

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

NO. 2007-CA-000329-MR

GREGORY W. CHIPMAN

APPELLANT

v.

APPEAL FROM GRANT CIRCUIT COURT  
HONORABLE STEPHEN L. BATES, JUDGE  
ACTION NO. 99-CR-00079

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: STUMBO AND WINE, JUDGES; GUIDUGLI,<sup>1</sup> SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: Gregory W. Chipman appeals the order of the Grant Circuit Court denying his CR 61.02 and RCr. 10.26 motion to vacate his conviction. Having thoroughly reviewed the record and believing that Chipman's motion is both procedurally and substantively deficient, we affirm.

On August 4, 1999, Chipman was indicted by the Grant County grand jury.

The indictment alleged “[t]hat on or about the 23<sup>rd</sup> day of July, 1999, in the county and

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

state, the above named defendant committed the crime of murder, in violation of KRS 507.020 and 534.030 (VOR Code 009010), punishable by life or a term of not less than twenty (20) years no more than fifty (50) years, in that he murdered Barry Sowder by shooting him with a handgun.” Chipman pled not guilty and requested a trial by jury. Following extensive discovery and numerous motion hearings a jury trial was held on June 22 and 23, 2000. At the conclusion of the trial the jury was instructed that it could find Chipman not guilty or guilty of murder, first-degree manslaughter, second-degree manslaughter or reckless homicide. The jury determined that Chipman was guilty of wanton murder and recommended a sentence of life imprisonment. Following a pre-sentence investigation the circuit court entered final judgment and sentence of imprisonment on September 12, 2000.

Chipman then appealed his conviction to The Kentucky Supreme Court which affirmed his conviction and sentence in a not to be published memorandum opinion rendered August 22, 2002. (2000-SC-0902-MR). Chipman’s sole argument on direct appeal was that the trial court erred when it failed to instruct the jury that it could find him guilty of first-degree manslaughter under an extreme emotional disturbance (EED) theory. The Supreme Court agreed that the court should have so instructed but found it to be harmless error based upon the jury’s verdict to convict him of wanton murder. The court found that since the jury determined that Chipman had acted unintentionally but wantonly with respect to Sowder’s death the verdict implied acquittal as to intentional murder. *See Terry v. Potter*, 111 F.3d 454 (6<sup>th</sup> Cir. 1997); *Todd v. Commonwealth*, 716 S.W.2d 242, 246 (Ky. 1986).

Thereafter, on September 30, 2003, Chipman filed a *pro se* RCr 11.42 motion seeking to vacate his sentence and requesting a new trial. That motion set forth three (3) arguments as to how his attorney had been ineffective: (1) by not impeaching statements of Mrs. Donna Chipman; (2) by failing to seek an EED jury instruction, and; (3) by failing to request a jury instruction on voluntary intoxication. That motion was denied by the trial court and this Court affirmed that decision in a not to be published opinion rendered October 15, 2004. (2003-CA-002349-MR). On March 30, 2005, Chipman then filed a federal habeas corpus petition. In this petition he raised the following claims of error: “The amended testimony of step-mother [Mrs. Chipman] and other witness,, No E.E.D. instruction, Ineffective assistance of counsel. Withholding Exculpatory Evidence, Acquittal of intentional murder, erroneous conviction of wanton murder.” (Spelling and grammatical errors uncorrected). On March 22, 2006, The United States District Judge for the Eastern District of Kentucky, denied his petition and adopted the magistrate judge’s twenty-four (24) page report and recommendation. In the report and recommendation the magistrate judge addressed Chipman’s argument that he was improperly convicted of wanton murder when indicted on capital murder and the circuit court’s final judgment stated he was guilty of “murder, a capital offense.” In that report, the magistrate judge states the following:

The critical inquiry in the instant matter then becomes whether Petitioner’s case was a capital case. In Kentucky, murder is a capital offense. K.R.S. 507.020(2). That alone, however, is not determinative of the present issue because not all capital offenses are tried as capital cases. Rather, logic dictates that a capital case can only occur when the defendant is potentially subjected to capital punishment, i.e., the death penalty.

In this case, it appears that the Commonwealth of Kentucky did not seek the death penalty, despite charging Petitioner with the capital offense of murder. The indictment makes no mention of the possibility of the death penalty. Specifically, the indictment charged Petitioner with murder, “punishable by life or a term of not less than twenty (20) years nor more than fifty (50) years.” (App. 1.) Furthermore, the record does not include the statutorily mandated notice which the Commonwealth would have been required to file if it intended to seek the death penalty. See K.R.S. 532.025(1)(a) (in capital cases, the prosecutor may use evidence of aggravating circumstances only if the defendant has been informed of that information prior to trial). Without the requisite notice, Petitioner could not have been subjected to the death penalty. See Smith v. Commonwealth, 845 S.W.2d 534 (Ky. 1993) (reversing and remanding as to the penalty phase because defense counsel was given inadequate notice that, the Commonwealth would seek the death penalty).

Therefore, it seems clear that Petitioner’s case was not a capital case. As such, the failure to instruct the jury on a lesser included offense does not rise to the level of an error cognizable in federal habeas review. Bagby, 894 F.2d at 797 (6<sup>th</sup> Cir. 1990); see also Elo, 302 F.3d at 606 (6<sup>th</sup> Cir. 2002). Accordingly, the undersigned recommends that Petitioner’s Claims 4 and 5 be denied as well.

Following the denial of his habeas corpus petition, Chipman filed a CR 60.02 and RCr 10.26 motion on April 24, 2006, in the Grant Circuit Court. Therein, he again raised the issue of instructing the jury on both intentional and wanton murder and that the indictment was improperly amended at trial. This motion was denied by an order entered May 9, 2006. Soon thereafter on August 4, 2006, Chipman filed a Motion to Vacate under CR 61.02 and RCr 10.26. In this motion he again attacks the jury instructions as to his EED defense and the murder instruction which permitted him to be found guilty of wanton murder as opposed to intentional murder. Both Chipman and the Commonwealth filed memorandums addressing the issues raised in the CR 61.02 and

RCr 10.26 motion. The Grant Circuit Court entered an order denying said motion on January 10, 2007. This appeal followed.

On appeal Chipman continues to argue that his conviction and sentence must be vacated because he was indicted on intentional murder and thus could not be convicted of wanton murder. We find no merit in this argument. Chipman was indicted under KRS 502.020. This statute has two components. Kentucky Revised Statute 502.020(1)(a) deals with intentional murder while KRS 502.020(1)(b) addresses wanton acts resulting in death. The jury was properly instructed that it could find Chipman guilty of murder if it believed “he caused the death of Barry Sowder intentionally” or if “he was wantonly engaging in conduct which created a grave risk of death to another and thereby caused the death of Barry Sowder under circumstances manifesting an extreme indifference to human life.” The Kentucky Supreme Court addressed this issue in Chipman’s direct appeal and the United States District Court addressed it in his habeas corpus petition. Both courts ruled against Chipman and found that the indictment, trial and verdict were proper. We also believe Chipman’s argument on this issue is meritless and unfortunately shows his lack of understanding of the legal principles involved.

Furthermore, as the Commonwealth correctly points out, Chipman’s motion is procedurally deficient. CR 61.02 is not a proper mechanism for post-conviction relief. This same issue was addressed by this Court in *Vaughn v. Commonwealth*, 2006-SL-2520309 (Ky. App.) rendered September 1, 2006 (2005-CA-002259-MR). In *Vaughn* this Court held

In addressing Vaughn’s CR 61.02 motion, the [trial] court concluded that CR 61.02 was synonymous with RCr 10.26. The court further found that there was no palpable

error affecting Vaughn's substantial rights and warranting a new trial. This appeal by Vaughn followed.

On appeal, Vaughn raises several arguments. These include: that the indictment was insufficient to charge him with PFO, that the PFO sentencing was conducted improperly, that the indictment was insufficient because it omitted reference to some essential elements of several offenses, and that his convictions of both robbery and assault constituted double jeopardy. Regardless of the merits of any of these arguments, we must affirm the trial court's order denying Vaughn's motion for the reasons set forth below.

First, CR 61.02 and RCr 10.26 are not mechanisms for obtaining post-conviction relief. Rather, those rules allow palpable error that was insufficiently raised or preserved to serve as grounds for relief in a motion for a new trial filed pursuant to RCr 10.06 or in a direct appeal. Since Vaughn's time for filing an RCr 10.06 motion for a new trial had passed long before he filed this motion, his motion for a new trial was untimely and could have been denied by the trial court for this reason alone.

Second, Vaughn's attempt to obtain relief in this fashion was not allowed by the rules governing post-conviction relief. In *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983), the Kentucky Supreme Court stated that "(t)he structure provided for attacking the final judgment of a trial court in **criminal cases** is not haphazard and overlapping, but is organized and complete. That structure is set out in the rules related to direct appeals, in RCr 11.42, and thereafter in CR 60.02." As Vaughn has utilized post-conviction attacks on his conviction by direct appeal, RCr 11.42, and CR 60.02, his belated attempt to obtain a new trial in the manner he employed was improper.

Finally, we note that even if the trial court and this court had treated Vaughn's motion as one under CR 60.02, he would not have been entitled to relief because the grounds asserted were grounds that could have been raised in his direct appeal or in his RCr 11.42 motion. Thus, he is precluded from raising them in this manner. *See Gross*, 648 S.W.2d at 856.

We agree with the *Vaughn* court that CR 61.02 and RCr 10.26 cannot be used to obtain post-conviction relief. Also, as in the *Vaughn* case, Chipman is precluded from again raising issues that had been or could have been raised on his direct appeal or in his RCr 11.42.

For the foregoing reasons the order of the Grant Circuit court denying Chipman's motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gregory W. Chipman  
Pro se

BRIEF FOR APPELLEE:

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