

RENDERED: June 19, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-3414-MR

JAMES R. THOMAS

APPELLANT

v. APPEAL FROM OWEN CIRCUIT COURT
HONORABLE RAY CORNS, SPECIAL JUDGE
ACTION NO. 95-CR-00033

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: BUCKINGHAM, KNOPF, and SCHRODER, JUDGES.

KNOPF, JUDGE. James Thomas appeals from an order of the Owen Circuit Court entered on November 22, 1996, denying his motion for a new trial. Finding no error, we affirm.

On June 2, 1995, following a two (2) day trial, a jury found Thomas guilty of the following felonies: one (1) count of trafficking in marijuana - five (5) pounds or more (KRS 218A.1421), one (1) count of cultivating five (5) or more marijuana plants while in possession of a firearm (KRS 218A.1423 and 218A.992), one (1) count of first-degree possession of a controlled substance (cocaine) while in possession of a firearm

(KRS 218A.1415 and 218A.992), and one (1) count of possession of drug paraphernalia while in possession of a firearm (KRS 218A.500 and 218A.992). On June 23, the circuit court sentenced Thomas, consistent with the penalties fixed by the jury, to twenty (20) years on the trafficking in marijuana offense, ten (10) years on the cultivating marijuana offense, ten (10) years on the first-degree possession of cocaine offense, and five (5) years on the possession of drug paraphernalia offense. All sentences were to run concurrently for a total sentence of twenty (20) years in prison. On June 26, 1995, Thomas appealed his conviction directly to the Kentucky Supreme Court challenging the search of his residence and the introduction of the firearm seized by the police. The Supreme Court affirmed the conviction in an unpublished opinion. Thomas v. Commonwealth, 95-SC-579 (rendered May 23, 1996).

On September 23, 1996, Thomas filed a motion for a new trial citing to RCr 10.26. Thomas requested a new trial based on an alleged violation of a parent-child privilege related to information given police by Thomas's daughter that led to the search and seizure of the physical evidence used to convict him. The Commonwealth filed a response challenging both the timeliness and the merits of the motion. On November 22, 1996, the circuit court summarily denied the motion for a new trial. Thomas appealed the order denying the motion.

The Commonwealth asserts that Thomas's motion was properly denied because it was filed beyond the time limitation

for a new trial motion imposed by RCr 10.06. This argument in effect raises the issue of the trial court's jurisdiction to entertain the motion and the procedural issues involved in this case. Under RCr 10.06, a motion for a new trial shall be served within five (5) days after the verdict unless the motion is based on newly discovered evidence, which may be made within one (1) year after entry of the judgment. Thomas's motion was filed on September 23, 1996 and served by mail on approximately September 20, 1996, as indicated by the certificate of service. This was clearly outside either the five (5) day or one (1) year time limit of RCr 10.06(1).

However, Thomas's motion merely cites RCr 10.26, which contains no explicit time limitation, as the rule supporting the request for a new trial. RCr 10.26 states:

A palpable error which affects the substantial rights of a party may be considered by the court on a motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

This rule expresses a substantive basis for granting relief upon review of an error, rather than establishing an independent procedural mechanism creating jurisdiction in a trial court. Review for palpable error under RCr 10.26 is available upon direct appeal, but is not appropriate for review on collateral attack of a conviction. See Humphrey v. Commonwealth, Ky., ___ S.W.2d ___, 1998 WL 79154 (Ky. Sup. Ct. Feb. 19, 1998).

The recognized mechanism for post-conviction review of trial errors is through RCr 11.42 or CR 60.02. Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983). These rules create jurisdiction in the trial court to grant relief in a collateral proceeding outside the time limitations of a direct appeal or motion for a new trial under RCr 10.06. See, e.g., Commonwealth v. Wine, Ky., 694 S.W.2d 689 (1985); McBride v. Commonwealth, Ky., 432 S.W.2d 410 (1968) (construing motion for concurrent sentences outside time limit of direct appeal as RCr 11.42 motion). An RCr 11.42 motion generally must be filed within three (3) years after the judgment becomes final, with two (2) exceptions. RCr 11.24(5). Based on the specific grounds for the requested relief, a CR 60.02 motion must be filed within one (1) year or reasonable time after the judgment becomes final. RCr 11.42 and CR 60.02 were not, however, intended to provide an appellant an opportunity to raise issues that could or should have been raised upon direct appeal. See Gross, supra; Cinnamon v. Commonwealth, Ky., 455 S.W.2d 583, 584 (1970), cert. denied, 401 U.S. 941, 91 S. Ct. 942, 28 L. Ed. 2d 221 (1971) (post-conviction proceeding under RCr 11.42 or CR 60.02 is not a substitute for appeal). Consequently, even construing Thomas's motion liberally as possibly filed under RCr 11.42 or CR 60.02 for purposes of satisfying the time constraints for a motion to vacate a sentence and providing jurisdiction in the trial court to consider the motion, Thomas is not entitled to relief because the issue of a possible parent-child privilege was readily apparent at the time of the trial and

could have been raised on his direct appeal. Thomas has not claimed ineffective assistance of counsel with respect to counsel's failure to raise the issue of privilege, which would be available under RCr 11.42. The issue of ineffective assistance of counsel cannot be considered on appeal unless it has already been raised before the trial court, so we will not address this issue. See White v. Commonwealth, Ky. App., 695 S.W.2d 438 (1985).

In any event, Thomas's request for a new trial may be rejected on substantive grounds. Only a few lower courts in New York have recognized a parent-child privilege, while all state supreme courts and federal appellate courts addressing the issue have refused to adopt this privilege. See In Re Grand Jury, 103 F.3d 1140 (3rd Cir.), cert. denied, ___ U.S. ___, 117 S. Ct. 2412, 138 L. Ed. 2d 177 (1997). The Kentucky Rules of Evidence were recently adopted without including a parent-child privilege. Claims of testimonial privilege generally are disfavored because they impede access to relevant or material evidence. See Jaffee v. Redmond, ___ U.S. ___, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996); Meenach v. General Motors Corp., Ky., 891 S.W.2d 398, 402 (1995). KRE 501 expresses an intent to restrict recognition or creation of common-law privileges. Consequently, Thomas has failed to establish the existence of a parent-child privilege.

For the foregoing reasons, we affirm the order of the Owen Circuit Court.

ALL CONCUR.

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