-defendant Tromonte Rice's testimony that Crumes committed the murder and robbery and also expert testimony explaining historical cell site information from which the jury could infer that Crumes was in the area around the time of the crimes. Crumes sought a new trial under Kentucky Rule of Civil Procedure (CR) 60.02 after Rice recanted his testimony and under Kentucky Rule of Criminal Procedure (RCr) 11.42 on

ineffective assistance grounds because trial counsel did not request a *Daubert*[1] hearing to challenge the admissibility of the expert cell site testimony. Although the trial court determined that Crumes was not entitled to a new trial under either rule, the Court of Appeals disagreed. The appellate court vacated Crumes's conviction and remanded the case for a new trial based upon Rice's recantation, the focus of his CR 60.02 motion. Upon discretionary review, we reverse the Court of Appeals and affirm the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

Crumes's convictions for robbery in the first-degree and complicity to murder were affirmed in December 2013 in his direct appeal to this Court. *See Crumes v. Commonwealth*, 2012-SC-000774-MR, 2013 WL 6730044 (Ky. Dec. 19, 2013).[2] Providing context for Crumes's current claims as well, the factual background provided in that opinion follows.

> [Sixteen-year-old] Mikel Crumes, was indicted in Kenton County as a youthful offender along with fifteen[-]year-old Tromonte Rice for the robbery and murder of fifteen[-]year-old Dre'Shawn Hammond and tampering with physical evidence in June 2011. Prior to Crumes's trial, Rice entered a guilty plea and agreed to testify against Crumes. Though Crumes was a juvenile, he was found to be a youthful offender and was therefore tried as an adult.
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> At trial, Rice testified that on the day of the murder Crumes contacted him via phone and text message asking if Rice wanted to "hit a lick" and if he had a "hammer." Rice testified that he understood the phrase "hit a lick" as asking him if he wanted to

[1] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

[2] Crumes's claim on direct appeal was that the trial court erred by not granting a directed verdict on the murder and robbery charges. The grounds for the directed verdict motions were the only witness testifying against him admitted lying to investigators prior to his testimony at trial and the cell phone evidence that placed him at the crime scene was not definitive.

make some money or rob someone, and that "hammer" was slang for gun. He testified that after he was contacted by Crumes, he obtained a gun from a man he was staying with at the time of the crime. Rice stated he told Crumes he had gotten a gun, and the two boys made plans to meet up later that afternoon.

After an initial meet-up at a local convenience store, Rice, Crumes, and a few other boys decided to go to the area of Latonia Terrace near Covington. At some time during this initial meeting, Rice testified that he had shown Crumes the gun and that Crumes had told him he intended to rob the victim, Dre'Shawn Hammond.

Rice then testified that he and Crumes, as part of a larger group of youths that included Hammond, met up to play basketball and had hung out behind Hammond's home that afternoon. Rice stated that he and Crumes had discussed trying to sell the gun to Hammond as a ruse to see how much money he had in his possession.

After this discussion, Rice testified that he went inside the Hammonds' home to use the restroom, and while inside, had approached Hammond about the possibility of purchasing the gun. He stated that he showed Hammond the gun and told him he would take $300 for it, but that Hammond had said that was too much to pay, and Rice had gone back outside. Shortly after this, Crumes, Rice, and Hammond decided to go to the City Heights neighborhood to find a dice game.

The boys took a wooded trail up a hill to City Heights. On the way, Hammond asked to see the gun to make sure it worked. Rice testified that Crumes took the gun from him and fired it into the air to show Hammond that it worked, and that Crumes had kept the gun after that time. Upon arriving in City Heights, Rice testified that the boys split up—Crumes and Hammond had gone to a nearby convenience store and Rice had gone to find a dice game. Crumes and the victim later found Rice and joined in the dice game for a time before going back to the convenience store. Video surveillance footage shows Crumes and Hammond at the store at both 9:20 p.m. and again at 10:16 p.m.

The group of boys met back up and were returning home on another wooded trail when the murder occurred. Rice testified that as they walked down the trail, Crumes pulled out the gun, pointed it at Hammond, and demanded that Hammond give him everything he had. Hammond, according to Rice, turned around to look at Crumes and then turned back around, as if to ignore him,

and continued walking down the trail. Crumes then shot Hammond in the back. After he fell, Rice testified Crumes shot Hammond several more times. Rice removed $180 and a cell phone from Hammond's pocket. He testified that he turned off the cell phone and threw it into the woods near the trail and split the money with Crumes. The boys walked together for a distance before going their separate ways.

On cross-examination, Rice admitted telling a different story to police—namely that he had found the gun, that he did not know anything about guns, that he had not touched the gun, and that he never had anything to do with the robbery and murder. However, he stated that his testimony at trial was the truth. The Commonwealth's proof also presented cell phone records showing that Crumes was in the vicinity of the crime scene near the time of the crime.

From the beginning, Crumes denied any involvement in the robbery and murder of the victim. In his defense, Crumes presented testimony from Stacy Patterson, a resident of the City Heights neighborhood who was familiar with Crumes. She testified that she saw Crumes getting into a sedan for a ride at approximately 10:30 p.m. This testimony was followed by testimony from two of Crumes's aunts, Marilyn Thompson and Michelle Thompson, placing him at their homes between 11:05 p.m. and 11:25 p.m. Crumes also elicited testimony that while phone records showed that his cell phone "pinged" through a cell phone tower close to the crime scene, there were three towers in the area and that a call will go to the tower where there is the strongest signal, not necessarily the closest tower. DNA, gunshot residue, and footprint testing were performed, but no match was found. The totality of Crumes's proof was that he could not have committed the murder and robbery because he was not present when the crime occurred.

At the close of the Commonwealth's case and again at the close of all evidence, Crumes moved for a directed verdict of acquittal on all charges. The court granted the motion on the charge of tampering with physical evidence. The remaining counts proceeded to the jury.

Despite testimony offered by the defense, the jury found Crumes guilty, and he was sentenced to 30 years in prison.

2013 WL 6730044, at *1-2.[3]

In 2014, Crumes moved the trial court to vacate or set aside his conviction and to grant a new trial. The basis of his CR 60.02 motion was Rice's recantation of his trial testimony. The basis of his RCr 11.42 motion was his trial counsel's ineffective assistance, specifically his failure to challenge through a *Daubert* hearing the admissibility of the cell phone evidence indicating the location of Crumes's phone at the time of the robbery and murder. The trial court denied the CR 60.02 motion, finding Rice's new testimony declaring Crumes's innocence not credible and the other evidence at trial sufficient to support the jury's verdict even without Rice's testimony.[4] The trial court also denied the RCr 11.42 motion for reasons including: the testimony of the telephone company representative was based on his specialized knowledge in the field but not on the type of scientific evidence generally requiring a *Daubert* hearing; and the admissibility of witness testimony is an issue that could have been raised on direct appeal and is not the proper subject for an RCr 11.42 motion. In another RCr 11.42 related motion, the trial court denied Crumes's request for raw data pertaining to the cell site testimony; Crumes sought this data to assess whether trial counsel was ineffective by failing to request the data himself.

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[3] Crumes's name replaces the original use of "Appellant." Brackets are not used to indicate the alteration.

[4] In *Curtis v. Commonwealth*, 474 S.W.2d 394, 396 (Ky. 1971), this Court stated that the trial court is not excluded from denying a new trial based upon "the fact that there is no probability that the result of the trial would have been different without the recanted testimony."

As noted, the Court of Appeals was persuaded that Rice's recantation meant a new trial was necessary, finding in effect that the trial court abused its discretion[5] by denying Crumes's CR 60.02 motion. The Court of Appeals then disposed of the RCr 11.42 claim by concluding Crumes is entitled to access the raw cell phone data in preparation for his new trial.

Other facts pertinent to Crumes's claims of error are set forth below.

ANALYSIS

The Court of Appeals addressed Crumes's CR 60.02 motion first and consequently did not decide whether the trial court erred by denying the RCr 11.42 motion. We have long held that a CR 60.02 claim is an avenue for relief not available by direct appeal or by RCr 11.42, and that the post-conviction structure is "not haphazard and overlapping." *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983) (CR 60.02, providing the extraordinary grounds for which a court may relieve a party from its final judgment, "is for relief that is not available by direct appeal and not available under RCr 11.42."). Given that RCr 11.42 claims are addressed first, i.e., before CR 60.02 motions, in our post-conviction review process, we begin our analysis with the RCr 11.42 claim.[6]

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[5] A trial court abuses its discretion when its decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

[6] Given the procedural posture of this case, one of Crumes's requests is for this Court to rule on the merits of the RCr 11.42 claim, rather than remanding it to the Court of Appeals for a decision on the merits.

I. The RCr 11.42 Claims

Crumes presents two RCr 11.42 related claims. First, he asserts that his trial counsel was ineffective by failing to challenge the scientific reliability of the historical cell site analysis (cell site analysis) introduced by the Commonwealth's expert to show Crumes was in the vicinity at the time of the crimes. Second, he maintains the trial court erred by denying discovery needed to support another potential RCr 11.42 ineffective assistance of counsel claim.

A. Prejudice Due to Trial Counsel Not Requesting a *Daubert* Hearing Was Not Shown

The foundation of Crumes's initial ineffective assistance of counsel claim is the admissibility of expert testimony under Kentucky Rule of Evidence (KRE) 702.

KRE 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if:
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> (1) The testimony is based upon sufficient facts or data;
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> (2) The testimony is the product of reliable principle and methods;
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> and
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> (3) The witness has applied the principles and methods reliably to the facts of the case.

KRE 702 reflects *Daubert*'s guidance to the trial court when deciding whether certain expert testimony may be entered into evidence. *Holbrook v. Commonwealth*, 525 S.W.3d 73, 78 (Ky. 2017). Plainly, the rule's objective is to ensure the reliability and relevancy of expert testimony. Thus, when a litigant invokes KRE 702, the trial court must determine that the expert testimony at issue rests on a reliable foundation before allowing its admission. *Futrell v. Commonwealth*, 471 S.W.3d 258, 282 (Ky. 2015) (quoting *Daubert*, 509 U.S. at 597).

To succeed on an RCr 11.42 ineffective assistance of counsel claim, a defendant must show that his counsel performed deficiently and that he suffered prejudice as a result. *Gall v. Commonwealth*, 702 S.W.2d 37, 39 (Ky. 1985) (adopting the ineffective assistance of counsel analysis pronounced in *Strickland v. Washington*, 466 U.S. 668 (1984)). Upon review, when judging counsel's deficiency, the inquiry is whether "counsel's representation fell below an objective standard of reasonableness," *Strickland*, 466 U.S. at 688, while "indulg[ing] a strong presumption that counsel's conduct [fell] within the wide range of professional assistance," *id.* at 689. In terms of prejudice, "[t]he defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." *Haight v. Commonwealth*, 41 S.W.3d 436, 441 (Ky. 2001) (quoting *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992)).

In this case, Crumes argues that his trial counsel was deficient because he failed to move for a *Daubert* hearing as to the admissibility of the Commonwealth's expert witness testimony describing the cell site analysis. He argues particularly that trial counsel's failure to file a *Daubert* motion was deficient assistance of counsel because the cell site evidence was the only evidence against him, other than Rice's testimony. He asserts that if his counsel had created a record as to the scientific reliability of the cell site evidence that the result of the trial would have been different.

Addressing the RCr 11.42 motion, the trial court—the same judge who had presided at trial—reviewed the expert witness's testimony and the exhibits introduced through his testimony. The Commonwealth's expert, a representative of Cincinnati Bell, described the cell phone data collected, including the tower through which a call is made. The witness described the location of three towers on which the relevant calls "pinged" and further explained the technique and limitations for identifying the cell phone location at the time of the call. He explained how a call searches for the strongest signal among the antennae of nearby towers and a call will route through the tower with the strongest signal so if the closest tower is busy or behind something that weakens its signal the call will go to the next tower. Furthermore, multiple "pings" on the same tower indicate a phone is more likely closest to that tower.

The trial court concluded that a hearing was not required for the expert witness's testimony, his testimony not being based on the type of scientific

evidence generally requiring a *Daubert* hearing.[7] *See* RCr 11.42(5). Consequently, the trial court denied the *Daubert*-based RCr 11.42 motion because Crumes failed to demonstrate that his counsel was ineffective. Finding that Crumes clearly failed to show prejudice, our review leads to the same conclusion. *See Strickland*, 466 U.S. at 697 (explaining that the defendant's failure to meet one part of the *Strickland* test precludes the necessity to analyze whether the second part is met).

While this Court has yet to render a decision that directly holds that a trial court may take judicial notice of the reliability of cell site analysis and need not hold a *Daubert* hearing, *see Florence v. Commonwealth*, 120 S.W.3d 699, 702 (Ky. 2003); *Johnson v. Commonwealth,* 12 S.W.3d 258, 262 (Ky. 1999),[8] we rendered *Holbrook* a few days after the trial court entered its August

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[7] The trial court's sentiment is akin to that of the *Holbrook* trial court. In *Holbrook*, after hearing pretrial proffered testimony similar to that presented by the expert at Crumes's trial, the trial court found that:

> [Special Agent Horan's] testimony is based upon the technology and analysis system which is the industry standard. His methods of analysis have been repeatedly utilized with success and were developed by and taught by industry members. His testimony is reliable, relevant, and of assistance to the trier of fact. Without question, the concerns which drive a *Daubert* analysis do not exist herein. This is not 'junk science' or 'junk technology' for this is the methodology of the industry itself. More importantly, this is not some technique devised by [Special] Agent Horan that is untested and unacknowledged. [Special] Agent Horan is simply interpreting that which was created by the industry using the guides the industry gave him to use in interpretation.

525 S.W.3d at 80.

[8] Not all KRE 702 motions require a hearing. *Johnson*, 12 S.W.3d at 262. "[T]rial judges in Kentucky can take judicial notice [of] those methods or techniques [that] have achieved the status of scientific reliability" by an appropriate appellate court. *Id*. Trial judges have discretionary authority "to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly

2017 order denying Crumes's motion. *Holbrook*, finding guidance in *United States v. Hill*, 818 F.3d 289 (7th Cir. 2016),[9] addressed the reliability of cell site analysis for showing the general area that a cell phone was in when a call was made. *Hill* explains that the cell site "science is well understood" and cell site analysis "has been subjected to publication and peer criticism, if not peer review," and that federal "[d]istrict courts that have been called upon to decide whether to admit historical cell-site analysis have almost universally done so." 818 F.3d at 297-98 (citations omitted).

In *Holbrook*, the defendant moved pretrial to exclude the Commonwealth's expert testimony about analysis of historical cell phone and cell tower records, alleging that the expert's conclusions were scientifically unreliable. 525 S.W.3d at 78. Because the historical cell site analysis is currently only reliable for showing the general area that a cell phone was in and not reliable to prove the location of a cell phone, this Court stated agreement with *Hill* that caution is warranted particularly when introducing "the level of precision—or imprecision—with which that particular evidence pinpoints a person's location at a given time." *Id.* at 82 (quoting *Hill*, 818 F.3d at 299). "The admission of historical cell-site evidence that overpromises on the technique's precision—or fails to account adequately for its potential

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taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

[9] Although Holbrook cited *United States v. Reynolds*, 626 Fed. Appx. 610 (6th Cir. 2015), in support of his argument that the expert's testimony was not reliable, we found *Reynolds* inapposite.

flaws—may well be an abuse of discretion." *Hill*, 818 F.3d at 299. Because the expert in *Holbrook* explained the limitations of the scientific techniques he employed and did not assert the callers were at a fixed location, we concluded the trial court did not abuse its discretion in allowing the jury to hear the relevant evidence from which the jury could infer the defendant was near the victim at the time the victim disappeared. 525 S.W.3d at 82.

Like in *Holbrook*, the expert testimony presented at Crumes's trial described the limitations of the cell site analysis, and the jury was left to weigh the testimony as proof of Crumes's guilt. While the trial court directed its analysis more toward *Strickland*'s deficiency prong, and while *Holbrook* offers support for a finding that trial counsel was not deficient in not asking for a *Daubert* hearing, rather than evaluating whether counsel was deficient, our decision rests on the easily reached conclusion that *Strickland*'s second prong was not met. Simply put, Crumes failed to show he was prejudiced by the lack of a *Daubert* hearing.

Crumes argues that his claim of ineffective assistance of counsel cannot be resolved by looking at the record alone because the record simply reflects that the Commonwealth had an expert and that expert testified in such a way as to impeach Crumes's defense that he was not present at the murder. Crumes complains that without an evidentiary hearing, the trial court did not know what the testimony of a defense expert would have been, had one been retained, because the expert that was prepared to offer that testimony in a post-conviction hearing was never provided the raw data (through a post-

conviction motion) that he needed to conduct his analysis. However, these arguments divert attention from the essence of Crumes's RCr 11.42 motion—that had his trial counsel filed a *Daubert* motion, the trial court would have excluded the Cincinnati Bell witness's testimony as unreliable and the jury would not have found him guilty based upon Rice's testimony and any other evidence offered by the Commonwealth.

Although discussion of other precedent directly addressing the admissibility of cell site testimony does not appear to be part of this record, as we noted in *Holbrook*, a number of state and federal courts have admitted just this type of evidence. 525 S.W.3d at 78-82. "Historical cell-site analysis can show with sufficient reliability that a phone was in a general area, especially in a well-populated one. It shows the cell sites with which the person's cell phone connected, and the science is well understood." *Hill*, 818 F.3d at 298 (citing *United States v. Evans*, 892 F. Supp. 2d 949, 956 (N.D. Ill. 2012) (noting that methods of "historical cell site analysis can be and have been tested by scientists")).

Beginning with the filing of his RCr 11.42 motion,[10] it was incumbent upon Crumes to state facts in support of the motion that would cast doubt on the scientific process employed by the expert witness in this case.[11] That

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[10] When filing an RCr 11.42 motion, the defendant has the burden, along with stating specifically the grounds on which his conviction is being challenged, of stating the facts he relies on to support such grounds. RCr 11.42(2). Failure to comply with these requirements warrants a summary dismissal of the motion. *Id.*

[11] When Crumes renewed his motion asking the trial court to require the Commonwealth to provide or allow Crumes to obtain certain cell phone and computer forensic documents, he submitted a letter prepared by an expert to support the need

burden of casting doubt on the scientific process (and thereby illustrating that a *Daubert* hearing was necessary for Crumes to receive effective assistance of trial counsel) did not change when the trial court was considering the motion and reviewing the record. Yet, Crumes did not offer the trial court anything of substance to show why or how his *Daubert* challenge would have been successful. Crumes does not identify any error in the technique used by the Commonwealth's expert. *See, e.g., Evans*, 892 F. Supp. 2d at 956-57 (holding that testimony based upon granulation theory as means to pinpoint precise location of a cell phone was not admissible, observing that in contrast to other methods of historical cell site analysis, the theory was untested by the scientific community). Without any statement of facts or some other support that the Commonwealth's expert testimony was inadmissible because the science upon which it was based is unreliable, Crumes failed to establish that even if his trial counsel had requested a *Daubert* hearing, the cell site testimony would have been inadmissible. Conclusory allegations do not suffice to prove a claim of ineffective assistance of counsel. *See Sanborn v. Commonwealth*, 975 S.W.2d 905, 909 (Ky. 1998). Speculation about the nature and substance of an opposing expert's testimony is not sufficient to support a finding of prejudice.

Based on the record before us, which demonstrates that Crumes has not satisfied his RCr 11.42 burden of proof, we cannot find a reasonable

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for the raw data. Although the letter was offered in support of the discovery motion, we observe the expert did not express any negative opinion of the science behind the cell site analysis.

probability of a different outcome in this case had his trial counsel moved for a *Daubert* hearing. *Commonwealth v. McGorman*, 489 S.W.3d 731, 740 (Ky. 2016). Without a showing that trial counsel's performance was ineffective, we must conclude the trial court did not err by denying Crumes's RCr 11.42 motion or an evidentiary hearing on that motion. More specifically, without the prejudice that is necessary to establish ineffective assistance of counsel, a new trial is unwarranted under his RCr 11.42 claim.

Given the rising importance of cell site analysis as evidence in trials across the Commonwealth, we emphasize some salient points. First, the Commonwealth's expert testified as to the limits of the historical cell site analysis and thus the jury was aware that the cell phone records did not establish Crumes's exact location. As a result, the concern expressed in *Holbrook* as to cell site analysis being portrayed as more precise and exacting than it actually is did not arise in this case. Next, although the cell site analysis could not pinpoint Crumes's exact location at the time his cell phone was in use, the analysis was properly admitted, allowing the jury to infer (if it so chose) that Crumes was near the scene at the time the crimes were committed.

B. The Trial Court Did Not Err by Denying the Discovery Motion

Crumes also claims the trial court erred by denying further discovery which he requested to support another RCr 11.42 claim.[12] After filing his

[12] Crumes states in his brief that his trial counsel was also ineffective by failing to obtain the cell site raw data in order to have his own expert review the data, which

Daubert-based RCr 11.42 motion, Crumes moved the trial court to require the Commonwealth to provide or allow Crumes to obtain certain cell phone and computer forensic documents. Crumes described the documents as necessary for his post-conviction expert to investigate the cell phone evidence admitted at his trial and to adequately present his RCr 11.42 claims. In the initial hearing of the motion his post-conviction counsel described his RCr 11.42 claim as including the fact that his trial counsel did not hire an expert to investigate whether the cell phone could be further pinpointed and therefore bolster Crumes's defense. The trial court denied the motion. When Crumes renewed the motion, he submitted a letter prepared by an expert, a forensic computer service professional, to support the need for raw data. The expert identified the data required to map/track a cellular phone's movement, to show towers and antenna faces on a map and to perform any type of analysis on the calls, texts and data usage for a cellular phone.

Crumes describes the raw data as necessary for his post-conviction expert to undertake the same analysis done by the Cincinnati Bell representative who testified on behalf of the Commonwealth. Crumes explains that the data is needed for his expert to test the veracity of the Commonwealth's expert's testimony. Citing *Gilliam v. Commonwealth*, 652 S.W.2d 856, 858 (Ky. 1983), and *Foley v. Commonwealth*, 17 S.W.3d 878, 889

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could potentially exculpate him. The issue of whether trial counsel was ineffective because of failing to obtain raw data was not decided by the trial court, the trial court denying Crumes's motion to obtain data he felt might support that potential ineffective assistance of counsel claim.

(Ky. 2000), the trial court denied Crumes's motion for additional records, finding nothing to support the grant of the motion under RCr 11.42, the purpose of the rule being to provide a forum for known grievances.

While recognizing Kentucky precedent generally establishes a defendant has no entitlement to discovery in a post-conviction proceeding, Crumes points this Court to changes in the statutory framework for post-conviction DNA testing through Kentucky Revised Statute (KRS) 422.285. He cites this statute to support what he views as a like, fair, change to post-conviction discovery of other scientific evidence that might demonstrate a reasonable certainty that a defendant would not have been convicted. Crumes asserts that like DNA, in the right case with the right set of facts, cell phone tower location data can provide an absolute answer to someone's guilt or innocence by placing the defendant, with an appropriate degree of certainty, far from the site of the crime at the time that it was committed. Taking into account Rice's recantation, he posits that upon a successful challenge of the cell phone location testimony, he would meet the standard post-conviction test to have his conviction vacated. Crumes insists that to prevent a transgression against the principle of fundamental fairness that innocent men should not be imprisoned, limited post-conviction discovery must be ordered in his case.

Given the context of Crumes's motion, we are not persuaded by his arguments that his is a case in which the requested discovery is warranted. The RCr 11.42 proceeding is fashioned to respect finality of judgments, *see Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968), while giving a

defendant "the opportunity to demand that a court vacate a judgment when constitutional rights have been abridged or fundamental procedural fairness has not obtained," *Case v. Commonwealth*, 467 S.W.2d 367, 368 (Ky. 1971) (citations omitted). In terms of the unsupported scientific arguments Crumes offers for distinguishing his motion from perhaps the usual post-conviction discovery motion, the preceding discussion addressing the limitation of cell site analysis demonstrates that, at least currently, the two techniques are not comparable in the way Crumes suggests, but even if the cell site analysis could better identify a caller's location, the movant maintains the evidentiary burdens under RCr 11.42. Much like the requirements for an RCr 11.42 motion itself, the trial court properly expected a factual basis to support the motion for raw data, which would then support a viable RCr 11.42 claim. Although Crumes states he now wants to check the veracity of the Commonwealth's expert testimony and particularly determine whether the cell phone location could be further pinpointed, Crumes's motion failed to provide specific allegations showing reason to believe that the requested discovery would produce information supporting an ineffective assistance of counsel claim. Neither precedent nor the fundamental fairness required by due process entitled him to discovery he sought and thus we conclude the trial court did not abuse its discretion by denying Crumes's request for discovery.

II. The CR 60.02 Motion[13]

Rice's first recantation came about through letters to his brother, Romello, who is Crumes's friend and, at least at that time, was imprisoned in the same facility as Crumes. The affidavit Rice provided October 3, 2014 stated:

> I am giving this statement of my own free will to tell the truth about what happened. Another person was with me, and he shot Dre'Shawn Hammond. Mikel Crumes did not shoot Hammond. The other person threatened me that if I told he would do to me what he did to Hammond.
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> After leaving the dice game, Crumes left, and I and this other person followed Hammond down the trail. We caught up with Hammond and the other person told Hammond to give him his possessions. Hammond turned around quickly as if to run and the other person shot him, first in back and then got on top of him and kept shooting.
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> The next day the other person threatened me again, said remember what I said. We had split the money, he gave me the

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[13] CR 60.02 states:

> On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.

Citing *Commonwealth v. Spaulding*, 991 S.W.2d 651, 657 (Ky. 1999), Crumes brought the motion under CR 60.02(f), alleging a denial of due process.

gun and Hammond's cell phone and said to get rid of them. I threw the phone in the woods and the gun in the river.

At the time of the trial I still felt threatened, is why I testified the Mikel Crumes had committed the murder, but he had not.[14]

The hearing to determine the voluntariness of the affidavit and to take other testimony regarding Crumes's motion on newly discovered evidence pursuant to CR 60.02 was held May 21, 2015. Rice invoked his rights under the Fifth Amendment and did not testify at the hearing. After Rice was resentenced as an adult, was granted probation, and subsequently had his probation revoked, he submitted a second affidavit on September 29, 2016.[15] Rice stated that "Crumes had nothing to do with the murder of Dre'Shawn Hammond" and that "Crumes was not there and had nothing to do with that crime at any time. The testimony that I am writing is on my own free will and is 100% true and accurate the testimony that I gave back in 2012 is false and inaccurate."[16]

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[14] The Department of Public Advocacy (DPA) represented Crumes in all post-conviction matters and was representing Crumes on an appeal on shock probation when Rice's recantation affidavit was secured. The affidavit was procured after Crumes's mother hired a private attorney and informed the attorney Rice would like to speak with him. Rice was incarcerated in a juvenile detention center at the time. Rice did not have counsel present during this October 2014 meeting although Rice was then represented by DPA; DPA did not have notice of the interview. Crumes's private counsel filed the motion to vacate judgment and grant a new trial in December 2014. Soon thereafter, counsel with the Kentucky Innocence Project, Department of Public Advocacy was substituted to represent Crumes on the motion. The trial court held a number of hearings to determine if conflicts existed, if fraud existed, if ethical violations had occurred, and if evidentiary hearings were necessary to determine if the affidavit presented evidence that was "newly discovered" or "perjured."

[15] This affidavit, written and signed by Rice, was obtained by DPA.

[16] Although this affidavit is prepared on a DPA form and provides that he was duly cautioned and sworn, the affidavit filed in the record is not notarized. The notice

The last hearing on the CR 60.02 motion was February 17, 2017. Rice testified at the hearing. He stated that Crumes was not at the scene of the crimes; that it was "Little E" who had the plan to rob Hammond; and that they were all at the dice game together, but that Crumes left before Rice. He testified that "Little E" and Hammond started down the trail and that it was "Little E" who pulled out a gun and shot and killed Hammond. In response to the Commonwealth's questioning, Rice stated that he was not scared to tell Crumes's counsel about "Little E"—counsel did not ask. Rice subsequently responded to the trial court that he told Crumes's counsel in October 2014 that it was "Little E" who shot Hammond.[17] Although "Little E" died in July 2014, neither the trial court nor the Commonwealth's attorney was informed of his death until the February 17, 2017 hearing.[18]

Reviewing the record in its entirety, the trial court denied Crumes's motion for relief under CR 60.02.[19] The trial court prepared a 109-page memorandum (exclusive of exhibits)[20] to accompany its order, summarizing testimony and evidence. The trial court identified testimony and evidence particularly relevant to its decision: the testimony of Rice at every stage of the

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of filing states that counsel for Crumes is in possession of an audio recording of an interview of Rice held at the Fayette County Detention Center that same day.

[17] Crumes's private counsel testified that he asked Rice who shot Hammond and he refused to tell him. The notary testified that Rice responded that he could not tell the shooter's name because the shooter threatened him.

[18] No one testified to knowing "Little E's" name. Rice testified that he heard "Little E" got "shot or something" in Cincinnati.

[19] The order also denied the RCr 11.42 relief.

[20] The memorandum is 142 pages with exhibits.

proceedings, the testimony of Rice's half-sister, India,[21] the statement and phone records of Crumes, the testimony of Kevin Smoot,[22] the apparent availability of witnesses to testify at a hearing who were not present for trial, the fact that a person by the name of "Little E" was known by defense prior to trial, and the time of "Little E's" death in the summer of 2014. The trial court concluded that Rice's new statements were not credible for reasons including: the statements were in direct contradiction to Rice's initial police interview and his trial testimony; the statements were made only after the person to whom the crimes were now attributed had died, making him an easy scapegoat; the statements did not have the detail of the earlier statements; and the statements were made only after contact with other persons having an interest in helping Crumes have his conviction overturned.

Contrary to Crumes's appellate argument that Rice's testimony was the only evidence linking Crumes to the murder, the trial court described other evidence implicating Crumes and concluded that evidence was sufficient on its own to support Crumes's conviction. The order denying Crumes's CR 60.02 motion states:

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[21] India testified at the evidentiary hearing that she is Rice's half-sister and the day after the murder, Rice told her that "Little E" was the real shooter. She testified she did not come forward during the trial because of her age, being a teenager. India also testified that she is close to Crumes and has called him, written letters, and visited him in prison 10-20 times.

[22] Smoot testified at trial that the night before the murder, through their dice game, Crumes learned that Hammond had about $1700. Smoot and Crumes exchanged texts the day of the murder. Based upon that exchange, Smoot testified that he understood Crumes to have a gun.

> Additionally, the evidence at trial consisted of far more than simply the testimony of [Rice] which has now been recanted. The credibility of . . . Rice was called into question at trial and the contradictions in his statements were pointed out. The evidence at trial included the testimony of other witnesses placing [Crumes] at the crime scene. The evidence also included text messages showing that [Crumes] had planned to rob the victim since hearing that he had $1,700 with him at a dice game the previous night and had only involved . . . Rice because it was believed he had access to a gun. There were cell phone records and surveillance video showing the location of [Crumes] at various times the evening of the crime which supported the Commonwealth's timeline of defendant's whereabouts on that evening. The court finds that there is ample evidence in the record to support the verdict of guilt even absent the testimony of [Rice].

The Court of Appeals found the truthfulness of Rice's recantation to be bolstered by the fact that he faced significant risk of harm to his own self-interest by recanting, such as perjury charges resulting in more time in prison. The appellate court further found that because "Little E" had died, Rice no longer had to fear "Little E's" retaliation against him for telling the truth. The Court of Appeals, while recognizing the stringent standard for granting a new trial, concluded that no other evidence established that Crumes was in the vicinity of the murder, Rice's recantation was very significant in the evidentiary scheme and the recantation presented newly discovered evidence sufficient to warrant a new trial. Concluding its CR 60.02 analysis of the recanted testimony, the appellate court stated that *Anderson*, 168 S.W.2d at 54, "articulated the test we are still bound to apply: whether there is a 'probability that the conviction would not have resulted if the truth had been revealed.'"

The Court of Appeals was persuaded that absent the original testimony of Rice, a different verdict could have reasonably resulted.[23]

The Commonwealth insists that the fundamental error in the Court of Appeals' decision is that court's finding that Rice's recantation was truthful. The Commonwealth argues that the Court of Appeals not only improperly substituted its judgment of the facts for that of the trial court concerning Crumes's CR 60.02 motion, but it also failed to identify how the trial court abused its discretion. Even before this Court, the Commonwealth notes Crumes continues to fail to identify how the trial court abused its discretion—an omission that the Commonwealth attributes to the fact that the trial court did **not** abuse its discretion by denying Rice's motion for a new trial.

Crumes, however, maintains that when considering the totality of the circumstances surrounding the trial testimony and the subsequent recantation, the Court of Appeals properly rejected the trial court's analysis and conclusion. He points particularly to the similarity of the stories told, except for the name of the perpetrator; the timing of the recantation; and the significant risk to Rice for recanting as weighing in favor of the truthfulness of

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[23] At least part of the basis for this conclusion seemingly resulted from the Court of Appeals' review of this Court's 2013 Opinion deciding Crumes's direct appeal. The Court of Appeals described this Court as "summariz[ing] a dual basis for sustaining Crumes's conviction: the testimony of Tromonte Rice and the cell tower data indicating that Crumes was in the vicinity of the murder. [And that although the Supreme Court] found the evidence to be sufficient, [the Court] noted that it was the only evidence supporting [Crumes's] conviction." While we disagree with the Court of Appeals' characterization of our 2013 Opinion describing Rice's testimony and the cell tower data as the **only** evidence supporting Crumes's conviction, we need not say more because it is not material to the disposition of this case.

the recantation. Crumes asserts that the Court of Appeals applied *Thacker*, 453 S.W.2d 566 (Ky. 1970), differently than the trial court.

While Crumes argues that the Court of Appeals reached the correct conclusion, he advocates for a less stringent rule than that expressed in *Thacker*, a rule he views as rejecting certain aspects of the standard "newly discovered evidence" test. He argues that the trial court's credibility assessment of recanted testimony should not be a key aspect of whether a new trial is granted. Although Crumes contends that the rule summarized in *Thacker* is different from the standard newly discovered evidence test, we do not discern a difference. A brief review of the newly discovered evidence rule and often-cited recanted testimony precedent is helpful. In reviewing our precedent, we reaffirm the trial court's role in determining the credibility of witnesses and the weight to be given the evidence and the deference an appellate court must afford the trial court if the determination is supported by competent, substantial evidence.

Our standard has long been that

> [t]o warrant the granting of a new trial on the ground of newly discovered evidence, it must appear (1) that the evidence is of such a decisive character as to render a different result reasonably certain [or stated another way, that the evidence is such as will probably change the result if a new trial is granted[24]]; (2) that it has been discovered since the trial; (3) that it could not have been discovered before the trial by the exercise of ordinary [due[25]] diligence; (4) that it is material to the issue, and (5) that it is not merely cumulative or impeaching.

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[24] *See Holliday v. Tennis Coal Co.*, 94 S.W.2d 657, 660 (Ky. 1936).

[25] *See id.*

See Howell v. Standard Oil Co., 28 S.W.2d 3, 5 (Ky. 1930) (citations omitted); *accord Ellis v. Commonwealth*, 143 S.W. 425, 430 (Ky. 1912). For many years, this standard has been applied to recanted testimony as well. *See Shepherd v. Commonwealth*, 101 S.W.2d 918, 920 (Ky. 1937);[26] *Anderson v. Buchanan*, 168 S.W.2d 48 (Ky. 1943).

Anderson, deciding a defendant could seek relief from conviction based upon perjured testimony through a writ of coram nobis–CR 60.02's predecessor,[27] articulates the purpose of extraordinary relief and reasons for the stringent newly discovered evidence standard for granting a new trial, particularly in the context of repudiated, recanted, or perjured testimony:

> We are deeply sensible of the need for ending litigation of every kind, particularly of criminal prosecutions, as early as is consistent with right, and that no one should be permitted to have de novo trial after trial ad infinitum; likewise, we realize that with little difficulty one whose life or liberty is at stake may fabricate evidence and call it newly discovered, or have a prosecuting witness repudiate his testimony and allege perjury in order to obtain a new trial or perhaps only a reprieve. . . . [While the writ of coram nobis is not available in some jurisdictions on the ground of newly discovered evidence or alleged false testimony, respecting the finality of the judgment, or the writ may be allowed if the evidence

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[26] The *Shepherd* Court stated:

> Ordinarily, a new trial will not be granted for newly discovered evidence impeaching in its nature or cumulative. Yet, when it seriously affects the testimony of the sole or all of the principal witnesses upon whose testimony it is manifest the conviction was had, and it is reasonably certain that had the evidence been heard, it would probably have induced a different conclusion by the jury, the recognized exception to the rule-always to be administered with caution-becomes operative. *Hensley v. Commonwealth*, 241 Ky. 367, 43 S.W.(2d) 996 [(Ky. 1931)]; *Elkins v. Commonwealth*, 245 Ky. 199, 53 S.W.(2d) 358 [(Ky. 1932)].

101 S.W.2d at 920.

[27] *See Harris v. Commonwealth*, 296 S.W.2d 700, 702 (Ky. 1956).

> demonstrates conclusively the judgment was wrong, we consider] the real purpose of the writ, which is to revest the court with jurisdiction in an extreme emergency and permit inquiry into the important question of whether the judgment of conviction should be vacated because the defendant was unknowingly deprived of a defense which would have probably disproved his guilt and prevented his conviction, and if that probability be established to grant the defendant a new trial of the accusation.

168 S.W.2d at 53 (internal citations omitted).

Pertinent to this case, *Anderson* also describes the trial court's role in judging whether the recanted testimony appears material to the issue. In regard to the trial court's credibility assessment, the *Anderson* Court concluded:

> [T]he court in which a conviction was had has discretion to grant the writ where it appears that but for **alleged false testimony or undiscovered evidence of such a conclusive character** that the verdict most probably would not have been rendered and there is strong probability of a miscarriage of justice unless the process be granted. **We 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**. It may be otherwise if the sole witness repudiates his testimony. It is to be emphasized also that obtaining the writ is not a matter of right but the granting of it is a matter of sound judicial discretion to be exercised upon a showing of reasonable certainty.
>
> The question of the guilt or innocence of the accused is not a necessary subject of the inquiry. **The question embraces the genuineness and good faith of the repudiation** or newly discovered evidence and the probability that the conviction would not have resulted if the truth had been revealed.

Id. at 53-54 (internal citations omitted) (emphasis added). In the context of recanted testimony, the materiality of the evidence rests upon the credibility of the recantation. A trial court's assessment of the credibility of the witness and

the testimony may be particular to recanted testimony but is nothing more than the trial court's evaluation of the quality of evidence relied upon by the motion for a new trial.

Thacker, decided in 1970, has since summarized the newly discovered evidence standard pertaining to recanted testimony, a summary which again highlights the trial court's role as the fact finder. The Court explained:

> [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. *See* Annotations 158 A.L.R. 1062; 74 A.L.R. 757; 33 A.L.R. 550.

453 S.W.2d at 568.

Comparing *Thacker*'s rule to the standard new evidence test, Crumes views *Thacker*'s statement that "[recanted] statements will form the basis for a new trial only when the court is satisfied of their truth" as the most problematic.[28] Crumes suggests that the rule asks the judge to decide the

[28] Crumes suggests the first rule, "recanting testimony is viewed with suspicion," should be qualified in that absent any evidence that the witness was pressured to recant or has another motive besides a desire to tell the truth, then a recantation should not be automatically suspect. Crumes suggests the third rule, "only in extraordinary and unusual circumstances will a new trial be granted because of recanting statements," would be better formulated as a statement that recanting testimony itself is both extraordinary and unusual because even in cases where it is the only evidence used to convict, it is exceedingly rare for the prosecuting witness to recant.

wrong question in a post-conviction proceeding. Without citing authority that the test has been construed as so limiting the trial court, Crumes insists that the test should allow the trial court to have some doubt about the veracity of the recantation, and yet defer to the judgment of the jury in a new trial. That, he says, is the standard test for newly discovered evidence which asks the judge to consider whether a juror might have found the new evidence compelling enough to sway their vote from conviction to acquittal.

Crumes contends *Anderson* applies the correct test—whether the introduction of the newly discovered evidence would have probably resulted in a different outcome at trial. *Anderson* does indeed express that.[29] Crumes's argument, however, overlooks *Anderson*'s directive that the trial court first consider the credibility of the recantation.[30] Comparing the two, *Anderson*'s statement of the newly discovered evidence test for recanted testimony is no different than that expressed in *Thacker*. Finding Crumes's criticisms of *Thacker* unfounded, we turn to whether the Court of Appeals erred.

As the Commonwealth observes, the Court of Appeals' decision to vacate the trial court's judgment and remand Crumes's case for a new trial rests

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[29] *Anderson* does not vary from *Shepherd*'s expression of the rule for granting a new trial based upon recanted or perjured testimony.

[30] *Spaulding* states that when dealing with perjured testimony "the burden remains on the defendant to show both that a reasonable certainty exists as to the falsity of the testimony and that the conviction probably would not have resulted had the truth been known before he can be entitled to [CR 60.029(f)] relief. 991 S.W.2d at 657. "[T]he test for whether perjured testimony entitles a defendant to a new trial, focuses on whether there is a probability that introduction of the truth 'would, with reasonable certainty, have changed the verdict or that it would probably change the result if a new trial should be granted.'" *Id.* (quoting *Jennings v. Commonwealth*, 380 S.W.2d 284, 286 (Ky. 1964)).

basically on its belief that the trial court erroneously found that Rice's recanted testimony was not credible. The Court of Appeals was persuaded that Rice's recanted testimony was truthful because he risked being charged with perjury and serving more time in prison and because Rice no longer had a reason to fear retaliation from "Little E" for telling the truth. However, an appellate court is only entitled to set aside the trial court's findings if those findings are clearly erroneous, that is, when the findings are not supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 353–54 (Ky. 2003).

The crucial question in assessing the CR 60.02 motion in this case is whether the new evidence showed Rice's original testimony to be false. The trial court, which personally observed Rice and other witnesses testify at trial and then Rice and other witnesses testify at the post-conviction hearing, expressly concluded that Rice's recanted testimony was not credible. As the trial court's memorandum and order reflects, along with observing the behavior of the witnesses on the stand, the trial court assessed the reasonableness and probability of their testimony; their candor or lack of candor; their interest and bias; and the circumstances surrounding their testimony. The trial court after carefully studying all the evidence answered the question whether the new evidence showed Rice's original testimony was false in the negative, and although not receiving attention in this appeal, also properly considered under the newly discovered evidence rule that "Little E" was known by Crumes at the

time of trial and yet Crumes failed to call him as a witness.[31] With these factual findings, the trial court applied the relevant precedent and concluded a new trial was not warranted.

Upon review, we conclude that the trial court's finding with regard to the credibility of Rice's recantation is supported by competent, substantial evidence; and we affirm its determination. The trial court did not reach its conclusion arbitrarily, unreasonably, unfairly, or without legal support. *English*, 993 S.W.2d at 945. The record shows clearly that the trial court gave Rice's original testimony and all post-conviction testimony careful consideration. We must conclude the Court of Appeals erred and improperly substituted its own factual finding that Rice's original trial testimony was false, and his post-conviction testimony was truthful. With the trial court's finding being supported by substantial evidence, we also affirm its legal conclusion that Rice's recanted testimony did not warrant a new trial.

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[31] In addition to finding Rice's recantation not credible, the trial court provided another reason for denying Crumes's motion:

> In their initial interviews with police, both [Crumes] and [Rice] referred to a "light skinned dude" being with the group on the night of the crime. [Rice's] testimony at trial included references to "Little E," whom he described as light skinned, being with [Crumes] and himself at the time the gun was transferred. The existence of "Little E" as a potential suspect or witness was known to the defense prior to trial and cannot be considered newly discovered evidence.

CONCLUSION

We affirm the trial court's decision to deny Crumes's RCr 11.42 and CR 60.02 motions for a new trial. Accordingly, the Court of Appeals' decision to vacate the trial court's order and remand this case for a new trial is reversed.

All sitting. All concur.

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