

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-001201-MR  
and  
NO. 1998-CA-002106-MR

ALDEAN HENDERSON, JR.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE ERNEST A. JASMIN, JUDGE  
ACTION NO. 80-CR-00412

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: DYCHE, JOHNSON, AND TACKETT, JUDGES.

JOHNSON, JUDGE: Aldean Henderson appeals pro se from an order of the Jefferson Circuit Court entered on May 6, 1998, that denied his motion for RCr<sup>1</sup> 11.42 relief and a second order entered on July 24, 1998, that denied his CR<sup>2</sup> 60.02 motion to have his conviction vacated or set aside. Having concluded that Henderson

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

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

was not entitled to relief on either motion, we affirm both of the trial court's orders.

Henderson was convicted of robbery in the first degree (KRS<sup>3</sup> 515.020), burglary in the first degree (KRS 511.020), and sexual abuse in the first degree (KRS 510.110). He was also convicted of being a persistent felony offender in the first degree (PFO I). On July 21, 1980, Henderson received a prison sentence of two life terms and twenty years, which sentences were to run concurrently.

Henderson took a direct appeal to the Supreme Court of Kentucky which, in a published opinion, affirmed his conviction, finding that Henderson's allegations that, inter alia, he had been deprived effective assistance of counsel, and that an amendment of the PFO indictment was improper were without merit.<sup>4</sup> Thereafter, Henderson filed a CR 60.02 motion attacking the effectiveness of his trial counsel. The circuit court denied that motion and, on appeal, this Court affirmed, concluding

that this is appellant's second CR 60.02 motion, that many of his complaints were also addressed in the direct appeal, and that he has received the complete array of judicial redress available to him. He has been ably represented throughout every stage of his various encounters with the justice system, been granted evidentiary hearings, and been permitted to supplement arguments of legal counsel with his own pro se claims."<sup>5</sup>

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<sup>3</sup>Kentucky Revised Statutes.

<sup>4</sup>Henderson v. Commonwealth, Ky., 636 S.W.2d 648 (1982).

<sup>5</sup>Court of Appeals No. 1984-CA-2477-MR, rendered August 8, 1986, not-to-be-published.

On September 26, 1997, Henderson filed his third CR 60.02 motion wherein he claimed that the amendment of the PFO indictment at trial was unconstitutional as a violation of his right to due process and equal protection. In essence, he averred that his PFO conviction was unlawful.

Subsequently, on October 2, 1997, Henderson filed a RCr 11.42 motion alleging ineffective assistance of counsel. The trial court denied the RCr 11.42 motion on the grounds that it was successive, barred by the statutory limitation period, as well as the doctrine of laches. From this order, appeal no. 1998-CA-001201 followed.

While the appeal of the RCr 11.42 matter was pending, Henderson moved for a judgment on the pleadings regarding his CR 60.02 motion. The trial court, on July 23, 1998, denied that motion and appeal no. 1998-CA-002106-MR followed. The two appeals were consolidated for our review.

With regard to appeal no. 1998-CA-001201, we conclude that the disposition of this matter is governed by the applicable law of the case. Specifically, the issues contained in the RCr 11.42 motion were addressed and decided by our Supreme Court in Henderson v. Commonwealth, supra. Therefore, that holding operates as the law of the case, is binding on this Court, and cannot be disturbed by this Court.<sup>6</sup> Given that our highest Court has determined that these specific claims made by Henderson lack merit, we are neither authorized nor inclined to attempt to

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<sup>6</sup>Commonwealth v. Schaefer, Ky., 639 S.W.2d 776 (1982).

disrupt that holding as it operates as a judgment upon which we must, and shall, adhere.<sup>7</sup>

In appeal no. 1998-CA-002106-MR, Henderson argues that the trial court's denial of his CR 60.02 motion operated as a deprivation of his constitutional right to due process and equal protection. Specifically, he claims that since his court record had been transferred to this Court at the time he filed his motion for a judgment on the pleadings, it was impossible for the trial court to properly evaluate the merits of that motion. We disagree.

On July 17, 1998, Henderson filed a motion for a judgment on the pleadings in regard to his CR 60.02 motion. At that time, the court record had already been transferred to this Court for review of Henderson's RCr 11.42 motion in the other appeal decided herein. In the July 17, 1998, motion Henderson stated, inter alia:

The Judge of this Court seem [sic] to be so devious and so full of hatred, as well as a lack of respect for law and his oath, that he has probably wrote [sic] an order denying the [movant's] motions but haven't gave [sic] it to the Clerk to file. To delay movant's appeal, and his freedom from this unlawful PFO conviction. [sic]

In response thereto, the trial court issued its order, wherein it stated:

As the Defendant is aware, his recent appeal has resulted in the removal of the record in this matter to the Court of Appeals. The materials left with the Circuit Court do not contain the CR 60.02 motion purportedly filed on September 25, 1997. However, as the

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<sup>7</sup>Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

Defendant's current motion states that he seeks, ". . . his freedom from this unlawful PFO conviction," it appears to this Court that the Defendant continues to assert the unconstitutionality of the PFO statute, as he has in all of his previous pleadings. As such, the Defendant's CR 60.02 motion must be overruled, since the constitutionality of that statute has been established, see Parke v. Raley, 506 U.S.\_\_\_\_, 113 S.Ct. 517, 121 L.Ed.2d 391 (1992).

Actually, Henderson's claim was that he should be permitted to retroactively challenge the amendment of his PFO indictment which, at the time of his 1980 trial, added six additional prior felony offenses. This argument regarding the amendment ignores the fact that the original indictment contained sufficient prior felony convictions to impose the sentencing enhancement.<sup>8</sup> Therefore, any alleged error would be harmless since Henderson's substantial rights were not affected.<sup>9</sup> As such CR 60.02 relief is unavailable to Henderson as no "substantial miscarriage of justice will result from the effect of the final judgment."<sup>10</sup> We believe Henderson has failed to demonstrate either to this Court or the trial court below any extraordinary circumstances justifying CR 60.02 relief.<sup>11</sup> Hence, albeit for the wrong reason, the trial court correctly denied Henderson's CR 60.02 motion.<sup>12</sup>

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<sup>8</sup>See KRS 532.080(3).

<sup>9</sup>CR 61.01.

<sup>10</sup>Wilson v. Commonwealth, Ky., 403 S.W.2d 710, 712 (1966).

<sup>11</sup>See Lewallen v. Commonwealth, Ky.App., 584 S.W.2d 748 (1979).

<sup>12</sup>Friend v. Rees, Ky.App., 696 S.W.2d 325 (1985).

In accordance with the foregoing discussion, the orders of the Jefferson Circuit Court are affirmed.

TACKETT, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT ONLY.

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