

RENDERED: OCTOBER 23, 2009; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2008-CA-001680-MR

TERRANCE LEE WAGNER

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE KELLY MARK EASTON, JUDGE  
ACTION NO. 00-CR-00284

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE AND CLAYTON, JUDGES; HARRIS,<sup>1</sup> SENIOR JUDGE.  
CLAYTON, JUDGE: Appellant, Terrance Lee Wagner, acting *pro se*, appeals from an order of the Hardin Circuit Court denying him post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. For the reasons stated herein, we affirm the trial court's decision.

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<sup>1</sup> Senior Judge William R. Harris 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.

## FACTUAL BACKGROUND

On September 26, 2000, Wagner was indicted by a Hardin County Grand Jury for first-degree sodomy. Wagner pled not guilty and waived his right to a jury trial. After a bench trial, Wagner was convicted of criminal attempt to commit sodomy in the first degree, KRS 506.010; KRS 510.070(1)(b)(2), and sentenced to twenty years' imprisonment.

On direct appeal to the Kentucky Supreme Court, Wagner alleged that the lower court erred in finding he was competent to stand trial. He also argued that the lower court erred in overruling the motion to suppress his confession. Finding no error, the Court affirmed his conviction on May 19, 2005.

On July 21, 2008, Wagner filed an RCr 11.42 motion in Hardin Circuit Court to set aside his conviction. On August 18, 2008, the circuit court denied Wagner's RCr 11.42 motion as an impermissible attempt to re-litigate the issues that were previously addressed on his direct appeal. The present appeal followed.

## STANDARD OF REVIEW

We review the trial court's denial of an RCr 11.42 motion for an abuse of discretion. An RCr 11.42 "motion is limited to [the] issues that were not and could not be raised on direct appeal." *Sanborn v. Com.*, 975 S.W.2d 905, 909 (Ky. 1998) (overruled on other grounds).

## DISCUSSION

In the current appeal, Wagner repeats the arguments he presented on direct appeal. First, he alleges he was incompetent to stand trial. Second, he asserts that his

confession and waiver was not knowingly, intelligently or voluntarily given and therefore required suppression. Thus, Wagner contends that his conviction and sentence must be vacated. We disagree.

RCr 11.42(2) states “[t]he ‘‘motion [must] be signed and verified[.]’’ In addition, “[t]he trial judge shall examine the motion to see if it is properly signed and verified and whether it specifies grounds and supporting facts that if true, would warrant relief. If not, the motion may be summarily dismissed.” *Fraser v. Com.*, 59 S.W.3d 448, 452 (Ky. 2001). Moreover, the motion must be filed no more than three years after the judgment in the case became final, and no grounds for further review have been stated or shown. RCr 11.42(10).

In this case, the trial court properly stated that Wagner's motion was neither signed nor verified. Additionally, Wagner filed his RCr 11.42 motion on July 11, 2008, three years and two months after the Supreme Court issued its final opinion. Thus, the three year statute of limitations had expired.

Notwithstanding these procedural issues, the merits of Wagner's claim were previously addressed and dismissed by the Kentucky Supreme Court. The purpose of an RCr 11.42 motion is defeated if a convicted defendant is allowed to retry issues which could and should have been raised in the original proceeding. *Thacker v. Com.*, 476 S.W.2d 838, 839 (Ky. 1972). Wagner is simply re-arguing the competency issue and the confession issues from his direct appeal. Thus, the trial court correctly denied Wagner's motion.

Based on the above, we find no abuse of discretion by the trial court in denying Wagner's RCr 11.42 motion for post-conviction relief.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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