

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-002076-MR

SHANE DEVER

APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT  
HONORABLE LARRY D. RAIKES, JUDGE  
ACTION NO. 95-CR-00012-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: THOMPSON, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.<sup>1</sup>

BUCKINGHAM, SENIOR JUDGE: Shane Dever appeals from an order of the Nelson Circuit Court denying his motion to vacate a conviction and sentence pursuant to Kentucky Rule of Civil Procedure (CR) 60.02. We affirm.

After having been indicted and having pled guilty pursuant to a plea agreement, the trial court sentenced Dever on November 11, 1996, to life in prison

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<sup>1</sup> Senior Judges David C. Buckingham and Michael L. Henry sitting as special judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

without the possibility of parole for 25 years for the crimes of Kidnapping (capital), Criminal Attempt to Commit Murder, and Receiving Stolen Property Over \$300. He did not file a direct appeal or any other post-conviction motion until January 23, 2006, when he filed the CR 60.02 motion that is the subject of this appeal.

As grounds for his motion, Dever states that at some point after being sentenced, he discovered while looking at his file that the court had ordered prior to his guilty plea that he undergo a psychiatric evaluation to determine his competency. He asserts, and the Commonwealth does not deny, that the evaluation never occurred. Thus, he claims that he is entitled to have his conviction and sentence vacated or is at least entitled to an evidentiary hearing on his motion “to flesh out what occurred between trial attorney and client regarding the client's competency.”

The trial court denied Dever's motion on the grounds that Dever is precluded from seeking relief under CR 60.02 because he could have sought such relief by direct appeal or under RCr 11.42 but failed to do so. The trial court cited *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983), and *McQueen v. Commonwealth*, 948 S.W.2d 415 (Ky. 1997), to support its order. Following the entry of the order denying the motion, this appeal by Dever followed.

We agree with the trial court that Dever is precluded from seeking relief under CR 60.02 because he could have sought relief by way of direct appeal or under RCr 11.42 but failed to do so. This is not a case of “newly discovered evidence” as Dever claims in his brief. Rather, the competency evaluation order has been a matter of

public record in Dever's file since it was first entered. The fact that Dever may have first noticed it after being sentenced does not establish a ground for relief based on “newly discovered evidence”.<sup>2</sup>

Dever also states that he “could also not have brought his action under RCr 11.42 because the remedy for failure to conduct a competency hearing was not available until the time on his RCr 11.42 already tolled.” Further, he states that “[t]he remedy for the failure to grant a competency hearing was not made available until 2001 when the Kentucky Supreme Court decided *Thompson v. Commonwealth*, 56 S.W.3d 406 (Ky. 1998), which became final in 2001.”

During the time following Dever's conviction and the expiration of the time within which he could have filed an RCr 11.42 motion, reversal of conviction was the relief granted to defendants due to a court's failure to hold a competency hearing. *See Hayden v. Commonwealth*, 563 S.W.2d 720, 723 (Ky. 1978). In the *Thompson* case, *Hayden* was overruled to the extent that reversal of the conviction was not required; rather, “a retrospective competency hearing is permissible depending on the facts of the case.” *Thompson*, 56 S.W.3d at 409. Therefore, Dever did have a remedy prior to *Thompson* and was not precluded from filing a direct appeal or an RCr 11.42 motion during that time.

Furthermore, the record in Dever's case reveals that the Commonwealth had requested the order for a competency evaluation based on the fact that Dever's attorney

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<sup>2</sup> Dever does not state in his brief when he first discovered the competency evaluation order. He states only that he discovered it “at some point later”.

had filed a notice that he intended to rely on the defense of mental illness at trial. There was no indication that the trial court had any doubt concerning Dever's competency when he pled guilty.

These facts are similar to those in *Mills v. Commonwealth*, 996 S.W.2d 473 (Ky. 1999). Therein, the Kentucky Supreme Court found it to be harmless error when the court sentenced the defendant without providing a competency hearing where a competency evaluation order had been entered because the defendant himself had raised the defense of mental illness. *Id.* at 486. Likewise, we conclude that any error in this regard in this case was harmless.

The order of the Nelson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Ken W. Riggs  
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