

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2005-CA-001032-MR

CHARLES EDWARD PEAK

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE MARTIN F. MCDONALD, JUDGE  
ACTION NO. 92-CR-000006

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ABRAMSON AND VANMETER, JUDGES; BUCKINGHAM,<sup>1</sup> SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Charles Edward Peak appeals from an order of the Jefferson Circuit Court denying his CR<sup>2</sup> 60.02 motion to vacate his conviction and sentence for criminal offenses. We affirm.

As a result of an incident that occurred on November 16, 1981, Peak was charged with first-degree rape, first-degree burglary, second-degree assault, and being a first-degree

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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.

persistent felony offender (PFO). Following a jury trial in which he was found guilty of the offenses, Peak was sentenced to 20 years on the rape charge, enhanced to life by the PFO charge, 20 years on the burglary charge, enhanced to 40 years by the PFO charge, and 10 years on the assault charge, enhanced to 20 years by the PFO charge.

After being sentenced on the charges, Peak filed a direct appeal to the Kentucky Supreme Court. In an opinion rendered on July 5, 1984, the supreme court reversed Peak's conviction for second-degree assault and remanded the charge to the trial court for the dismissal of that charge. The court affirmed Peak's convictions and sentences for the other offenses. See 83-SC-229-MR.

In April 1991, Peak filed a motion to vacate, set aside, or correct his sentence pursuant to RCr<sup>3</sup> 11.42. In his motion, Peak raised several allegations of ineffective assistance of counsel. The trial court denied the motion. In an opinion rendered on August 28, 1992, this court affirmed the trial court's denial of Peak's motion. See 91-CA-1814-MR.

In July 2004, Peak filed a motion to vacate his conviction and sentence pursuant to CR 60.02. On April 27, 2005, the trial court entered an opinion and order denying the motion. This appeal by Peak followed.

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

Peak raises 12 arguments in his brief. The last 11 arguments involve matters that Peak could have raised on direct appeal. Therefore, he was precluded from raising those arguments in a CR 60.02 motion. See Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983). Only his first argument merits discussion.

Peak argues that the trial court should have granted him relief under CR 60.02 because the Commonwealth failed to disclose exculpatory evidence to him and his attorney before and during his trial and that he only recently became aware of such evidence. Dr. John Tomlinson was one of the five doctors who examined the victim at the hospital following the incident. In his report, Dr. Tomlinson stated that "(t)here was an attempted rape by her description." Peak states that he became aware of this information in 2004 after he was allowed for the first time to see unsealed portions of the trial record. Thus, he claims a Brady violation by the Commonwealth that warrants a new trial.

In rejecting Peak's argument, the trial court noted that Peak was represented by counsel at the trial level and that Dr. Tomlinson's report was a part of the trial record in the case. Citing Ringo v. Commonwealth, 455 S.W.2d 49 (Ky. 1979), the court here stated that "Peak's unsupported allegation that this information was not produced cannot contradict plain, unambiguous court records." We agree.

Further, the trial court rejected Peak's argument because it was a claim for relief pursuant to CR 60.02(f) that was not brought within a reasonable time as required by the rule. The facts are that Peak filed his motion 22 years after he was convicted and sentenced. "What constitutes a reasonable time in which to move to vacate a judgment under CR 60.02 is a matter that addresses itself to the discretion of the trial court." Gross, 648 S.W.2d at 858. We find no abuse of that discretion here.

Finally, the trial court cited Brown v. Commonwealth, 932 S.W.2d 359 (Ky. 1996), wherein the Kentucky Supreme Court stated that "relief should not be granted, pursuant to Rule 60.02(f), unless the new evidence, if presented originally, would have, with reasonably certainty, changed the result." Id. at 362. We agree with the trial court that had the evidence been presented to the jury (assuming it was not), there is no reasonable certainty that the result would have been different.<sup>4</sup>

The order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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<sup>4</sup> It is unclear to us whether the report of Dr. Tomlinson was introduced to the jury at the trial. In the record before us, there are copies of exhibits that contain the report.

BRIEF FOR APPELLANT:

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