

RENDERED: March 27, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-3388-MR

THOMAS SHANE KINSER

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN D. MINTON, JUDGE
ACTION NOS. 94-CR-045 AND 94-CR-075

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: COMBS, JOHNSON, and SCHRODER, Judges.

COMBS, JUDGE. The Warren Circuit Court denied Thomas Kinser's motion for RCr 11.42/CR 60.02 relief. We affirm.

On December 18, 1995, appellant filed an RCr 11.42/CR 60.02 motion with supporting memorandum. The court appointed counsel to represent the appellant, ordering that counsel "may" supplement the motion within 60 days. On January 24, 1996, Kinser's attorney filed a supplement to the motion in compliance with the court's order, stating that he could not supplement Kinser's motion for post-conviction relief and moving the court to appoint substitute counsel as Kinser believed that there was a conflict of interest. On February 29, 1996, appellant's counsel refiled his motion to appoint substitute counsel. The trial

court overruled the appellant's motion to substitute counsel on March 5, 1996. On March 18, 1996, Kinser, *pro se*, filed an objection to the court's denial of substitute counsel. The trial court reconsidered and granted the motion on April 5, 1996, and appointed Steven Chase Todd.

On April 15, 1996, the newly appointed attorney filed a statement that he could add nothing further to Kinser's *pro se* motion. On September 11, 1996, appellant, *pro se*, filed a motion to supplement and to argue issues on his RCr 11.42 motion. The trial court entered an order on October 16, 1996, overruling appellant's motion to modify sentence. On October 28, appellant made a motion for reconsideration and included new arguments which had not been part of his original RCr 11.42 motion. The trial court overruled the motion on November 6, 1996. On November 18, 1996, the defendant filed a timely appeal.

Appellant argues on appeal that he should have been allowed to supplement his RCr 11.42/CR 60.02 motion, *pro se*. The Supreme Court of Kentucky recently discussed this issue in Bowling v. Commonwealth, Ky., 926 S.W.2d 667, 670 (1996):

In recognition of the need for both speed and specificity, we hold that an RCr 11.42 motion must be filed in an expeditious manner and is subject to amendment, if appropriate, with leave of court. Due to the unquestioned right of defendants to have their contentions decided by a court, "leave [to amend] shall be freely given when justice so requires." CR 15.01.

Kentucky cases interpreting CR 15.01 as it relates to the amendment of civil complaints have held that the standard of

review is whether the trial court abused its discretion. See Commonwealth, Fayette County ex rel. Geary v. Kentucky Central Life Insurance Co., Ky., 746 S.W.2d 565, 566 (1987).

The trial court in this case appointed counsel on two separate occasions at appellant's request and on each occasion allowed counsel to supplement the *pro se* motion of Kinser. Both counsel for Kinser attempted to comply with the court's order but were unable to add any new light to the *pro se* motion for collateral relief. The appellant in his original motion stated an issue that he wanted to present and amply supported that issue with a four-page memorandum of law.

However, even if we were to consider the issue advanced in appellant's supplemental motion, his argument would fail. In essence, appellant sought to bring to light his belief that one of the crimes for which he was charged and convicted constituted a lesser-included offense of another crime for which he was also sentenced -- resulting in his argument of double jeopardy. However, this argument is without substantive merit as appellant had entered a valid guilty plea, thereby waiving any right to raise this issue as a defense thereafter. Under these circumstances, we find that the trial court did not abuse its discretion by not allowing Kinser, *pro se*, to supplement his RCr 11.42/CR 60.02 motion.

We affirm the Warren Circuit Court order denying appellant RCr 11.42/CR 60.02 relief.

SCHRODER, JUDGE, CONCURS.

JOHNSON, JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

JOHNSON, JUDGE, DISSENTING. I respectfully dissent.

Unfortunately, the Majority Opinion has accepted an argument that is often misapplied by the Commonwealth. Centers v. Commonwealth, Ky.App., 799 S.W.2d 51, 55 (1990), is often incorrectly cited by the Commonwealth for the rule of law that a movant cannot raise a substantive issue relating to a defense to a charge because he has waived all defenses upon his plea of guilty. Such an argument begs the question of a movant's allegation of ineffective assistance of counsel under RCr 11.42.

While Kinser's argument that his counsel was ineffective for failing to raise a double jeopardy defense should be extreme enough to make this point, I will use an even more extreme example to hopefully make the point even more clear. Suppose a movant has pleaded guilty and accepted a life sentence upon the advice of his counsel that he is likely to receive the death penalty if convicted, but in fact, the movant was not even subject to the death penalty. Further, suppose there is strong evidence that counsel and the judge had taken a bribe from the movant's enemy. Obviously, a movant who could prove these atrocities would receive RCr 11.42 relief. It would not matter that the movant had pleaded guilty and waived all defenses because his plea would be constitutionally impaired. It would not be a knowing and intelligent plea under Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), and the

assistance rendered by his counsel would not meet the Sixth Amendment requirements under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). While Kinser is not alleging such outrageous, his legal argument is the same--since his counsel failed to raise a double jeopardy defense, he was ineffective and the plea does not pass constitutional muster. I am not expressing an opinion as to the double jeopardy argument, but Kinser should get his day in court on the question of ineffective assistance of counsel.

BRIEF FOR APPELLANT *PRO SE*

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