

RENDERED: OCTOBER 19, 2012; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2011-CA-000647-MR

JASON R. RICHARDSON

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE STEVE ALAN WILSON, JUDGE  
ACTION NO. 04-CR-00576

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, MAZE, AND TAYLOR, JUDGES.

CLAYTON, JUDGE: This is an appeal from the Warren Circuit Court's denial of the defendant, Jason R. Richardson's, motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 and Kentucky Rules of Civil Procedure (CR) 60.02. Based upon the following, we affirm the decision of the trial court.

## BACKGROUND INFORMATION

Richardson pled guilty to an amended charge of Possession of a Controlled Substance in the First Degree as part of a plea bargain with the Commonwealth. He was sentenced to two years of imprisonment which would be probated upon his successful completion of the drug court program. On August 15, 2008, he completed the program.

On August 29, 2008, Richardson filed a motion to set aside and void his conviction based upon his completion of drug court. The trial court denied Richardson's motion. On February 3, 2010, Richardson filed a pro se motion under CR 60.02 asking for his conviction to be voided. After counsel was appointed, he filed a supplemental RCr 11.42 motion asserting that his counsel was ineffective in failing to specifically set forth the expungement of his conviction in the plea agreement. The trial court also denied these motions and it is from this denial that Richardson brings the current appeal.

## 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 issues that were not and could not be raised on direct appeal." *Sanborn v. Commonwealth*, 975 S.W.2d 905, 909 (Ky. 1998), *overruled on other grounds*.

We review the denial of a CR 60.02 motion under an abuse of discretion standard as well. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000); *Brown v. Commonwealth*, 932 S.W.2d 359, 361 (Ky. 1996). "The test for abuse of

discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Therefore, we affirm the lower court's decision unless there is a showing of some "flagrant miscarriage of justice." *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

## DISCUSSION

Richardson first contends in his Cr 60.02 motion that part of his plea agreement was that he would receive probation and that if he completed a two-year drug program during his probationary period, his conviction would be set aside and expunged. He contends that his attorney, Wes Milliken, stated that it was a verbal agreement with the Commonwealth. Richardson argues that the Warren Circuit Court abused its discretion when it denied his CR 60.02 motion based upon this condition of the plea negotiations.

In denying Richardson's motions, the trial court held as follows:

The relevant part of the plea, which was taken on September 20, 2004, "on a plea of guilty, the Commonwealth recommends; Count 1-2 years. The Commonwealth recommends that the Defendant be placed on probation. Defendant to complete Drug Court. Defendant's probationary period to expire in this case once he completes Drug Court." On that day a colloquy was held with the Defendant and the Defendant acknowledged that he in fact understood the terms and conditions set forth in his order on plea of guilty. To demonstrate this fact the Court was corrected when it contented [sic] that the Defendant would be on probation for a period of five (5) years. Counsel, with the agreement of the Commonwealth, agreed that the probationary period would run for a period of five (5)

years or until such time that he successfully completed Drug Court. Nothing in the record indicates that there was any other agreement set out on the behalf of this Defendant. Petitioner contends that his counsel did not specifically set out the material terms of the parties' agreement. Nothing in the record supports that contention. An issue of expungement is routinely made a part of the record and its absence supports the contention that no such agreement had been reached. The Defendant acknowledged this was the agreement and therefore it stands as such.

Therefore, the Court specifically overrules the Defendant's Motion for 11.42.

Order overruling entered March 16, 2011.

In order to succeed on the CR 60.02 motion, Richardson would have to prove that the offer to expunge was made and was part of the plea agreement he had with the Commonwealth. Nothing in the record, however, suggests that such was the case. It was not a part of the written plea agreement and nothing was set forth during the acceptance of the plea agreement by the trial court that would indicate an agreement was made. As a result, the trial court did not abuse its discretion in overruling Richardson's motion. Thus, we affirm the trial court's denial of Richardson's CR 60.02 motion.

Richardson's RCr 11.42 motion sets forth that his trial counsel made a verbal agreement with the Commonwealth regarding his future expungement but did not reduce the term to writing. As a result, Richardson contends he was denied effective assistance of counsel. Richardson's motion pursuant to RCr 11.42,

however, was not filed within the statutory time period. RCr 11.42(10) provides that:

Any motion under this rule shall be filed within three years after the judgment becomes final, unless the motion alleges and the movant proves either:

(a) that the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence; or

(b) that the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

Richardson's guilty plea was accepted on November 3, 2004. He filed his RCr 11.42 motion on December 15, 2010. None of the exceptions are present and Richardson did not file within three years of his final judgment. Thus, we find that his RCr 11.42 motion was not filed within the statutory time period and will affirm the trial court's denial of his motion.

We, therefore, affirm the decision of the trial court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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