

RENDERED: AUGUST 22, 2008; 10:00 A.M.
 NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2007-CA-001467-MR

MITCHELL B. THOMAS

APPELLANT

v. APPEAL FROM MASON CIRCUIT COURT

HONORABLE ROBERT W. MCGINNIS, JUDGE

ACTION NO. 01-CI-00008

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

*** * * * *

BEFORE: CAPERTON AND STUMBO, JUDGES; BUCKINGHAM, SENIOR JUDGE.¹

BUCKINGHAM, SENIOR JUDGE: Mitchell B. Thomas appeals from an order of the Mason Circuit Court, entered on February 1, 2007, which denied his motion for relief made pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. We affirm.

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Thomas was convicted of three counts of first-degree trafficking in a controlled substance (second or subsequent offense) and one count of trafficking in a controlled substance within 1000 yards of a school. He was sentenced to serve 12 years on each of the three counts of first-degree trafficking, with two sentences to run concurrently and one to run consecutively, and three years on the count of trafficking in a controlled substance within 1000 yards of a school, to run concurrently, for a total sentence of 24 years. His conviction was affirmed by the Kentucky Supreme Court. *See Thomas v. Commonwealth*, 2004 WL 535929 (Ky. March 18, 2004) (2002-SC-00552-MR).² On August 9, 2006, Thomas filed a pro se motion to vacate his conviction pursuant to RCr 11.42. The motion was denied, and this appeal followed.

The gist of Thomas's argument is that his sentences on the three counts of first-degree trafficking were improperly enhanced due to two prior convictions for drug offenses dating from 1974 and 1976. He contends that the use of prior drug offenses to enhance sentences should be limited in scope and time frame.

In *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky.1983), the Kentucky Supreme Court explained that the structure of post-conviction 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 is aware, or should be aware, during the period when this remedy is

² Thomas states in his brief that he served approximately six years of the sentence and is now on parole.

available to him.” *Id.* at 857. The sentence enhancement issue could have been raised on direct appeal, and it may not therefore be raised in a post-conviction motion pursuant to RCr 11.42. Moreover, Thomas himself has admitted, and the record confirms, that his trial counsel objected to the introduction of these prior offenses into evidence. These alleged errors were therefore fully preserved for review on direct appeal.

Thomas further argues that the enhancement of his sentences constitutes cruel and unusual punishment under the 8th Amendment of the United States Constitution and Section 17 of the Kentucky Constitution. His argument is based on his statement that the convictions occurred years ago and involved only small amounts of marijuana. Thomas did not raise this issue in his RCr 11.42 motion.

“The Court of Appeals is one of review and is not to be approached as a second opportunity to be heard as a trial court. An issue not timely raised before the circuit court cannot be considered as a new argument before this Court.”

Lawrence v. Risen, 598 S.W.2d 474, 476 (Ky. App. 1980). Furthermore, as with his argument regarding the sentence enhancement, this constitutional argument could have been raised in his direct appeal. For these reasons, it is precluded from our consideration in this post-conviction proceeding.

Finally, we note that Thomas raised numerous arguments in his original RCr 11.42 motion that he failed to mention in his appellate brief. “The [f]ailure of appellant to discuss the alleged errors in its brief is the same as if no

brief had been filed in support of its charges.” *R. E. Gaddie, Inc. v. Price*, 528 S.W.2d 708, 710 (Ky. 1975). Alleged errors set forth in a motion but then not presented on appeal are deemed to be waived. *See Smith v. Commonwealth*, 567 S.W.2d 304, 306 (Ky. 1978).

The order of the Mason Circuit Court is therefore affirmed.

ALL CONCUR.

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