

**Commonwealth Of Kentucky**

**Court Of Appeals**

NO. 1997-CA-000328-MR

DANIEL JONES

APPELLANT

v. APPEAL FROM KNOTT CIRCUIT COURT  
HONORABLE JOHN ROBERT MORGAN, JUDGE  
ACTION NO. 82-CR-00003

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\* \* \* \* \*

BEFORE: HUDDLESTON, KNOPF, AND MILLER, JUDGES.

KNOPF, JUDGE. Daniel Jones (Jones) appeals from an order of the Knott Circuit Court denying his motion for relief and modification of sentence brought pursuant to Kentucky Rule of Civil Procedure (CR) 60.02 and Kentucky Revised Statute (KRS) 532.070. We affirm.

After a four (4) day trial in October 1982, a jury found Jones guilty of murdering his ex-wife. In December 1983, the trial court sentenced Jones to life imprisonment consistent with the jury's recommendation. Jones' conviction was affirmed

on direct appeal by the Kentucky Supreme Court. Jones v. Commonwealth, 84-SC-288-MR (unpublished opinion rendered February 28, 1985). In this opinion, the court said that defense counsel erred by failing to renew his prior motion for a directed verdict at the close of all the evidence, but still rejected Jones' claim that there was not sufficient evidence to support the jury's verdict of guilt.

In April 1985, Jones filed a motion to vacate or set aside the judgment pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. In the motion, Jones alleged that his attorney was ineffective and he raised several other complaints involving alleged coercion of his children and alleged defects in the jury selection process. On February 20, 1986, the trial court denied the RCr 11.42 motion. Jones filed a notice of appeal of the order denying the motion, but the circuit court clerk failed to notify the clerk of the Court of Appeals of the appeal. In August 1986, Jones filed a supplement to the RCr 11.42 motion in the circuit court that raised additional complaints.

In December 1986, Jones filed a motion to vacate pursuant to CR 60.02(f) in which he again alleged ineffective assistance of counsel and sought to reinstate the grounds raised in his original RCr 11.42 motion. After conducting a hearing, the trial court denied the CR 60.02 motion in September 1997. During the hearing, Jones was advised to seek a belated appeal in the Court of Appeals on his RCr 11.42 motion.

In June 1988, a panel of the Court of Appeals granted Jones' motion for a belated appeal from the February 1986 and September 1987 orders denying both the RCr 11.42 motion and the CR 60.02 motion, respectively. In July 1989, this Court issued an unpublished opinion affirming the denial of both post-judgment motions. Jones v. Commonwealth, 1988-CA-000866-MR (rendered on July 28, 1989). In its opinion, this Court reviewed all of the issues raised in the original RCr 11.42 motion, the supplemental RCr 11.42 filing and the CR 60.02 motion. This Court held that Jones had not established ineffective assistance of counsel, the complaint involving coercion of his children did not support a new trial because two (2) of the children did not testify and the third stated she did not believe Jones killed the victim. This Court also rejected his challenge to the venire selection process as being without merit. Jones' request for discretionary review was denied by the Kentucky Supreme Court.

On May 14, 1996, Jones filed a second motion for relief pursuant to CR 60.02 and KRS 532.070. After a preliminary evidentiary hearing, the trial court denied the motion as a successive motion and because it was untimely. This appeal followed.

In Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983), the Kentucky Supreme Court established the procedure for appellate review in criminal cases. The court stated that the structure for appellate review is not haphazard or overlapping. Id. at 856. It held that a criminal defendant must first bring a direct appeal when available, then utilize RCr 11.42 by raising

every error of which he should be aware, and utilize CR 60.02 only for extraordinary situations not otherwise subject to relief by direct appeal or by way of RCr 11.42. Id. More recently in McQueen v. Commonwealth, Ky., 948 S.W.2d 415, 416, cert. denied, \_\_\_ U.S. \_\_\_, 117 S. Ct. 2535, \_\_\_ L. Ed. 2d \_\_\_ (1997), the Court reaffirmed the procedural requirements set out in Gross, when it said:

A defendant who is in custody under sentence or on probation, parole or conditional discharge, is required to avail himself of RCr 11.42 as to any ground of which he is aware, or should be aware, during the period when the remedy is available to him. Civil Rule 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could "reasonably have been presented by direct appeal or RCr 11.42 proceedings." RCr 11.42(3); Gross v. Commonwealth, supra, at 855, 856. The obvious purpose of this principle is to prevent the relitigation of issues which either were or could have been litigated in a similar proceeding.

In addition, where a claim of ineffective assistance of counsel is litigated in an RCr 11.42 proceeding, a defendant cannot raise the issue of ineffective assistance in a subsequent RCr 11.42 motion. See McQueen v. Commonwealth, Ky., 949 S.W.2d 70, 71, cert. denied, \_\_\_ U.S. \_\_\_, 117 S. Ct. 2536, 138 L. Ed. 2d 1035 (1997).

In the case at bar, Jones' current CR 60.02 motion is procedurally barred under the successive motions principle. Jones filed two extensive post-judgment motions under RCr 11.42 and CR 60.02 that were denied on the merits by the trial court. This Court permitted a belated appeal of the trial court's decision and affirmed the denial. Most of the issues raised in

the current appeal were rejected in either this Court's opinion on the previous motions or the Supreme Court's opinion on direct appeal. In any event, all of the issues presented in the current CR 60.02 motion either were or should have been raised in the initial RCr 11.42 motion or on direct appeal. Thus, Jones cannot utilize CR 60.02 to circumvent established criminal appellate procedure and obtain repeated review of issues he should have presented earlier.

In addition to the successive motions procedural bar, the trial court also held that Jones' CR 60.02 motion was untimely because it was not filed "within a reasonable time." As the court stated in Gross, "what constitutes a reasonable time in which to move to vacate a judgment under CR 60.02 is a matter that addresses itself to the discretion of the trial court." 648 S.W.2d at 858. The availability of witnesses and the integrity of the physical evidence has been compromised by the fourteen year time span since Jones' conviction. The trial court did not abuse its discretion in holding the motion was untimely. Cf. Gross, supra (affirming trial court decision that five year delay in bringing CR 60.02 motion was untimely).

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

ALL CONCUR.

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