

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

NO. 2008-CA-000774-MR

JOSE VICTORIANO ZAMORA, JR.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE GARY D. PAYNE, JUDGE  
ACTION NO. 95-CR-00591-005

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: MOORE AND THOMPSON, JUDGES; LAMBERT,<sup>1</sup> SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: This is a belated appeal from a 1999 order of the Fayette Circuit Court that summarily dismissed Appellant's motion for post-conviction relief brought pursuant to Kentucky Rules of Criminal Procedure (RCr)

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<sup>1</sup> Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

11.42. Appellant contends that he was effectively denied his constitutional and statutory rights to counsel and to file a reasonable appeal because appointed post-conviction counsel failed to properly supplement his original RCr 11.42 motion, which was filed *pro se*. Thus, Appellant contends that he received ineffective assistance of *post-conviction* counsel with respect to his RCr 11.42 motion. For reasons that will follow, we reject this contention and, therefore, affirm.

Appellant was convicted of conspiracy to traffic in marijuana over five pounds and engaging in a criminal syndicate, for which he received a cumulative sentence of fifteen years' imprisonment. These convictions were affirmed on appeal. Appellant subsequently filed a *pro se* motion for post-conviction relief pursuant to RCr 11.42 in which he alleged that: (1) the indictment against him was faulty; (2) the evidence introduced at trial was tainted and otherwise insufficient for a conviction; and (3) the trial court had allowed unsupported hearsay evidence to be introduced against him at trial. The circuit court appointed counsel to represent Appellant, but counsel filed no supplements to Appellant's original *pro se* motion. The circuit court then summarily denied Appellant's motion without a hearing on the grounds that the claims presented should have been raised on direct appeal from the judgment of conviction. For reasons that need not be recounted here, Appellant was subsequently allowed to file this belated appeal.

On appeal, Appellant does not raise any of the claims presented in his *pro se* RCr 11.42 motion. Instead, he now contends that he received ineffective

assistance of post-conviction counsel because of counsel's failure to file a supplement to that motion. Appellant specifically contends that post-conviction counsel advised him that his trial counsel could be found ineffective for failing to challenge Appellant's criminal-syndicate conviction. This challenge would have been based on the grounds that the Commonwealth did not present sufficient proof that five people were involved in the criminal syndicate.<sup>2</sup> Because this particular argument was not raised in Appellant's *pro se* RCr 11.42 motion, he argues that post-conviction counsel should have presented it to the circuit court in a supplemental pleading and that her failure to do so violated his constitutional and statutory rights to effective assistance of counsel and due process.

The United States Supreme Court and the Supreme Court of Kentucky have held that “[t]here is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.” *Coleman v. Thompson*, 501 U.S. 722, 752, 111 S.Ct. 2546, 2566, 115 L.Ed.2d 640 (1991) (Internal citations omitted); *Harper v. Commonwealth*, 978 S.W.2d 311, 318 (Ky. 1998).

Consequently, Appellant's contention that his constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution and Sections 2 and 11 of the Kentucky Constitution were violated because of ineffective assistance of post-conviction counsel must be rejected.

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<sup>2</sup> KRS 506.120, the statute addressing organized crime, provides that “‘criminal syndicate’ means five (5) or more persons . . . collaborating to promote or engage in any of the following on a continuing basis: . . . [i]llegal trafficking in controlled substances as prohibited by KRS Chapter 218A[.]” KRS 506.120(3) & (3)(e).

With this said, Appellant does have a statutory right to post-conviction counsel pursuant to RCr 11.42(5) and, where merited, KRS 31.110(2)(c). This statutory right, our Supreme Court has held, “anticipates that the representation provided to indigent defendants will be at least minimally competent.” *Moore v. Commonwealth*, 199 S.W.3d 132, 139 (Ky. 2006). However, Appellant did not present the circuit court with any complaint about post-conviction counsel’s performance or lack thereof. Thus, “[i]n the absence of palpable error affecting Appellant’s rights, this issue is not reviewable on appeal.” *Harper*, 978 S.W.2d at 318. After review of the record, we do not find any palpable error in this regard because there was clearly evidence presented at trial from which a jury could conclude that five or more persons – including Appellant – were involved in a criminal syndicate. Thus, post-conviction counsel was not ineffective or otherwise incompetent for failing to present a supplemental pleading regarding this issue.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jose Victoriano Zamora, Jr., *pro se*  
Mathis, Texas

BRIEF FOR APPELLEE:

Jack Conway  
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