

RENDERED: May 5, 2006; 2:00 P.M.  
NOT TO BE PUBLISHED

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

NO. 2005-CA-000728-MR

TIMOTHY P. ASHWORTH

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT  
HONORABLE R. JEFFREY HINES, JUDGE  
INDICTMENT NO. 03-CR-00415

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: KNOFF AND TACKETT, JUDGES; HUDDLESTON, SENIOR JUDGE.<sup>1</sup>

HUDDLESTON, SENIOR JUDGE: Timothy Ashworth appeals *pro se* from the denial of his motion seeking post-conviction relief pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. Ashworth entered guilty pleas to charges of public intoxication, possession of a controlled substance (cocaine), possession of drug paraphernalia and to being a second-degree persistent felony offender. McCracken Circuit Court sentenced Ashworth to a total of seven years' imprisonment. Ashworth claims he is

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

entitled CR 60.02 relief because his plea was involuntary. His counsel, he says, rendered ineffective assistance when he failed to argue that the charges against him subjected him to double jeopardy.

Ashworth's argument is not properly preserved for appellate review. "A defendant cannot pursue one theory at the trial court level and another on the appellate review."<sup>2</sup> In his motion before the circuit court, Ashworth argued ineffective assistance of counsel relating to counsel's alleged mistake as to the availability of probation. He also argued that possession of drug paraphernalia is a lesser-included offense of possession of a controlled substance. Ashworth did not assert a double jeopardy violation in his motion to the circuit court.

Furthermore, Ashworth's CR 60.02 motion is his first request for post-conviction relief. *Gross v. Commonwealth*<sup>3</sup> teaches that a movant must first utilize Kentucky Rules of Criminal Procedure (RCr) 11.42 to "'state all grounds for holding the sentence invalid of which the movant has knowledge.'"<sup>4</sup> Thereafter, a movant may request extraordinary relief pursuant to CR 60.02, but may not rehash arguments that were or should have been raised on direct appeal or in an RCr

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<sup>2</sup> *Commonwealth v. Duke*, 750 S.W.2d 432, 433 (Ky. 1988).

<sup>3</sup> 648 S.W.2d 853 (Ky. 1983).

<sup>4</sup> *Id.* at 856 (quoting Ky. R. Crim. Proc (RCr) 11.42(3)).

11.42 motion.<sup>5</sup> Consequently, Ashworth's CR 60.02 claim is also procedurally improper.

Even if Ashworth's double jeopardy claim was properly before this Court, it is without merit. Ashworth specifically complains that his convictions for possession of a controlled substance and possession of drug paraphernalia are barred by double jeopardy. We evaluate Ashworth's claim under the well-settled test:

Double jeopardy does not occur when a person is charged with two crimes arising from the same course of conduct, as long as each statute 'requires proof of an additional fact which the other does not.'<sup>6</sup>

Possession of a controlled substance<sup>7</sup> requires knowing and unlawful possession of an actual substance proscribed by the statute. Conversely, possession of drug paraphernalia<sup>8</sup> only requires intentional possession of paraphernalia. Each statute requires proof of an element the other does not.

For the foregoing reasons, the order denying Ashworth's motion for CR 60.02 relief is affirmed.

ALL CONCUR.

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<sup>5</sup> *Id.*

<sup>6</sup> *Commonwealth v. Burge*, 947 S.W.2d 805, 809 (Ky. 1996), quoting *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306 (1932).

<sup>7</sup> Ky. Rev. Stat. (KRS) 218A.1415.

<sup>8</sup> KRS 218A.500.

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