

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2006-CA-001795-MR

ERIK HAMILTON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE DENISE CLAYTON, JUDGE  
ACTION NO. 94-CR-002621

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON AND WINE, JUDGES; HENRY,<sup>1</sup> SENIOR JUDGE.

WINE, JUDGE: Erik Hamilton appeals from an order entered by the Jefferson Circuit Court denying him relief from a prison sentence under Kentucky Rules of Criminal Procedure (RCr) 11.42. Having concluded that the trial court did not abuse its discretion in denying Hamilton relief, we affirm.

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<sup>1</sup> 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.

Hamilton was indicted in November 1994 on one count of murder (Kentucky Revised Statutes (KRS) 507.020), one count of attempted murder (KRS 506.010), one count of carrying a concealed deadly weapon (KRS 527.020), and two counts of using restricted ammunition during the commission of a crime (KRS 527.080). These charges stemmed from an incident on October 26, 1994, in which Hamilton shot and killed Derek Newman.

In January 1996, Hamilton pled guilty to the charges of manslaughter in the first degree, wanton endangerment, and using restricted ammunition during a crime. Hamilton's plea included ten years for the manslaughter charge, and twenty years for the ammunition charge, to be served consecutively for a total of thirty years in prison. Hamilton also received one year on the wanton endangerment charge, to run concurrently with the other sentences. Under the terms of the agreement, Hamilton was not eligible for shock probation and agreed to testify truthfully against any individuals indicted as a result of his testimony. A judgment of conviction detailing the above plea was entered March 18, 1996.

Three years after his conviction on March 23, 1999, Hamilton filed his first Kentucky Rules of Civil Procedure (CR) 60.02 motion, *pro se*, to alter, amend, or vacate his sentence. In that motion, Hamilton argued that KRS 527.080, the statute criminalizing the use of restricted ammunition in the commission of a crime, contained a factual inaccuracy. As a result, he contended that the

indictment failed to state a public offense with respect to this charge. The trial court denied the motion, finding that the indictment properly charged Hamilton with a public offense under KRS 527.080. The trial court further found that Hamilton failed to challenge the sufficiency of the statutory definitions of “black talon” and “flanged” ammunition. This Court affirmed the trial court’s denial of the motion. *Hamilton v. Commonwealth*, 1999-CA-001317-MR.

Hamilton was released on bond in 2001. However, an arrest warrant was issued for Hamilton on February 26, 2003, when he did not return to custody. He was arrested on that warrant on January 9, 2004.

Thereafter, Hamilton, through counsel, filed a second CR 60.02 motion raising essentially the same issues in his first CR 60.02 motion. An additional argument Hamilton included was that the prosecutor and his defense counsel both advised him at his plea hearing that the ammunition statute was accurate. The trial court denied his subsequent CR 60.02 for the same reasoning his first CR 60.02 was denied and concluded that Hamilton’s plea was knowing and intelligent. In its order denying, the trial court noted that it reviewed the guilty plea hearing. Hamilton appealed to this Court but the case was eventually dismissed. *See Hamilton v. Commonwealth*, 2005-CA-000008-MR.

Hamilton filed a petition for *habeas corpus* relief in the Muhlenberg Circuit Court on December 29, 2005. The record from the *habeas* proceeding was not made a part of the record on appeal. The trial court denied his claims stating that the issues raised should have been made on direct appeal and that *habeas*

*corpus* was not an appropriate vehicle for his claims. This Court affirmed the denial of his petition on May 8, 2006. Discretionary review was denied on August 17, 2006.

Hamilton filed this *pro se* RCr 11.42 motion on June 5, 2006. In addition, Hamilton sought an evidentiary hearing and appointment of counsel. The trial court denied Hamilton's RCr 11.42 motion because it was untimely, involved issues already presented and rejected, and Hamilton failed to show that his counsel was ineffective. In a separate order, the trial court also denied Hamilton's request for an evidentiary hearing and appointment of counsel. This appeal followed.

On appeal, Hamilton argues that the trial court erred by determining his motion was untimely and failing to grant an evidentiary hearing. Hamilton concedes that his motion is untimely but asserts that he is entitled to application of the exception to the three-year limitations period outlined in RCr 11.42(1)(2)(3) and (10)(a) and (b). This rule provides that a motion to vacate, set aside or correct sentence shall be filed within three years after the judgment becomes final unless the facts upon which the claim is predicated were unknown and could not have been ascertained by the exercise of due diligence. Hamilton asserts that the trial court should have excused his untimely motion by application of equitable tolling to his case as he was mostly a *pro se* litigant the years between his judgment and the filing of his RCr 11.42 motion. *See Robertson v. Commonwealth*, 177 S.W.3d 789 (Ky. 2005). We disagree.

Hamilton's RCr 11.42 motion was filed June 5, 2006, ten years after judgment was entered on March 18, 1996. Hamilton was represented by counsel throughout a significant portion of his two CR 60.02 motions. Most significantly, the facts in support of his constitutional claims have been known to Hamilton since at least the time when he filed his second CR 60.02 motion where he first alleges that his counsel misinformed him about the ammunition statute. Thus, Hamilton was aware of all the facts set forth in support of his motion for RCr 11.42 relief.

In addition to this motion being untimely, we agree with the trial court that Hamilton's motion fails on the merits. Hamilton has not set forth actions taken by his counsel in securing his plea bargain that would indicate to this Court that they were either inefficient or that the outcome of his case would have been any different had he not entered a guilty plea. *See Centers v. Commonwealth*, 799 S.W.2d 51, 55 (Ky. App. 1990), *citing Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In fact, Hamilton faced a potential sentence far greater than the time he received by virtue of his bargained-for plea agreement. He also received the benefit of amended/dismissed charges and parole eligibility in a substantially diminished amount of time. Regardless of Hamilton's assertions to the contrary, the issues set forth in his motion have been heard and disposed of properly.

Since we agree with the trial court's conclusion that the record on its face refuted the allegations made in Hamilton's RCr 11.42 motion, it follows that the court did not err by failing to appoint counsel below. RCr 11.42(5). *See*

*Fraser v. Commonwealth*, 59 S.W.3d 448, 453 (Ky. 2001). Finally, given the absence of any “material issue of fact that cannot be determined on the face of the record,” RCr 11.42(5), the trial court did not err by denying Hamilton’s request for an evidentiary hearing.

Accordingly, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

David S. Mejia  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

Matthew Robert Krygiel  
Assistant Attorney General  
Frankfort, Kentucky