

RENDERED: JULY 25, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 1999-CA-002683-MR
AND
NO. 2001-CA-002234-MR

JESSE N. JONES

APPELLANT

v. APPEALS FROM GRAVES CIRCUIT COURT
HONORABLE JOHN T. DAUGHADAY, JUDGE
ACTION NOS. 94-CR-00039 AND 97-CR-00103

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * * * * *

BEFORE: BAKER, BARBER AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Jesse N. Jones has appealed from two orders of the Graves Circuit Court entered on October 6, 1999, and September 14, 2001, which denied his motion for pre-release probation pursuant to KRS¹ 439.575, and his motion to vacate, set

¹ Kentucky Revised Statutes.

aside or correct sentence filed pursuant to RCr² 11.42, respectively. Having concluded that his motion for prerelease probation was properly denied because KRS 439.575 has been held to be unconstitutional, and his RCr 11.42 motion was procedurally barred as a successive motion, we affirm both orders.

On November 21, 1994, in Case No. 94-CR-39, the circuit court sentenced Jones to five years' imprisonment on a guilty plea to the amended charge of assault in the second degree,³ but suspended the term of imprisonment and sentenced him to probation for a period of five years. While on probation, Jones was indicted in June 1997 in Case No. 97-CR-103 for trafficking in a controlled substance (cocaine) in the first degree⁴ involving the sale of cocaine to a confidential informant, and being a persistent felony offender in the second degree (PFO II).⁵ On January 22, 1998, a jury found Jones guilty of trafficking in a controlled substance (cocaine) in the first degree and recommended a sentence of ten years. Immediately

² Kentucky Rules of Criminal Procedure.

³ KRS 508.020.

⁴ KRS 218A.1412.

⁵ KRS 532.080(2).

thereafter, Jones entered a conditional guilty plea⁶ to the PFO II charge pursuant to a plea agreement with the Commonwealth, which recommended an enhanced sentence of 12 years. On March 9, 1998, the trial court sentenced Jones to serve 12 years consistent with the Commonwealth's recommendation in Case No. 97-CR-103. At the same time the trial court revoked Jones's probation in Case No. 94-CR-39 and ordered the 12-year sentence to run consecutively to the revoked five-year sentence, for a total sentence of 17 years under both indictments. On March 19, 1998, Jones filed a notice of direct appeal,⁷ which resulted in an affirmance.

In August 1998 Jones, acting pro se, filed his first RCr 11.42 motion to vacate. In the motion, Jones raised questions concerning potential bias of one of the jurors, the racial composition of the jury, the chain of custody of the cocaine evidence, and ineffective assistance of counsel. On August 18, 1998, the trial court entered an order denying the motion without a hearing stating the chain of custody evidentiary issue should be raised in the direct appeal and the other issues of jury selection and ineffective assistance of counsel were clearly refuted by the record. Jones did not

⁶ See RCr 8.09.

⁷ Case No. 1998-CA-000755-MR.

appeal the denial of this RCr 11.42 motion.

On April 7, 2000, Jones filed his second pro se RCr 11.42 motion raising three issues involving ineffective assistance of counsel. Jones alleged trial counsel was ineffective for not objecting to testimony that the confidential informant had identified him following the drug-buy from a book containing arrest subjects. He further alleged that counsel was ineffective for not objecting to testimony by the confidential informant that she had told the police she could purchase drugs from individuals that she knew or had seen sell drugs in the past. Finally, Jones claimed counsel was ineffective for not objecting to a statement by the prosecutor during voir dire that the venire members may be familiar with some of the facts in his case based on their participation in a previous drug trial.

On April 18, 2000, the trial court entered an order denying the motion because it was unable to review the court record, which was in the possession of the Court of Appeals for consideration of the direct appeal. The trial court stated Jones could refile the motion at a later date. Jones filed a motion to amend the order pursuant to CR⁸ 52.02 and CR 59.05 asking the trial court to hold the RCr 11.42 in abeyance, rather than deny it, because of the three-year time limitation in RCr

⁸ Kentucky Rules of Civil Procedure.

11.42(10). On May 9, 2000, the trial court summarily denied the motion to amend.

On September 6, 2001, Jones refiled the same RCr 11.42 he had submitted in April 2000. On September 14, 2001, the trial court summarily denied the motion. Jones has appealed the denial of this RCr 11.42 motion in Case No. 2001-CA-002234.

Meanwhile, on April 22, 1999, Jones filed his first pro se motion for prerelease probation pursuant to KRS 439.575.⁹ On May 24, 1999, the trial court denied the motion on the grounds that Jones had not been certified as eligible for the release program by the Department of Corrections and the statute violated the separation of powers provisions of the Kentucky Constitution.

On July 1, 1999, Jones filed a second motion for prerelease probation, which the trial court denied on July 15, 1999, stating the same grounds as in the prior denial. On September 23, 1999, Jones filed his third motion for prerelease probation in which he argued that the statutory prerelease program was constitutional and asked the trial court to order the Department of Corrections to prepare a risk assessment evaluation and to certify him for eligibility. On September 6, 1999, the trial court entered an order identical to the prior

⁹ Jones's motion erroneously refers to KRS 439.119, which does not exist.

two orders denying the motion. Jones appealed the latest order in Case No. 1999-CA-002683. On May 31, 2000, this Court granted Jones's motion to hold this appeal in abeyance pending resolution of the issue concerning the constitutionality of KRS 439.575 before the Supreme Court of Kentucky. Case No. 1999-CA-002683 has been taken out of abeyance and the two appeals were designated to be heard together.

First, we address the issue of prerelease probation. In Prater v. Commonwealth,¹⁰ the Kentucky Supreme Court held that the prerelease probation program created by KRS 439.575 was unconstitutional as a violation of the separation of powers doctrine embodied in Sections 27 and 28 of the Kentucky Constitution. Despite use of the word "probation" in the statute, the Supreme Court stated that the prerelease statutory procedure was more akin to "parole" because of its post-judgment character involving suspension of execution of a sentence, rather than suspension of imposition of a sentence before final judgment. The Supreme Court held that KRS 439.575, in violation of the Kentucky Constitution, impermissibly authorized the judiciary to exercise the purely executive function of granting parole which was reserved for the executive branch. Thus, the

¹⁰ Ky., 82 S.W.3d 898 (2002).

trial court correctly denied Jones's requests for prerelease probation on constitutional grounds.

With regard to Jones's RCr 11.42 motion, it was properly denied under the successive motions principle. RCr 11.42(3) provides: "The motion shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding" [emphasis added]. In Gross v. Commonwealth,¹¹ the Supreme Court discussed the procedures for challenging a criminal conviction and stated that the structure for attacking a final judgment is not haphazard or overlapping.¹² A defendant must first bring a direct appeal when available and state every ground of error of which he or his counsel is reasonably aware.¹³ Next, a defendant in custody must utilize RCr 11.42 to raise errors of which he is aware or should be aware during the period this remedy is available.¹⁴ "Final disposition of that [RCr 11.42] motion, or waiver of the opportunity to make it, shall conclude all issues

¹¹ Ky., 648 S.W.2d 853 (1983).

¹² Id. at 856.

¹³ Id. at 857.

¹⁴ Id.

that reasonably could have been presented in that proceeding.”¹⁵

The rule prohibiting successive RCr 11.42 motions is well established in case law. In Caudill v. Commonwealth,¹⁶ the Court affirmed the denial of a second RCr 11.42 motion stating: “Neither our Rules of Criminal Procedure nor our case law provides for a second assault to be made upon the judgment of conviction. The proper procedure for Caudill to have followed was the timely filing of an appeal to this court from the original judgment denying the relief he sought under his first RCr 11.42 motion” [citations omitted].¹⁷ A major purpose of the rule prohibiting successive motions is to promote efficient utilization of court resources by imposing finality and requiring comprehensiveness for post-judgment motions. In Hampton v. Commonwealth,¹⁸ the Court upheld denial of a second RCr 11.42 motion that raised four issues presented in the first RCr 11.42 motion, plus two new issues. “The courts have much more to do than occupy themselves with successive ‘reruns’ of RCr 11.42 motions stating grounds that have or should have been

¹⁵ Id. See also McQueen v. Commonwealth, Ky., 949 S.W.2d 70, 71 (1997) (“[Claimant] is precluded from raising issues in a successive RCr 11.42 motion which were or could have been raised in the first motion”).

¹⁶ Ky., 408 S.W.2d 182 (1966).

¹⁷ Id. at 182. See also Satterly v. Commonwealth, Ky., 441 S.W.2d 144 (1969).

¹⁸ Ky., 454 S.W.2d 672 (1970).

presented earlier.”¹⁹ As the Court stated in Bell v. Commonwealth,²⁰ “[e]very person charged with [a] crime is entitled to at least one fair and impartial trial, but it is absolutely absurd to take the time of the courts with continuous filing and refiling of motions for the same relief under the same proceedings.”

Moreover, failure to receive a decision on the merits on appeal from denial of an earlier RCr 11.42 motion does not preclude dismissal of a subsequent motion. In Szabo v. Commonwealth,²¹ the Court held that a petitioner who abandons the appeal of his initial RCr 11.42 motion is not entitled to relief on a second RCr 11.42 motion even though there has never been an appellate post-conviction review on the merits of his initial motion. Similarly, in Lycans v. Commonwealth,²² the Court upheld denial of a second RCr 11.42 motion even though the appeal of the trial court’s denial of petitioner’s first RCr 11.42 motion

¹⁹ Id. at 673. See also Burton v. Tartar, Ky., 385 S.W.2d 168, 169 (1964)(second RCr 11.42 motion denied as attempt at “trifling with the court”); Case v. Commonwealth, Ky., 467 S.W.2d 367 (1971)(second RCr 11.42 motion denied because it involved “nothing, which was not or could not have been presented originally”); and Shepherd v. Commonwealth, Ky., 477 S.W.2d 798 (1972)(fourth RCr 11.42 motion dismissed for failure to demonstrate reasons why issues were not raised in earlier motions).

²⁰ Ky., 396 S.W.2d 772, 772-73 (1965). See also Warner v. Commonwealth, Ky., 398 S.W.2d 490 (1966)(subsection 3 of RCr 11.42 was intended to protect the courts against abuse of successive proceedings to vacate the same judgment).

²¹ Ky., 458 S.W.2d 167 (1970).

²² Ky., 511 S.W.2d 232 (1974).

had been dismissed for failure to properly file a notice of appeal. The Court said, "when a prisoner fails to appeal from an order overruling his motion to vacate judgment or when his appeal is not perfected or is dismissed, he should not be permitted to file a subsequent motion to vacate" ²³

In the current case, Jones filed his initial RCr 11.42 motion in August 1998. The trial court denied the motion rejecting the evidentiary issue on procedural grounds, that being it should have been raised in the direct appeal, and rejecting the issues of ineffective assistance of counsel and juror selection on the merits. Jones's motion indicates that he was aware of the successive motions principle because it states, "RCr 11.42 requires that I put into this motion all of my possible grounds for setting aside my conviction, and I need a lawyer to look at my case and see if there are other things I could have put in it." Although the trial court denied the motion without appointing an attorney to assist him, ²⁴ Jones failed to appeal the denial of this motion. Jones's second and third RCr 11.42 motions raised three identical issues of

²³ Id. at 233. See also Crick v. Commonwealth, Ky., 550 S.W.2d 534 (1977) (second RCr 11.42 motion barred despite failure to appeal denial of first RCr 11.42 motion).

²⁴ We note that Jones was represented by and received assistance of counsel in his direct appeal, which was still ongoing at the time he filed his initial RCr 11.42 motion.

ineffective assistance by his trial attorney. Jones has not argued that those issues could not have been raised in his initial RCr 11.42 motion. The facts supporting those complaints occurred during trial and were available at the time Jones filed his initial RCr 11.42 motion. Consequently, Jones's second and third RCr 11.42 motions were procedurally barred under the successive motions principle and RCr 11.42(3).

For the foregoing reasons, we affirm the orders of the Graves Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Pam Clay
Lexington, Kentucky

Kim Brooks
Covington, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

Perry T. Ryan
Anitria M. Franklin
Assistant Attorney Generals
Frankfort, Kentucky