

RENDERED: OCTOBER 21, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-002013-MR

JOHN D. ALSTATT

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
ACTION NO. 08-CR-00213

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, STUMBO, AND VANMETER, JUDGES.

STUMBO, JUDGE: John Alstatt appeals from an order of the Muhlenberg Circuit Court denying his RCr 11.42 motion to correct a sentence of imprisonment. Alstatt contends that the circuit court erred in dismissing the motion for failure to comply with RCr 11.42(2). We conclude that the circuit court properly dismissed the motion upon finding that it was not verified as required by the civil rules. As such, we affirm the order on appeal.

On November 5, 2008, the Muhlenberg Circuit Court rendered a judgment reflecting Alstatt's plea of guilty to one count of receiving stolen property over three hundred dollars, and to being a persistent felony offender. The court sentenced Alstatt to five years in prison, to be served consecutively with the sentence he was then serving. On March 19, 2009, Alstatt entered an additional plea of guilty in Franklin Circuit Court to one count each of burglary, theft, criminal mischief and a persistent felony offender charge, and was sentenced to seven years in prison.

In September 2010, Alstatt filed a *pro se* RCr 11.42 motion in Muhlenberg Circuit Court to amend the November 2008 judgment to reflect whether it was to run concurrently with the March 2009 judgment. The court summarily dismissed the motion as being unverified (i.e., not notarized), and this appeal followed.

Alstatt now argues *pro se* that the Muhlenberg Circuit Court erred in dismissing his RCr 11.42 motion as unverified. He maintains that he was improperly denied the right to receive concurrent sentences under KRS Chapters 197 and 532, and also argues that he was improperly denied the right to appointed counsel and the right to pursue a post-conviction appeal as provided for by the United States Constitution. The focus of Alstatt's argument, though, appears to be his claim that the Muhlenberg Circuit Court erred in failing to amend its November 5, 2008 judgment to reflect whether the sentence imposed therein is to run concurrently with the sentence imposed by the Franklin Circuit Court on March 12,

2009. He seeks an order reversing the Muhlenberg Circuit Court's dismissal of his RCr 11.42 motion with instructions that the trial court not hold him to the same standard as a licensed attorney and that it order the sentences at issue to run concurrently.

Having examined the written arguments and the record, we find no error in the Muhlenberg Circuit Court's dismissal of Alstatt's RCr 11.42 motion. Though Alstatt characterizes the issue as whether he was entitled to concurrent sentences, the question before us is whether the Muhlenberg Circuit Court properly dismissed the motion as unverified. We must answer that question in the affirmative. RCr 11.42(2) provides that the "motion shall be signed and verified by the movant and shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion." In this context, verification requires that the movant's signature be witnessed and acknowledged by a notary. *Stanford v. Commonwealth*, 854 S.W.2d 742 (Ky. 1993).

It is uncontroverted that Alstatt's signature on the RCr 11.42 motion was not witnessed and acknowledged by a notary. While Alstatt would hold himself to a lesser standard than that of a licensed attorney because he is proceeding *pro se*, and though we recognize the procedural minefield encountered by *pro se* litigants, Alstatt is nevertheless required to act in accordance with the civil rules and case law. Both RCr 11.42 and *Stanford, supra*, provide in clear and

unambiguous terms that a movant's signature on the RCr 11.42 motion must be verified, and that the failure to verify warrants summary dismissal of the motion. This rule of procedure was promulgated not to stymie *pro se* litigants, but to ensure that the person purporting to make the motion and the person whose signature appears on the motion are the same.

The Muhlenberg Circuit Court properly determined that Alstatt's motion was not verified, and the civil rules and case law allow for the summary dismissal of unverified RCr 11.42 motions. Accordingly, we find no error in the order on appeal. For the forgoing reasons, we affirm the order of the Muhlenberg Circuit Court dismissing Alstatt's motion for RCr 11.42 relief from judgment.

ALL CONCUR.

BRIEF FOR APPELLANT:

John D. Alstatt, *Pro Se*
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