

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

NO. 2007-CA-002424-MR

TRAMPIS BARNES

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT  
HONORABLE ROBERT J. HINES, JUDGE  
ACTION NO. 04-CR-00211-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE AND NICKELL, JUDGES; LAMBERT,<sup>1</sup> SENIOR JUDGE.

NICKELL, JUDGE: Trampis Ray Barnes (Barnes) has appealed from the

November 5, 2007, order of the McCracken Circuit Court denying his *pro se* CR<sup>2</sup>

60.02 motion for post-conviction relief. He requests that we vacate his convictions

<sup>1</sup> Senior Judge Joseph E. Lambert 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.

<sup>2</sup> Kentucky Rules of Civil Procedure.

and sentences for possession of controlled substance in the first degree, methamphetamine, first offense,<sup>3</sup> and possession of anhydrous ammonia in an unapproved container with the intent to manufacture methamphetamine, first offense.<sup>4</sup> For the following reasons, we affirm.

On April 1, 2004, McCracken County Sheriff's Department Detective Matt Carter (Det. Carter) investigated a complaint of methamphetamine manufacturing at Barnes's residence. After receiving consent from Barnes to walk through the home, Det. Carter observed numerous items associated with the manufacture of methamphetamine in plain view. His subsequent request for consent to search the home was denied. Det. Carter then secured the home and obtained a search warrant. Execution of the search warrant revealed multiple containers of anhydrous ammonia, all of the items necessary to manufacture methamphetamine, Lortab in an improper container, Skelaxin and methamphetamine syringes. Barnes and a co-defendant were arrested. Both confessed to manufacturing methamphetamine, using methamphetamine, and stealing anhydrous ammonia to make methamphetamine.

Barnes was indicted by a McCracken County grand jury for: (1) possession of anhydrous ammonia in an unapproved container with intent to manufacture methamphetamine, second or subsequent offense;<sup>5</sup> (2) manufacturing

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<sup>3</sup> KRS 218A.1415, a Class D felony.

<sup>4</sup> KRS 250.991(2), a Class B felony.

<sup>5</sup> KRS 250.991(2), a Class A felony.

methamphetamine, second or subsequent offense;<sup>6</sup> (3) use or possession of drug paraphernalia, second or subsequent offense;<sup>7</sup> (4) possession of a controlled substance in the first degree; (5) illegal possession of a legend drug;<sup>8</sup> and (6) possession of a prescribed controlled substance in an improper container.<sup>9</sup>

Following plea negotiations, on October 11, 2004, Barnes entered an unconditional guilty plea.

Pursuant to the plea agreement, the charge of possession of anhydrous ammonia in an unapproved container was amended from a second or subsequent offense to a first offense. The Commonwealth recommended Barnes be sentenced to twenty years' imprisonment on each of the possession of anhydrous ammonia and manufacturing methamphetamine counts, and five years on the drug paraphernalia charge, all to be served concurrently with one another but consecutively to a sentence of two years on the possession of methamphetamine charge. The Commonwealth also recommended sentences of ninety days each on the remaining three misdemeanor counts to be served concurrently with the twenty year sentence, for a total sentence of twenty-two years' imprisonment. Barnes was sentenced on November 12, 2004, in accordance with the Commonwealth's recommendation.

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<sup>6</sup> KRS 218A.1432, a Class A felony.

<sup>7</sup> KRS 218A.500(2), a Class D felony.

<sup>8</sup> KRS 217.182(7), a Class B misdemeanor.

<sup>9</sup> KRS 218A.210, a Class B misdemeanor.

Nearly three years later, on August 1, 2007, Barnes filed a motion for clarification of his final sentencing order, asking that his sentence be amended to provide that he was not subject to the violent offender statute, KRS 493.3401, thus exempting him from the eighty-five percent parole eligibility rule. On September 13, 2007, he filed a motion for post-conviction relief pursuant to CR 60.02(b)(e) and (f) in which he alleged double jeopardy violations. In his CR 60.02 motion, Barnes sought the “vacating and/or rendering void” of his convictions or alternatively the amendment of his sentence to remove him from the applicability of KRS 493.3401. The trial court denied both motions by order entered September 21, 2007. No appeal was taken from the denial. Barnes re-filed the September 13, 2007, motion for modification or amendment of his conviction and sentence pursuant to CR 60.02(b)(e) and (f) on October 22, 2007. The Commonwealth responded to the renewed motion and noted Barnes had previously made the same motion and was alleging no new grounds or reasons to grant the relief requested. The trial court denied Barnes’s subsequent CR 60.02 motion by an order entered November 5, 2007. This appeal followed.<sup>10</sup>

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<sup>10</sup> Prior to filing his notice of appeal, Barnes filed motions in the trial court to vacate, set aside or correct his conviction pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42, to proceed *in forma pauperis*, for appointment of counsel, and for a “full blown” evidentiary hearing. He subsequently requested the trial court recuse itself from further consideration of his case and filed another motion for appointment of counsel. On November 21, 2007, the trial court stayed further proceedings on the RCr 11.42 motion pending the outcome of this appeal. One week later, Barnes was granted pauper status and counsel was appointed in the RCr 11.42 proceeding. No further action has occurred in that proceeding. Barnes has also filed a state *habeas corpus* petition in the Lyon Circuit Court although no information regarding the status of that proceeding appears in the record before us.

We review the denial of a CR 60.02 motion for an abuse of discretion. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000). To warrant relief, the trial court's decision must have been "arbitrary, unreasonable, unfair, or unsupported by sound legal principals." *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007). A trial court may grant relief under CR 60.02 only if a movant demonstrates "he is entitled to this special, extraordinary relief." *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). We will affirm the trial court's decision absent a "flagrant miscarriage of justice." *Id.* at 858.

We need not set forth Barnes's allegations of error nor comment on their merits. All of the requests presented in his October 22, 2007, motion for modification or amendment of his sentence were identical to those made in his previously denied petition for post-conviction relief under CR 60.02. As noted, Barnes filed no appeal from the trial court's September 13, 2007, denial. Nor did he seek clarification or reconsideration of the trial court's denial. Rather, he chose to merely re-file his initial motion for relief and the trial court was again unpersuaded. The failure to appeal from the initial denial is fatal to the current appeal.

The filing of a notice of appeal from entry of the order by which one is aggrieved is mandatory, and without such filing appellate courts are without jurisdiction to provide relief. *Fox v. House*, 912 S.W.2d 450 (Ky. App. 1995). Re-filing a previously overruled motion cannot breathe new life into an already deceased claim. Further, it is well-settled that where a motion for post-conviction

relief is merely one in a series of successive motions stating only grounds that were raised or could have been raised in the prior motion, denial of the motion will not be reviewed on appeal. *Hampton v. Commonwealth*, 454 S.W.2d 672, 673 (Ky. 1970). The Supreme Court of Kentucky has held that “when a prisoner fails to appeal from an order overruling his motion to vacate judgment or when his appeal is not perfected or is dismissed, he should not be permitted to file a subsequent motion to vacate . . . .” *Lycans v. Commonwealth*, 511 S.W.2d 232, 233 (Ky. 1975).

In addition, CR 60.02 is an extraordinary remedy to be utilized only when RCr 11.42 has no applicability and the intent is not for CR 60.02 to be an afterthought or substitute for RCr 11.42. “Civil Rule 60.02 is 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.” *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997) (citing RCr 11.42(3); *Gross*, 648 S.W.2d at 855-56).

Barnes has failed to appeal from the initial denial of his original motion, failed to show that he was entitled to the relief afforded by CR 60.02, and failed to prove that the issues could not reasonably be raised in another proceeding. Thus, we conclude Barnes is not entitled to the extraordinary remedy and discern no “flagrant miscarriage of justice.” *Gross*. The trial court did not err.

In reaching our decision, we are mindful Barnes is conducting his own post-judgment motion practice and courts generally hold *pro se* litigants to a lesser

standard than imposed upon attorneys, with some leniency being given when evaluating compliance with procedural requirements. *Miller v. Commonwealth*, 416 S.W.2d 358, 360 (Ky. 1967), *Case v. Commonwealth*, 467 S.W.2d 358, 360 (Ky. 1971). However, there are rules, both procedural and substantive, which are so deeply ingrained in our jurisprudence that even under the rule of lenity, they cannot be wholly ignored. Because Barnes has failed to even minimally comply with the procedural requirements, we are unwilling to grant him the leniency he seeks.

Finally, we note that Barnes's request for relief pursuant to CR 60.02(b) was time barred on its face as motions pursuant to that section of the rule must be made "not more than one year after the judgment, order, or proceeding was entered or taken." Clearly, Barnes's request under CR 60.02(b), filed nearly three years after the date his conviction was entered, was untimely. Thus, there can be no argument that the trial court acted correctly in denying that portion of Barnes's request.

For the foregoing reasons the judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

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