RENDERED: August 22, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court of Appeals

NO. 2002-CA-000594-MR

DONALD LEE RUCKER — APPELLANT

v.

APPEAL FROM McCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 95-CR-00275-002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON AND KNOPF, JUDGES; AND MILLER, SENIOR JUDGE.[1]

JOHNSON, JUDGE: Donald Lee Rucker, pro se, has appealed from an order entered by the McCracken Circuit Court on March 12, 2002, which denied his motion for leave to file a second RCr[2] 11.42 motion and a motion to vacate, correct or set aside his conviction pursuant to RCr 10.26, RCr 11.42, CR[3] 60.02(f), and CR

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] Kentucky Rules of Criminal Procedure.

[3] Kentucky Rules of Civil Procedure.

60.03. Having concluded that the trial court properly denied Rucker's motions, we affirm.

On September 20, 1996, Rucker was convicted by a jury of trafficking in marijuana over five pounds,[4] wanton endangerment in the first degree,[5] attempting to elude,[6] leaving the scene of an accident,[7] and being a persistent felony offender in the first degree (PFO).[8] On September 23, 1996, the McCracken Circuit Court sentenced Rucker to prison terms totaling 15 years.[9] Rucker's convictions were affirmed by this Court on his direct appeal.[10]

On March 25, 1999, Rucker filed a motion to vacate judgment pursuant to RCr 11.42 alleging that he received ineffective assistance of counsel. On April 26, 1999, the McCracken Circuit Court entered an order denying Rucker's motion without holding an evidentiary hearing. Rucker appealed the trial court's order and on February 18, 2000, this Court rendered an Opinion affirming the judgment of the McCracken

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[4] Kentucky Revised Statutes (KRS) 218A.1421.

[5] KRS 508.060.

[6] KRS 189.393.

[7] KRS 189.580.

[8] KRS 532.080(3).

[9] On September 25, 1996, and October 11, 1996, the sentencing judgment was amended due to clerical errors.

[10] 1996-CA-002690-MR rendered December 24, 1997, not to be published.

Circuit Court.[11] On February 25, 2002, Rucker filed a motion for leave to file a second RCr 11.42 motion and a motion to vacate, correct or set aside his conviction and sentence pursuant to RCr 10.26, RCr 11.42, CR 60.02(f), and CR 60.03. The trial court denied Rucker's motions on March 12, 2002. This appeal followed.

The events leading up to Rucker's convictions began in June 1995 when James Rupke, through his counsel, contacted the McCracken County Sheriff's Department. Rupke was the subject of an arrest warrant arising out of a drug investigation in McCracken County. He contacted the Sheriff's Department and told the officers of his willingness to cooperate in a drug investigation concerning Rucker. On August 22, 1995, Rupke appeared at the Sheriff's Department with a green duffle bag containing 16 pounds of marijuana. Rupke claimed that he had gotten the marijuana from Rucker and that he was to pay Rucker for the marijuana after he sold it. The bag of marijuana was turned over to the police and they began a tape-recorded surveillance of Rupke's telephone conversations.

Based on information gathered in these tape-recorded telephone conversations, the police formulated a plan whereby Rupke would buy a shipment of marijuana from Rucker. However, on August 26, 1995, Rucker informed Rupke during one of the

[11] 1999-CA-001076-MR, not to be published.

taped conversations that the suppliers of the 16 pounds of marijuana that Rupke had previously turned over to the police wanted the money for the marijuana immediately. Since the police could not come up with the money needed to satisfy Rucker and his supplier, the police decided to do a "reverse", whereby Rupke would give the marijuana back to Rucker at a prearranged location where the police would be watching and waiting to arrest Rucker.

On the evening of August 26, Rupke, who was wearing a wire transmitter, went to the parking lot of a local bank and waited for Rucker. When Rucker arrived, he was driving his own car and seated in the front passenger's seat was Miguel Garcia. Rupke and Rucker got out of their cars and began talking. According to police testimony, Rupke then walked to the passenger side window of Rucker's car and handed the green duffel bag of marijuana to Garcia. Rucker returned to his car and started to drive away.

As Rucker was pulling out of the parking lot, one of the unmarked police cars attempted to block Rucker's car by pulling in front of it. Rucker struck the police car and pulled out onto the street. A police chase ensued as several law enforcement vehicles pursued Rucker's car. Eventually, Rucker's vehicle exited the road into a mobile home court. At that time, one of the police officers saw Garcia throw the duffel bag out

of the passenger side window. At the far end of the mobile home court, Rucker's car slid off the road and went down a wooded embankment. When the officers reached Rucker's car, both Rucker and Garcia were gone. The duffel bag and marijuana were later recovered by the police from the area where it had been thrown.

Early on August 27, Carolyn Craven received a phone call from Garcia. In response to Garcia's request, she picked up Garcia and Rucker and drove them to Carbondale, Illinois, where she checked them into a hotel. Rucker was then taken to a Carbondale hospital, where he was subsequently arrested. Garcia was arrested at the hotel in Carbondale.

On August 19 and 20, 1996, Garcia and Rucker were jointly tried.[12] Prior to trial, both defendants moved the trial court for an order granting severance, which was denied. At trial, Garcia denied any involvement in the drug deal and maintained that he just happened to be getting a ride with Rucker when the whole ordeal took place. Rucker did not testify at trial, but his defense theory was that he acted under duress because he was scared that his supplier, Garcia, would kill him and his family.[13]

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[12] Garcia was indicted on charges of trafficking in marijuana and wanton endangerment in the first degree. Garcia was first tried on February 28 and February 29, 1996. That trial ended in a mistrial when the jury was unable to reach a verdict. After the mistrial, Garcia was charged in a superceding indictment with tampering with physical evidence, KRS 524.100, and the charge of wanton endangerment in the first degree was dismissed.

[13] Garcia was convicted of possession of marijuana and tampering with physical evidence and sentenced to prison for a term of five years.

In this appeal Rucker raises three claims of error. His first claim is predicated upon the alleged ineffective assistance of his trial counsel.[14] More specifically, Rucker claims that his former attorney failed to inform him of the substance of an alleged plea offer. According to Rucker, the prosecutor presented the attorney with a "deal" by which Rucker would have served less than two years in the state penitentiary. Rucker claims he was never made aware of the Commonwealth's offer. In support of his argument, Rucker cites the following language contained in a letter dated January 8, 1999, which appears to be from the office of his former attorney:[15]

> 3. Didn't we get you a deal with Tim Kaltenbach[16] that included a letter from his office wherein you would be doing less than two years in the Department of Corrections. I do not remember exactly what it was because your sister came in and we gave her your file.

Rucker claims this letter "clearly demonstrates that he was denied his constitutional right to effective assistance of counsel . . . ."

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[14] The term trial counsel is somewhat misleading as Rucker's original counsel withdrew from the case prior to trial. Rucker's ineffective assistance of counsel claim pertains to the pre-trial conduct of his original attorney.

[15] The letter is not signed by Rucker's attorney, rather, it is signed by the law firm's paralegal.

[16] Tim Kaltenbach was the Commonwealth's Attorney who prosecuted the case.

We decline to reach the merits of Rucker's argument since this issue should have and could have been raised in his initial RCr 11.42 motion.[17] The letter cited by Rucker in support of his argument is dated January 8, 1999. Rucker's initial RCr 11.42 motion was filed on March 25, 1999. Thus, there is no escaping the clear and unequivocal language contained in RCr 11.42(3), which provides as follows:

> 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.

This provision has been consistently interpreted as barring successive motions under RCr 11.42.[18] As was stated by our Supreme Court in Hampton v. Commonwealth,[19] "[t]he 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 presented earlier."

Rucker seeks to relitigate his claim of ineffective assistance of counsel by arguing that he did not receive the above-quoted letter until after he filed his initial RCr 11.42

[17] Rucker did in fact raise the issue of ineffective assistance of counsel in his initial RCr 11.42 motion, however, his claim was based on different grounds.

[18] See Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 454 (2001); and Butler v. Commonwealth, Ky., 473 S.W.2d 109, 109 (1971).

[19] Ky., 454 S.W.2d 672, 673 (1970)(citing Kennedy v. Commonwealth, Ky., 451 S.W.2d 158, 159 (1970)).

motion. Rucker claims the letter was not mailed directly to him, but was instead mailed to his sister in Illinois. This assertion, however, is refuted by the fact that the letter in question was addressed to the state penitentiary in LaGrange, where Rucker currently resides. Moreover, Rucker has failed to introduce any evidence indicating the letter was sent to his sister in Illinois.[20]

Rucker's argument also fails under CR 60.02 since that rule was 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.[21] Similarly, we hold that Rucker has failed to establish an adequate basis for relief under RCr 10.26 and CR 60.03 as his claims amount to no more than conclusionary allegations unsubstantiated by the record.

Rucker next claims that his PFO I conviction and sentence should be vacated because it is constitutionally null and void. This claim was presented in Rucker's initial RCr 11.42 motion, denied by the trial court, and affirmed by this

[20] Rucker has failed to produce any supporting affidavits from his original trial counsel and/or sister. Thus, Rucker's arguments appear to be no more than conclusionary allegations. Moreover, the letter in question is not even signed by Rucker's former counsel, rather, it is signed by the law firm's paralegal.

[21] See McQueen v. Commonwealth, Ky., 948 S.W.2d 415 (1997).

Court. Accordingly, Rucker is barred from raising this argument in a subsequent post-conviction relief motion.[22]

Rucker's final claim of error is that the trial court erred by failing to hold a competency hearing. Once again, any arguments pertaining to Rucker's competency to stand trial should have been raised on direct appeal or in his initial RCr 11.42 motion. Regardless, the arguments advanced by Rucker are without merit. Rucker claims that a competency hearing is mandatory pursuant to KRS 504.100. Rucker further argues that by failing to hold a competency hearing the trial court violated his due process rights under the Fourteenth Amendment to the United States Constitution. Rucker, however, fails to demonstrate exactly how he was prejudiced by the trial court's failure to conduct a competency hearing.

In the case sub judice, the trial judge ordered a psychiatric evaluation. Rucker was subsequently evaluated by a Clinical Psychologist, Dr. Robert B. Sivley, who filed a report indicating that Rucker was competent to stand trial. The record does not contain any medical evidence contradicting Dr. Sivley's report. Moreover, Rucker has failed to offer any evidence

[22] "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." See RCr 11.42(3).

indicating that he was incompetent to stand trial.[23] Since Rucker has failed to establish that he was prejudiced by the trial court's failure to conduct a competency hearing, such failure at most would constitute harmless error.[24] Error without prejudice is disregarded.[25]

Based on the foregoing reasons, the order of the McCracken Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Donald Lee Rucker, Pro Se
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky

[23] All of the cases cited by Rucker in support of his argument involve instances in which the record contained evidence, such as doctors reports, questioning the defendant's competence to stand trial. See Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); Gabbard v. Commonwealth, Ky., 887 s.W.2d 547, 548-49 (1994); and Hayden v. Commonwealth, Ky., 563 S.W.2d 720, 721-22 (1978), overruled in part Thompson v. Commonwealth, Ky., 56 S.W.3d 406, 409 (2001).

[24] See Mills v. Commonwealth, Ky., 996 S.W.2d 473, 486 (1999).

[25] Commonwealth v. Donovan, Ky., 610 S.W.2d 601, 602 (1980)(citing RCr 9.24).