

RENDERED: AUGUST 1, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001296-MR

JAMES WILSON ESTES

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE ROBERT J. HINES, JUDGE
ACTION NO. 05-CR-00569

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: THOMPSON AND VANMETER, JUDGES; HENRY,¹ SENIOR JUDGE.

VANMETER, JUDGE: James Wilson Estes appeals from the McCracken Circuit Court's denial of his motion for post-conviction relief pursuant to RCr² 11.42. We affirm.

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

² Kentucky Rules of Criminal Procedure.

Estes was sentenced to ten years' imprisonment in December 1993 after pleading guilty to first-degree attempted rape. He was released in June 1999 and registered as a sex offender in August of that year. In June 2004, Estes pled guilty to a charge of failure to register as a sex offender after he failed to inform authorities of a change in address, as required by the Sex Offender Registration Act. *See* KRS 17.510. In October 2006, Estes failed to notify authorities of another change in address and was again charged for failing to register as a sex offender as well as being a second-degree persistent felony offender (PFO II). He pled guilty to both charges and received a five-year sentence for the Class D felony of failure to register as a sex offender, enhanced to ten years by virtue of the PFO II.

Subsequently, Estes filed a *pro se* motion for post-conviction relief pursuant to RCr 11.42. He alleged ineffective assistance of counsel, arguing that counsel failed to investigate the 2006 charges and discover that under the applicable statutory provisions, Estes could only be charged with a Class A misdemeanor which was subject to a sentence of no more than one year imprisonment. The McCracken Circuit Court denied the motion because Estes “failed to verify his motion as required by RCr 11.42(2)[.]” This appeal followed.

Estes claims the circuit court denied his motion based on its merits as well as his failure to verify. He argues that this court should rule the verification requirement waived due to the alleged decision on the merits. We are not

persuaded by this argument. While the circuit court used language that leaves its intent somewhat ambiguous, that language is not determinative of the outcome of this case. The order denying Estes's motion under RCr 11.42 was based upon his failure to verify that motion, which deprived the circuit court of jurisdiction to reach the substantive merits of the motion. Therefore, we reject Estes's argument that the dismissal reached the merits of his motion.

In affirming the trial court, we express no opinion as to the merits of Estes' claims. Further, we decline to address the tolling issue, which has been raised for the first time on appeal.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

Melanie A. Foote
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Jason B. Moore
Assistant Attorney General
Frankfort, Kentucky