

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-002330-MR

ROBERT STAMPER

APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT  
HONORABLE WILLIAM ENGLE, III, JUDGE  
ACTION NO. 86-CR-00031

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; ACREE, JUDGE; HENRY,<sup>1</sup> SENIOR JUDGE.

HENRY, SENIOR JUDGE: Robert Stamper was convicted of murder and sentenced to serve forty years' imprisonment. That conviction was affirmed by the Kentucky Supreme Court in an unpublished memorandum opinion of the Court. *Stamper v. Commonwealth*, 88-SC-000261-MR (Ky. Rendered June 29, 1989). Stamper then sought post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. We affirmed the

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

trial court's denial of that requested relief in an unpublished opinion. *Stamper v. Commonwealth*, 91-CA-000734-MR (Ky.App. Rendered January 22, 1993). Stamper later filed a motion pursuant to Kentucky Rules of Civil Procedure (CR) 60.02 alleging that inaccurate parole eligibility information presented to the jury required a new trial. The trial court denied relief, and we affirmed that decision in an unpublished opinion. *Stamper v. Commonwealth*, 2000-CA-000950-MR (Ky.App. Rendered December 7, 2001).

Stamper then filed this successive CR 60.02 motion, alleging that the trial court erred when it declined to instruct the jury on the potential defenses of extreme emotional disturbance, voluntary intoxication, and a lesser-included offense, manslaughter. The trial court again denied relief and appointed the Department of Public Advocacy to represent Stamper in an appeal. After a review of the record, the Department of Public Advocacy moved to be relieved from the case, indicating that the appeal was “not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense.” KRS 31.110(2)(c). The trial court granted that request and Stamper has proceeded with this appeal *pro se*.

Stamper brings two issues to our attention on appeal. First, he alleges that the trial court abused its discretion when it denied him an evidentiary hearing; and second, he claims that the denial of the requested CR 60.02 relief was an additional abuse of discretion. We find no error and affirm the decision of the trial court.

The relief afforded by CR 60.02 is an extraordinary remedy. *Wilson v. Commonwealth*, 403 S.W.2d 710, 712 (Ky. 1966). A trial court's ruling on a CR 60.02 motion is entitled to great deference on appeal, and we will only overturn such decisions on a showing of an abuse of discretion. *Barnett v. Commonwealth*, 979 S.W.2d 98, 102 (Ky. 1998). Our review of the record indicates that a hearing was held on the motion. Stamper argues both that no hearing was conducted at all and that the hearing was short and superficial. The record refutes both characterizations.

The court's order from which this appeal is taken indicates that a hearing was held on October 4, 2006. There is nothing in the record to rebut that fact. At the hearing, arguments and evidence were presented for the court's consideration. The hearing lasted almost thirty minutes. Stamper had the opportunity to present arguments and to call any witnesses he chose. He elected to rest on the arguments and documents presented to the trial court. We cannot find an abuse of discretion for failure to conduct a hearing when in fact an ample hearing was conducted. There was no error in this regard.

Stamper next argues that he was entitled to relief because of a failure of the trial court to present lesser-included instructions to the jury. Specifically, he argues that, given the facts of the case, the court erred by refusing to give instructions on first-degree manslaughter and the defenses of extreme emotional disturbance and voluntary intoxication.

The issue related to first-degree manslaughter was presented to the Supreme Court in the original direct appeal of Stamper's conviction. The Court found that there

was “no evidence to support a lesser-included offense of manslaughter.” *Stamper v. Commonwealth*, 88-SC-000261-MR (Ky. Rendered June 29, 1989). Civil Rule 60.02 is not intended as an opportunity to relitigate issues which either were, or which reasonably could have been decided by direct appeal or in an RCr 11.42 proceeding. *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). The Kentucky Supreme Court decided the issue and we may not re-examine it.

CR 60.02 “is meant to provide relief which is not available by direct appeal or under RCr 11.42.” *Barnett*, 979 S.W.2d at 101. Here, the issue of instructions regarding extreme emotional distress or voluntary intoxication could have been raised in the original appeal to the Supreme Court. It was not. It could have been raised in the subsequent RCr 11.42 proceeding by alleging that counsel was deficient in failing to request those instructions. Again, the issue was not raised. It could have been presented in Stamper's initial request for relief pursuant to CR 60.02. Again, the record is silent as to these instructions.

If there was indeed error regarding an instruction for extreme emotional distress or voluntary intoxication, it could have or should have been uncovered prior to the current CR 60.02 motion. *See Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983). We will not at this late date address the issue of erroneous instructions by way of a CR 60.02 motion.

The trial court did not abuse its discretion by declining to instruct the jury on the defenses of extreme emotional distress or voluntary intoxication or on the offense

of manslaughter. A subsequent motion pursuant to CR 60.02 is not the appropriate time to raise these issues.

Our review of the facts and record in this case indicates that the trial court conducted an evidentiary hearing. Stamper received a just determination of his request for relief. The trial court did not abuse its discretion in any form. There was no error. The decision of the Perry Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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