

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2008-CA-002131-MR

EARL D. TIPTON

APPELLANT

v. APPEAL FROM POWELL CIRCUIT COURT  
HONORABLE FRANK ALLEN FLETCHER, JUDGE  
ACTION NO. 95-CR-00012

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: TAYLOR, CHIEF JUDGE; ACREE, JUDGE; BUCKINGHAM,<sup>1</sup>  
SENIOR JUDGE.

ACREE, JUDGE: The appellant, Earl D. Tipton, seeks reversal of the Powell Circuit Court order denying relief for alleged malfeasance by the prosecutor. The appellant has appealed his conviction via two direct appeals, Kentucky Rule(s) of Civil Procedure (CR) 60.02, and Kentucky Rule(s) of Criminal Procedure (RCr)

---

<sup>1</sup> 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 Kentucky Revised Statute(s) 21.580.

11.42. Tipton has exhausted his remedies and is not permitted to collaterally attack the judgment against him. Therefore, we affirm.

In January 1997, Tipton was convicted of three counts of rape, one count of kidnapping, and one count of sodomy. He took a direct appeal to the Supreme Court of Kentucky which affirmed his conviction, but remanded to the circuit court for a new sentencing trial. The retrial of the sentencing phase occurred on April 11, 2000; he was sentenced to twenty years on each count to run consecutively for 100 years. Tipton took a second direct appeal to the Supreme Court and that sentence was affirmed on November 21, 2002.

In January of 2003, Tipton filed a *pro se* motion for relief under RCr 11.42. The motion was denied and Tipton appealed the decision to the Kentucky Court of Appeals which affirmed the decision of the circuit court.

On June 4, 2007, Tipton filed a *pro se* motion to dismiss the indictment and judgment pursuant to CR 60.02. The motion included several of the issues raised in this appeal. The circuit court denied his motion. On November 5, 2007, Tipton filed another CR 60.02 motion which also included issues repeated in this appeal.

Tipton subsequently filed a motion labeled “Prosecutor Herald committed Misfeasanceby [sic] misapplying the statutes used in this case.” It is unclear under which rule Tipton is attempting to base his motion. Tipton also

failed to attach a copy of the opinion from which he is appealing. It appears this appeal is a result of the circuit court's denial of the aforementioned motion because Tipton asserted the same arguments in the motion that he now attempts to argue on appeal. However, he is without recourse.

“The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete.” *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). RCr 11.42

[p]rovides a vehicle to attack an erroneous judgment for reasons which are not accessible by direct appeal. In subsection (3) it provides that “the motion shall state *all* grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall include *all* issues that could reasonably have been presented in the same proceeding.”

*Id.* (quoting RCr 11.42). Relief under CR 60.02 is “for relief that is not available by direct appeal and not available under RCr 11.42.” *Id.*

Tipton has already filed both an RCr 11.42 motion and a CR 60.02 motion. The arguments raised in this appeal could have been and should have been raised previously and, in fact, were previously raised in prior motions. He simply will not be permitted to have yet another bite at this apple. *Gross v. Commonwealth*, 648 S.W.2d 853, 857 (Ky. 1983) (citing *Alvey v. Commonwealth*, 648 S.W.2d 858 (Ky. 1983)). The decision of the circuit court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Earl D. Tipton, *Pro se*  
Burgin, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

Susan Roncarti Lenz  
Assistant Attorney General  
Frankfort, Kentucky