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NOT TO BE PUBLISHED

MODIFIED: OCTOBER 27, 2006; 10:00 A.M.

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

NO. 2004-CA-002183-MR

DWAYNE BRUCE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE  
ACTION NO. 96-CR-000344

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: SCHRODER AND TAYLOR, JUDGES; BUCKINGHAM,<sup>1</sup> SENIOR JUDGE.  
BUCKINGHAM, SENIOR JUDGE: Dwayne Bruce appeals from an order of  
the Jefferson Circuit Court denying his motion to vacate his  
convictions and sentences pursuant to CR<sup>2</sup> 60.02. We affirm.

A jury tried Bruce in late 1996 for sex crimes  
involving his adopted daughter. It convicted him of various  
offenses, and the court sentenced Bruce to 270 years in prison

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<sup>1</sup> Senior Judge David C. Buckingham sitting as Special Judge by assignment of  
the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution  
and KRS 21.580.

<sup>2</sup> Kentucky Rules of Civil Procedure.

in early 1997 pursuant to the jury's recommendation. The Kentucky Supreme Court affirmed his convictions and sentences on direct appeal. See 97-SC-85-MR.

In January 1999, Bruce filed a motion to vacate his convictions and sentences pursuant to RCr<sup>3</sup> 11.42. The trial court denied the motion without an evidentiary hearing, and this court affirmed the trial court's order. However, the Kentucky Supreme Court reversed and remanded to the trial court. See 2001-SC-0359-D. On remand, the trial court granted Bruce's motion in part and denied it in part. The effect of the court's order was that Bruce's sentence was reduced from 270 years to 250 years. That order is the subject of a separate appeal to this court.

In May 2004, Bruce filed a motion to vacate pursuant to CR 60.02. In an order entered on October 6, 2004, the trial court denied the motion. This appeal by Bruce followed.

Bruce's first argument is that the court erred in not granting his motion to vacate because the Commonwealth wrongly withheld a "confidential envelope" from him and his attorney and that the contents thereof should have been disclosed to him prior to trial. Apparently, there was a confidential envelope containing the victim's medical records that the Commonwealth filed of record four days before the trial. Bruce claims that

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<sup>3</sup> Kentucky Rules of Criminal Procedure.

neither he nor his attorney was made aware of it and that he did not discover its existence "until the Commonwealth tried to introduce it into the records during a prior proceeding [before this court]." <sup>4</sup>

Bruce argues that the envelope contained "newly discovered evidence". However, he does not demonstrate how the medical records might contain exculpatory evidence so as to possibly warrant relief. Because Bruce did not show how his lack of knowledge of the records prior to trial might have prejudiced his right to a fair trial, we conclude his argument in this regard is without merit.

Bruce's second argument is that the trial court erred in denying his motion because the Commonwealth "did indeed subordinate perjury when it characterized its chief witness as an expert, and allowed Detective Atkins to testify as an expert when the Commonwealth knew Detective Atkins had only been on assignment with the Child Abuse unit for approximately one (1) year prior to appearing before the Jefferson County grand jury[.]" Bruce asserts that the prosecutor in the grand jury proceeding mischaracterized Detective Atkins as an expert and allowed her to testify as to the victim's injuries. Bruce

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<sup>4</sup> Bruce is apparently referring to the initial appeal to this court of the trial court's denial of his RCr 11.42 motion.

claims that this action by the prosecutor amounted to a "knowing use of false evidence."

We reject Bruce's argument for several reasons. First, he has not demonstrated that the testimony of Detective Atkins was erroneous or false, even if she were not an expert qualified to testify as to medical condition. Second, CR 5.10 states that "no indictment shall be quashed or judgment of conviction reversed on the ground that there was not sufficient evidence before the grand jury to support the indictment." Third, Bruce has not cited any authority for the proposition that he is entitled to relief from a final judgment in a criminal case under CR 60.02 when the indictment might have been based on perjured testimony or hearsay evidence. Furthermore, we know of no authority to support that argument.

Bruce's third argument is that he was entitled to relief from the final judgment wherein he was convicted and sentenced because he was not made aware of the exact dates of the charged offenses until years after he was tried and convicted. Bruce asserts that had he been made aware of the exact dates of the alleged offenses, he would have been able to demonstrate to the jury that he was incarcerated on each of the dates and thus would have been able to prove his innocence.

We likewise reject this argument for several reasons. First, Bruce has not demonstrated that the indictment was

insufficient or invalid for lack of specificity. Second, Bruce had the opportunity to file a motion for a bill of particulars prior to trial. See RCr 6.22. Third, Bruce's attorney had the opportunity at trial to cross-examine witnesses and to introduce records or testimony as to the dates of Bruce's incarceration in defense of the charges. Fourth, this is an issue that Bruce could have raised on direct appeal. Thus, he was precluded from raising it in a CR 60.02 motion. See Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983).

For the aforementioned reasons, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Dwayne Bruce, *Pro Se*  
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
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