

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2013-CA-001332-MR

DARIEN J. DALTON

APPELLANT

v. APPEAL FROM GRAVES CIRCUIT COURT  
HONORABLE TIMOTHY C. STARK, JUDGE  
ACTION NO. 07-CR-00039

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON, NICKELL, AND VANMETER, JUDGES.

VANMETER, JUDGE: Darien Dalton appeals from the Graves Circuit Court's order denying his RCr<sup>1</sup> 11.42 motion. For the following reasons, we affirm.

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<sup>1</sup> Kentucky Rules of Criminal Procedure.

## I. Procedural and Factual Background

Dalton was convicted by jury trial on charges of wanton endangerment and murder. On direct appeal, the Kentucky Supreme Court affirmed both convictions and sentences. *Dalton v. Commonwealth*, No. 2008-SC-000837-MR, 2010 WL 2025102, at \*1-2 (Ky. May 20, 2010).

On April 1, 2011, Dalton filed, *pro se*, a motion titled “Motion to Vacate Sentence & Judgment Pursuant to CR<sup>2</sup> 60.02 & RCr 10.26” (hereinafter First Motion). On April 8, 2011, the trial court denied this motion, which the court considered as a motion for relief under RCr 11.42. On April 22, Dalton filed a CR 59.05 motion to alter or amend the trial court’s April 8, 2011 order denying his motion to vacate, which the trial court denied. Dalton’s appeal of that denial was dismissed.

On June 7, 2013, Dalton filed, *pro se*, a motion to vacate his sentence pursuant to RCr 11.42 (hereinafter Second Motion). In his Second Motion, Dalton raised the following five issues, which he alleges denied his constitutional rights:

- 1) When a third party was allowed to testify to hearsay regarding James Dalton’s statements;
- 2) When the trial court allowed Jessica Hamilton to testify to what James Dalton, her boyfriend, told her regarding the crime;
- 3) When trial counsel failed to challenge the foundation and reliability of Jessica Hamilton’s third party hearsay statement;
- 4) When his appellate attorney failed to properly investigate and prepare an adequate brief for his direct appeal; and
- 5) by the cumulative effect of

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<sup>2</sup> Kentucky Rules of Civil Procedure.

each of these errors. On June 12, 2013, the trial court denied his Second Motion. From that denial, Dalton appeals.

## **II. Standard of Review**

We review a trial court's denial of an RCr 11.42 motion for abuse of discretion. *Bowling v. Commonwealth*, 981 S.W.2d 545, 548 (Ky. 1998). An abuse of discretion has occurred when the trial court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (internal citation omitted). In relevant part, RCr 11.42 states that "[t]he motion . . . shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds . . . . Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding."

## **III. Arguments**

Dalton makes three arguments on appeal. First, he argues the trial court erred in denying his First Motion by considering it as seeking relief under RCr 11.42 instead of CR 60.02 and RCr 10.26. He further contends that claims raised on direct appeal, or claims that could have been raised on direct appeal, are not precluded in an RCr 11.42 motion. Second, he argues the trial court erred in its denial of an evidentiary hearing. Third, Dalton argues he was denied his Sixth and Fourteenth Amendment rights to counsel when he was appointed counsel in his post-conviction collateral appeal, but that counsel failed to provide any meaningful assistance.

## A. Denial of Dalton's First and Second Motions

### i. *Dalton's First Motion*

Dalton's CR 59.05 motion appealing the denial of his First Motion was not timely pursuant to CR 73.02, and thus this court dismissed the appeal. Since the appeal of his First Motion has been settled, the denial of the First Motion is not before this court for review.

First, Dalton argues the trial court erred in considering and denying his First Motion pursuant to RCr 11.42. In its order denying Dalton's First Motion, the trial court stated that

[a]lthough [Dalton's] motion styles itself as a motion for relief under CR 60.02 and RCr 10.26, it appears to be a pleading for relief under RCr 11.42. However, a claim will not lie under that rule because the matters [Dalton] complained of were matters that could have been, or were addressed on [direct] appeal.

The trial court was correct in its consideration of this First Motion to be seeking relief pursuant to RCr 11.42. In *Gross v. Commonwealth*, the Supreme Court of Kentucky stated

The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case 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. . . . It is for relief that is not available by direct appeal and not available under RCr 11.42. The movant must demonstrate why he is entitled to this special, extraordinary relief. Before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.

Dalton argues that the court cannot deny his First Motion without citing any reason for the denial under the proper standard of review for CR 60.02 and RCr 10.26. Dalton seems to confuse the standards of review contained within RCr 10.26 and CR 60.02 with the standard required to deny such a motion. RCr 10.26 is a statutory standard of review that applies only on direct appeal.<sup>3</sup> CR 60.02 applies only to specific grounds for relief on collateral attack, and Dalton's arguments do not fit within the appropriate grounds for CR 60.02.<sup>4</sup> Since Dalton already exhausted his direct appeal, and did not allege any grounds for vacating his conviction under CR 60.02, the trial court was correct to construe his First Motion as an RCr 11.42 motion.

*ii. Successive RCr 11.42 Motions*

Dalton argues the trial court erred in concluding that claims already raised, or that could have been raised, on direct appeal are prohibited from being raised under RCr 11.42. The trial court denied his Second Motion, stating that the

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<sup>3</sup> “RCr 10.26 is a standard of review for either the trial court, on a motion for new trial, or the appellate court, when reviewing an appeal from a final judgment, because of a palpable error during trial that resulted in manifest injustice.” *Stoker v. Commonwealth*, 289 S.W.3d 592, 598 (Ky. App. 2009).

<sup>4</sup> In his First Motion, Dalton argued that inadmissible hearsay was admitted at trial on the part of Jessica Hamilton, and that Kenneth Jackson should not have been allowed to testify due to his disabilities. CR 60.02 limits relief to specific grounds that must be brought within certain time periods. The first three grounds specified in the rule are: (a) mistake, inadvertence, surprise or excusable neglect, (b) newly discovered evidence, and (c) perjury, and are limited to application for relief “not more than one year after the judgment.” The additional specified grounds are: (a) fraud, (b) the judgment is void, vacated in another case, satisfied and released, or otherwise no longer equitable, or (c) other reasons of an “extraordinary nature” justifying relief, which must be brought within a “reasonable time.” *See* CR 60.02; *Gross*, 648 S.W.2d at 857.

substance of Dalton's First Motion sought the same relief, and he "is not entitled to file serial motions for relief under RCr 11.42." The trial court further stated that in Dalton's Second Motion, "Arguments 1 – 3 were raised and addressed on [direct] appeal. Therefore, not only could they have been dealt with on [direct] appeal, they were in fact dealt with."

Although Dalton is proceeding *pro se* and is not held to the same standard as a licensed attorney, he must still follow the procedures set forth by the rules of civil and criminal procedure. "The proper procedure for a defendant aggrieved by a judgment in a criminal case is to directly appeal that judgment, stating every ground of error which it is reasonable to expect that he or his counsel is aware of when the appeal is taken." *Gross*, 648 S.W.2d at 857. "It is fundamental that when an issue is finally determined by an appellate court, the trial court must comply with such determination. This . . . prevents a RCr 11.42 movant from relitigating issues which were raised and decided in the direct appeal or which could have been raised." *Commonwealth v. Tamme*, 83 S.W.3d 465, 468 (Ky. 2002).

Therefore, the trial court was correct in ruling that, to the extent the Supreme Court of Kentucky has already addressed Dalton's arguments 1 – 3 on direct appeal, further review would be in error. Dalton's arguments 4 and 5 were without merit and also raised previously, thus no issues remain on appeal. The trial court did not abuse its discretion in the denial of Dalton's Second Motion.

B. Denial of Dalton's Motion for Evidentiary Hearing

Second, Dalton argues that the trial court erred in denying his motion for an evidentiary hearing. “An evidentiary hearing is not required about issues refuted by the record of the trial court. Conclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of a discovery deposition.”

*Sanborn v. Commonwealth*, 975 S.W.2d 905 (Ky. 1998) (overruled by *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009) on different grounds); *Stanford v. Commonwealth*, 854 S.W.2d 742, 743 (Ky. 1993). In this case, the record shows that all five of Dalton’s arguments raised in his Second Motion had already been either rejected on direct appeal or refuted by record. Therefore, the trial court did not err in denying this motion for an evidentiary hearing.

### C. Ineffective Assistance of Counsel for Post-Conviction Collateral Appeals

Last, Dalton argues that he was appointed counsel for his post-conviction collateral appeals, but that counsel failed to provide any level of assistance in the presentation of his claims. Dalton also argues that he was denied his constitutional right to be represented by counsel.

Due to a seeming clerical error, on October 31, 2014, Dalton received a letter from the Department of Public Advocacy (DPA) indicating he would be provided counsel. On the same day the letter was sent, the DPA filed a “Response to This Court’s Order Passing the Appellant’s Motion for Appointment of Counsel” requesting that Dalton’s motion for appointment of counsel be denied since “a reasonable person with adequate means would not be willing to bring at

his or her own expense.” The trial court granted the DPA’s motion.<sup>5</sup> The record is unclear whether Dalton refers to ineffectiveness of counsel on the collateral appeal of his First or Second Motion, however, Dalton was not actually appointed counsel for either of his collateral appeals, nor is he entitled to counsel on collateral appeal.<sup>6</sup>

No United States or Kentucky Constitutional right exists to a “post-conviction collateral attack on a criminal conviction or to be represented by counsel at such a proceeding where it exists.” *Fraser v. Commonwealth*, 59 S.W.3d 448, 451 (Ky. 2001). The Constitution of Kentucky provides “for one appeal as a matter of right, and contains no provision with respect to a post-conviction collateral attack[.]” *Id.* The provisions of RCr 11.42

establish the following procedural steps with respect to an evidentiary hearing and the appointment of counsel:

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After the answer is filed, the trial judge shall determine whether the allegations in the motion can be resolved on the face of the record, in which event an evidentiary hearing is not required. A hearing is required if there is a material issue of fact that cannot be conclusively resolved[.] . . . If an evidentiary hearing is not required, counsel need not be appointed because appointed counsel would [be] confined to the record.

*Fraser*, 59 S.W.3d at 452-53 (internal citations and quotations omitted).

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<sup>5</sup> Kentucky Revised Statutes 31.110(2)(c), which governs court-appointed counsel, dictates that “if the department and the court of competent jurisdiction determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his or her own expense, there shall be no further right to be represented by counsel under the provisions of this chapter.”

<sup>6</sup> With regard to his First Motion, the argument for ineffective assistance of counsel is successive, and we will not address it.



Since no cognizable claims remained on his Second Motion, the court did not abuse its discretion in granting the DPA's motion for no additional appointment of counsel for the appeal of the denial of Dalton's successive RCr 11.42 motion. Furthermore, Dalton suffered no prejudice from the denial since the trial court gave him leave to file his RCr 11.42 motion *pro se*, which was timely filed.

#### **IV. Conclusion**

The trial court did not abuse its discretion in denying Dalton's successive RCr 11.42 motion. For the foregoing reasons, the order of the Graves Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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