

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-000066-MR

YAQOB TAFAN THOMAS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 03-CR-00460

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, MAZE AND NICKELL, JUDGES.

NICKELL, JUDGE: Yaqob Tafan Thomas, *pro se*, challenges an opinion and order entered by the Fayette Circuit Court on December 6, 2011, denying his second CR¹ 60.02 motion on the strength of *Hollon v. Commonwealth*, 334 S.W.3d 431 (Ky. 2011). In denying relief, the trial court stated *Hollon* is to be applied

¹ Kentucky Rules of Civil Procedure.

prospectively only and allows ineffective assistance of counsel claims to be alleged against appellate attorneys only in relation to direct appeals and not on motions for post-conviction relief. *Id.* at 437. The trial court went on to find Thomas's motion was meritless as there was no proof any of his many attorneys had caused his conviction, provided subpar representation, or caused the denial of his requests for post-conviction relief. Having reviewed the briefs, the record and the law, we affirm.

This is not the first time Thomas's 2006 conviction for murder and tampering with physical evidence has been reviewed. The Supreme Court of Kentucky affirmed the direct appeal of his forty-year sentence in *Thomas v. Commonwealth*, 2006 WL 141607 (Jan. 19, 2006, unpublished). We affirmed the trial court's denial of RCr² 11.42 relief in *Thomas v. Commonwealth*, 2008 WL 682521 (March 14, 2008, unpublished). We again affirmed the trial court's denial of RCr 11.42 and CR 60.02 relief in *Thomas v. Commonwealth*, 2011 WL 2553519 (June 10, 2011, unpublished).

Now, in appealing the denial of his second CR 60.02 motion, Thomas seeks to invoke the benefit of *Hollon*, in which our Supreme Court recently recognized criminal defendants are entitled to effective assistance of counsel not only at trial, but also on direct appeal, and a RCr 11.42 motion is the proper avenue by which to assert such a claim. *Hollon*, 334 S.W.3d at 442. Under *Hollon*, we

² Kentucky Rules of Criminal Procedure.

now review allegations that an attorney who prepared a direct appeal ignored issues that should have been raised on appeal. *Id.* at 437.

A relatively recent opinion, *Hollon* is discussed at length in *Sanders v. Commonwealth*, 339 S.W.3d 427 (Ky. 2011). As in *Sanders*, Thomas cannot argue ineffectiveness of appellate counsel because the denial of his request for RCr 11.42 relief became final long ago³ and cannot be resurrected at this juncture. The need for finality of judgments remains strong. *See Hollon*, at 437.

Additionally, Thomas is foreclosed from filing a second RCr 11.42 motion because all known claims, and those that could have been known through reasonable diligence, must be raised in a single motion. RCr 11.42(3); *See [Fraser v. Commonwealth](#), 59 S.W.3d 448, 454 (Ky. 2001)* (citing *[Butler v. Commonwealth](#), 473 S.W.2d 108, 109 (Ky. 1971)*). Were Thomas to file a second motion to vacate alleging ineffectiveness of appellate counsel, it would be dismissed as a successive motion, *Sanders*, 339 S.W.3d at 438, or denied as being untimely. RCr 11.42(10).

Finally, our Supreme Court has specified that a claim of ineffectiveness of appellate counsel is to be asserted under RCr 11.42. Thomas has attempted to raise his claims under CR 60.02 which is inconsistent with the directive of both *Hollon* and *Sanders*. As stated repeatedly, CR 60.02 exists not as a second bite at the apple, but to provide relief that is unavailable by either direct appeal or RCr 11.42 motion. *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky.

³ Our Supreme Court denied Discretionary Review on October 15, 2008.

1983). Thomas has not demonstrated extraordinary circumstances triggering CR 60.02 relief. *Sanders*, at 437. The claims he seeks to assert would normally be raised on either direct appeal or via motion to vacate, set aside or correct sentence.

WHEREFORE, the trial court having correctly analyzed and applied *Hollon* to deny RCr 11.42 relief, the order of the Fayette Circuit Court is AFFIRMED.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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