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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2025-CA-1164-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM ESTILL CIRCUIT COURT
HONORABLE MICHAEL DEAN, JUDGE
ACTION NO. 23-CR-00131

SAMUEL MCKINNEY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CETRULO, AND KAREM, JUDGES.

CETRULO, JUDGE: The Commonwealth of Kentucky appeals from the May 29, 2025 order of the Estill Circuit Court setting aside the jury verdict of guilty and granting Samuel McKinney ("McKinney") a new trial on the count of first-degree rape of a minor child less than 12 years of age. However, as McKinney's motion was procedurally barred and substantively insufficient, the trial court abused its discretion in granting a new trial. Accordingly, we vacate the Estill Circuit Court

order granting a new trial and remand with instructions to reinstate the verdict of conviction and enter a judgment of conviction.

BACKGROUND

In November 2023, an Estill County grand jury indicted McKinney on four counts of first-degree sexual abuse, victim under 12; four counts of first-degree sodomy, victim under 12; and one count of first-degree rape, victim under 12. The indicted counts covered separate, individual periods between 1982 and 1985, during which McKinney was 18 to 21 years old and the alleged victim, McKinney's younger cousin, was seven to 11 years old, respectively. The victim had reached adulthood by the time she first disclosed the allegations to police in 2023.

At the final pretrial conference on March 4, 2025, the trial court inquired about the parties' readiness for the upcoming jury trial scheduled for March 17. The Commonwealth stated it was ready but noted that McKinney had made a request that morning for text messages outside of the existing discovery, and because the request lacked a specific timeframe, the Commonwealth was uncertain of its ability to provide them. McKinney's counsel clarified that she sought text messages between the victim and her mother but added that if the Commonwealth was unable to produce them, she saw no reason to continue the trial.

The week before trial, McKinney served the victim's mother with a subpoena duces tecum ordering her to produce several items, including any documents she prepared on behalf of the victim or the victim's husband and all text messages, recordings, emails, and correspondence between herself, the victim, and the victim's husband from September 1, 2022 to the present. The Commonwealth moved to quash the subpoena, arguing it was overbroad and burdensome. The trial court granted the Commonwealth's motion to quash, finding McKinney failed to demonstrate the necessary specificity regarding relevance and admissibility.

McKinney's three-day trial commenced on March 17, 2025. The text message issue arose again during McKinney's cross examination of the victim. McKinney questioned the victim regarding her joint efforts with her mother to establish a timeline, as well as her recollection of specific dates, times, and facts. During this testimony, the victim stated that she had deleted messages to clear storage space on her cell phone and acknowledged that the deleted files may have included communications with her mother regarding the allegations.

Following the victim's testimony, the jury heard additional testimony from several other witnesses for the Commonwealth, including the investigating detective, the victim's mother, and the victim's friend. However, the Commonwealth introduced no physical evidence, and its case-in-chief relied

primarily on the victim's testimonial account as the basis for the allegations. After the Commonwealth rested, McKinney elected not to testify nor call any witnesses.

On March 19, the jury returned a guilty verdict on the single count of first-degree rape, victim under 12. The jury deadlocked on the remaining four counts of first-degree sodomy, resulting in a mistrial on those charges.[1] McKinney made an oral motion for judgment notwithstanding the verdict and objected to declaring a mistrial on the four first-degree sodomy counts. The trial court overruled both motions and proceeded to the penalty phase of trial, at the end of which, the jury recommended a 20-year prison sentence.

On March 28, McKinney filed a written motion for judgment notwithstanding the verdict, or in the alternative, for a new trial. In that motion, McKinney challenged several aspects of the trial, including the admission of inadmissible evidence and improper comments the prosecutor made during closing argument. McKinney further contended that the victim destroyed potentially exculpatory evidence by deleting her text messages. McKinney claimed that those errors resulted in an unfair trial.

[1] At the close of all the evidence and following McKinney's renewed motion for directed verdict, the trial court indicated that it would instruct the jury on the four counts of first-degree sexual abuse as lesser-included offenses of the four counts of first-degree sodomy, but not as separate offenses. Later, when McKinney opposed instructing on lesser-included offenses, the trial court dismissed the sexual abuse counts, ultimately instructing the jury on one count of first-degree rape and four counts of first-degree sodomy.

On May 20, the Commonwealth filed a response and maintained that, as a threshold matter, McKinney's motion for acquittal or a new trial was untimely under the provisions of RCr[2] 10.02, 10.06, and 10.24. In his reply, McKinney argued that his motion for a new trial was timely because RCr 10.06(1) permits such a motion based on newly discovered evidence to be made within one year. McKinney did not explicitly identify what constituted the newly discovered evidence. Instead, McKinney referenced the "destruction of evidence and clear prejudice outlined" in his underlying motion to support granting a new trial.

On May 29, the trial court entered an order denying McKinney's motion for acquittal on the first-degree rape count for which the jury had returned a guilty verdict and on the other four first-degree sodomy counts for which the jury had been unable to reach a verdict. The court, however, granted McKinney's motion for a new trial on the first-degree rape count, finding that multiple trial errors deprived him of a fair trial. The order did not address the timeliness of McKinney's motion nor contain any finding regarding the claim of newly discovered evidence. The Commonwealth then brought this interlocutory appeal, arguing that the trial court erred by granting McKinney's motion for a new trial.

[2] Kentucky Rules of Criminal Procedure.

ANALYSIS

Under RCr 10.02(1), "the court may grant a new trial for any cause which prevented the defendant from having a fair trial, or if required in the interest of justice." We review a trial court's decision to grant a new trial for an abuse of discretion. *Foley v. Commonwealth*, 425 S.W.3d 880, 888 (Ky. 2014) (citation omitted). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted). Here, the trial court granted McKinney's motion for a new trial because it determined that inadmissible evidence of the victim's religious beliefs and victim-impact testimony was introduced during the guilt phase, in contravention of the Kentucky Supreme Court's holding in *Stephens v. Commonwealth*, 680 S.W.3d 887 (Ky. 2023). The order then stated that "[t]he cumulative effect of the admission of this evidence, the missing texts, and the Commonwealth's closing rendered the trial fundamentally unfair." This Court, however, need not address the trial court's ruling under *Stephens* because, as a threshold matter, we conclude that the trial court abused its discretion in granting McKinney's motion for a new trial as it was both procedurally barred and substantively insufficient.

First, McKiney's trial-error claims are procedurally barred as untimely under RCr 10.06(1), which states:

> The motion for a new trial shall be served not later than five (5) days after return of the verdict. A motion for a new trial based upon the ground of newly discovered evidence shall be made within one (1) year after the entry of the judgment or at a later time if the court for good cause so permits.

Failure to observe and enforce the time requirements of RCr 10.06 equates to an abuse of discretion. That is, if the motion was untimely, the trial court lacked discretion to grant a new trial on the grounds asserted in the motion and should have denied it without reaching the merits. *See* RCr 10.06(1); *Price v. Commonwealth*, 59 S.W.3d 878, 882 (Ky. 2001); *Ford Motor Credit Co. v. Swarens*, 447 S.W.2d 53, 55 (Ky. 1969).[3] Whether McKinney's motion for a new trial abided by the time limits imposed by RCr 10.06(1) presents a question of procedural compliance governed by the rule's plain language: "The rule clearly provides that, although a motion for a new trial premised upon newly discovered

[3] The Kentucky Supreme Court's decision in *Via v. Commonwealth*, No. 2022-SC-0453-MR, 2024 WL 5172397 (Ky. Dec. 19, 2024) (unpublished), directly supports the conclusion that an untimely motion for a new trial must be denied without reaching its merits. *Id.* at *6. In *Via*, the defendant filed a belated motion for a new trial, but the Commonwealth did not object on timeliness grounds. *Id.* The trial court ultimately denied the motion, but it did so after considering the motion on its merits. *Id.* Our Supreme Court noted that RCr 1.10(e) expressly states that "[t]he time for a motion for a new trial . . . shall not be extended." *Id.* at *5 (alterations in original) (quoting RCr 1.10(e)). When considered alongside RCr 10.06(1), our Supreme Court "perceive[d] the terms of [each rule] to explicitly mandate a definite time after which a criminal verdict becomes free from attack by a motion for new trial." *Id.* at *6. Even though the parties and the trial court in *Via* proceeded as though the motion was timely, our Supreme Court held that "litigation conduct cannot operate to waive or extend the procedural requirements in contravention of the Criminal Rules." *Id.* The Court thus concluded that the "motion for new trial was untimely and the trial court should have denied it on that basis without a determination on the merits." *Id.* As this case is unpublished, we cite it not as binding precedent but for its persuasive value. Kentucky Rule of Appellate Procedure ("RAP") 41(A).

evidence may be filed within one year of the judgment, *a motion premised upon any other grounds must be filed within five days of the verdict*." *Johnson v. Commonwealth*, 17 S.W.3d 109, 112 (Ky. 2000) (emphasis added).[4] In short, the rule establishes separate deadlines for motions for a new trial depending on the grounds asserted. Additionally, RCr 1.10(e) states that "[t]he time for a motion for a new trial . . . shall not be extended."

In this case, the jury rendered its verdict on Wednesday, March 19, 2025, and McKinney filed his motion for new trial on Friday, March 28, 2025, which was two days after the five-day deadline.[5] Therefore, McKinney's claims premised on trial errors were untimely, and this procedural flaw is dispositive. *See Commonwealth v. Brewer*, 297 S.W.3d 905, 907 (Ky. App. 2009) (citing RCr

[4] We also note the plain language of RCr 10.06(1) that states: "[a] motion for a new trial based upon the ground of newly discovered evidence shall be made within one (1) year *after* the entry of the judgment or at a later time if the court for good cause so permits." (Emphasis added.) Although the majority in *Johnson* did not decide whether a motion for a new trial based on newly discovered evidence may be filed before the entry of a final judgment, Justice Keller's separate opinion concluded that it may not. *See Johnson*, 17 S.W.3d at 115-16 (Keller, J., concurring in part and dissenting in part). Justice Keller reasoned that RCr 10.06(1)'s express reference to the period "after the entry of the judgment" contemplates a motion filed only after final judgment. Because this issue was not decided by the majority, Justice Keller's view is persuasive rather than binding authority.

[5] Rule 1.10 explains how to calculate deadlines under Kentucky Rules of Criminal Procedure when the Rules do not provide otherwise. Subsection (a) provides that the day of the event giving rise to the time limit is excluded from the computation, while the last day of the prescribed period is counted unless it falls on a weekend or legal holiday. RCr 1.10(a). For time limits shorter than seven days, weekends and legal holidays that fall in the middle of the counting period are also excluded. *Id.*; *see Shadowen v. Commonwealth*, 82 S.W.3d 896, 897 (Ky. 2002).

1.10(e)). To the extent the trial court granted relief based on those claims, it should have denied the motion as untimely rather than adjudicating the claims on their merits.

McKinney attempts to save his untimely motion by relying on the newly-discovered-evidence provision in RCr 10.06(1). However, he did not initially invoke that provision of RCr 10.06(1) and raised it only after the Commonwealth argued that the motion was untimely. Even then, McKinney failed to explain how relying on the newly-discovered-evidence provision cured the untimeliness of his trial-error claims. While RCr 10.06(1) provides an extended period to file a motion based on newly discovered evidence, that provision does not operate to preserve or extend the deadline for claims based *on other grounds*, and nothing in the plain language of RCr 10.06(1) supports that result. *See Johnson*, 17 S.W.3d at 112 n.3 ("[T]he only grounds for a motion for new trial filed later than five days after the return of the verdict is one premised upon newly discovered evidence."). Moreover, McKinney's claim of newly discovered evidence in and of itself provides no basis for relief as it was substantively and legally deficient.

Kentucky law imposes a stringent threshold that a movant must affirmatively establish before a court may disturb a final verdict based on newly discovered evidence. *Rowe v. Commonwealth*, 355 S.W.3d 480, 485-86 (Ky. App.

2011) (quoting *Foley v. Commonwealth*, 55 S.W.3d 809, 814 (Ky. 2000)). "[I]n order for newly discovered evidence to support a motion for a new trial it must be 'of such decisive value or force that it would, with reasonable certainty, have changed the verdict or that it would probably change the result if a new trial should be granted.'" *Commonwealth v. Harris*, 250 S.W.3d 637, 640-41 (Ky. 2008) (quoting *Jennings v. Commonwealth*, 380 S.W.2d 284, 285-86 (Ky. 1964)). Additionally, "[n]ewly discovered evidence is evidence that could not have been obtained at the time of trial through the exercise of reasonable diligence." *Id.* at 642 (citing *Richardson v. Head*, 236 S.W.3d 17, 21 (Ky. App. 2007)). Consistent with the latter standard, our Supreme Court requires compliance with the following precondition: "[A] motion for new trial based upon newly discovered evidence must be accompanied by an affidavit showing that Appellant exercised sufficient diligence to obtain the evidence prior to his trial." *Commonwealth v. Carneal*, 274 S.W.3d 420, 432 (Ky. 2008) (quoting *Collins v. Commonwealth*, 951 S.W.2d 569, 576 (Ky. 1997)). *See also Commonwealth v. Abnee*, 375 S.W.3d 49, 55 (Ky. 2012) (citing RCr 10.08) (holding that "our system for obtaining a new trial under RCr 10.02 presupposes that there will be affidavits filed in support of the motion").

McKinney failed to satisfy these mandatory criteria: he failed to demonstrate a probable change in the outcome; he failed to show due diligence; and he failed to attach supporting affidavits. *See Rowe*, 355 S.W.3d at 485-87.

Regarding the first criterion, the "newly discovered evidence" in this case was in fact presented to the jury through the trial testimony of the victim, so it is unclear how this evidence would have, "with reasonable certainty," changed the verdict or resulted in a different one upon retrial. Indeed, if its intended use was for impeachment of the victim, that goal was accomplished at trial as the jury heard the victim's admission from the witness stand. Furthermore, "newly discovered evidence that merely impeaches the credibility of a witness or is cumulative is generally disfavored as grounds for granting a new trial." *Foley*, 55 S.W.3d at 814 (citing *Collins*, 951 S.W.2d at 576).

The record also reveals that despite having 16 months between his arraignment[6] and jury trial, McKinney did not initiate any meaningful investigation into the victim's electronic communications until just a few weeks before trial. At some point during this time span, McKinney had to be on notice that the most incriminating evidence against him was the victim's testimony and text messages. Yet, McKinney did not attempt any additional investigation of the victim's electronic communications, whether by seeking access to her personal devices or by pursuing the records of third parties communicating with her, until the final pretrial conference on March 4, 2025. Related to this failure to demonstrate pretrial due diligence, McKinney concedes on appeal that no affidavits were filed

[6] McKinney was arraigned on December 5, 2023.

with his post-verdict motion. Without a supporting affidavit, Kentucky precedent allows for dismissal of the motion on that basis alone: "The oft-repeated rule is that a motion for new trial on the ground of newly discovered evidence will not be considered unless the defendant files his own affidavit showing diligence in attempting to discover the new evidence before the first trial." *Wheeler v. Commonwealth*, 395 S.W.2d 569, 571 (Ky. 1965) (citing *Bales v. Commonwealth*, 231 S.W.2d 61, 63 (Ky. 1950)).

Accordingly, as McKinney's post-verdict motion was procedurally and substantively deficient, the trial court's decision to grant a new trial was not supported by sound legal principles, and the court abused its discretion in so doing.

CONCLUSION

For the foregoing reasons, we VACATE the trial court's order granting a new trial, and REMAND with instructions to reinstate the jury verdict and enter a judgment of conviction.

ALL CONCUR.

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