

RENDERED: JULY 25, 2014; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2013-CA-000186-MR  
AND  
NO. 2013-CA-000187-MR

ANTHONY WAYNE FAGAN

APPELLANT

v. APPEALS FROM MCCRACKEN CIRCUIT COURT  
HONORABLE TIMOTHY KALTENBACH, JUDGE  
ACTION NOS. 10-CR-00107 & 10-CR-00107-001

HON. TIMOTHY KALTENBACH;  
HON. ANTHONY KITCHEN;  
COMMONWEALTH OF KENTUCKY;  
DANIEL BOAZ AND MICHAEL MURPHY

APPELLEES

AND

NO. 2013-CA-000517-MR  
AND  
NO. 2013-CA-000935-MR

ANTHONY FAGAN

APPELLANT

v. APPEALS FROM MCCRACKEN CIRCUIT COURT  
HONORABLE TIMOTHY KALTENBACH, JUDGE  
ACTION NOS. 10-CR-00107 & 10-CR-00107-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, COMBS AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Anthony Wayne Fagan, *pro se*, filed four appeals: (1) from a denial of his motion to reconsider the trial court's order denying his motion for recusal; (2) an order denying his motion for a new trial; (3) an order denying his motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 based on ineffective assistance of trial counsel and alleged bias of the trial judge; and (4) an order denying his successive RCr 11.42 motion alleging ineffective assistance of appellate counsel and repeating his allegations that the trial judge was biased.

On November 23, 2010, a final judgment of conviction and sentence was entered by the McCracken Circuit Court convicting Fagan of theft by unlawful taking over \$10,000 and three counts of first-degree criminal mischief. He was sentenced to a total of twenty-years' imprisonment and ordered to pay restitution to the victims. The original final judgment in Fagan's case mistakenly awarded him 305 days jail-time credit for time served. On December 11, 2010, the trial court amended the judgment and decreased Fagan's credit to 174 days.

Fagan filed a direct appeal to the Kentucky Supreme Court alleging: "(1) his convictions for theft by unlawful taking over \$10,000 and first-degree criminal mischief violate double jeopardy; (2) the trial court erred by amending the final judgment more than ten days after its entry; and (3) the trial court erroneously

ordered Fagan to pay restitution exceeding a \$100,000 statutory cap.” *Fagan v. Commonwealth*, 374 S.W.3d 274, 276 (Ky. 2012).<sup>1</sup> While his direct appeal remained pending in the Supreme Court, Fagan filed a motion for new trial. The trial court denied the motion.

On August 23, 2012, the Supreme Court affirmed Fagan’s convictions but held the trial court erred when it amended the judgment more than ten days after its entry by decreasing Fagan’s jail-time credit. *Id.* at 278. Consequently, the amended judgment was vacated and the case remanded to the trial court to reinstate the final judgment as originally entered. *Id.* at 281.

On October 22, 2012, the trial court reinstated the final judgment and sentence of conviction entered on November 23, 2010. Fagan then filed a motion for recusal, which was denied on the basis Fagan had unsuccessfully appealed his conviction and the motion was without legal basis. Fagan filed a motion to reconsider the denial and, on November 20, 2012, filed a second motion for a new trial. Both motions were denied and Fagan appealed from each order.

On January 31, 2013, Fagan filed a motion to vacate his conviction pursuant to RCr 11.42. In that motion, he alleged ineffective assistance of trial counsel and allegations of bias by the trial judge. His motion was denied on February 21, 2013. Fagan appealed.

Fagan filed a second RCr 11.42 motion alleging ineffective assistance of appellate counsel. He alleged appellate counsel “failed to properly investigate the

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<sup>1</sup> The underlying facts of the crimes are recited in the Supreme Court opinion and are unnecessary to the resolution of these appeals.

case” and “failed to argue former jeopardy.” He repeated allegations of bias against the trial judge made in his prior motions. The motion was denied and Fagan appealed.

In support of his claim that he is entitled to a new trial, Fagan argues the trial court erred by amending the indictment, the Commonwealth’s attorney erred in charging him with criminal mischief and theft by unlawful taking, the Commonwealth’s attorney used unethical tactics to pursue a conviction, and the trial judge conducted the proceedings in a manner prejudicial to Fagan.

RCr 10.06(1) provides as follows:

The motion for a new trial shall be served not later than five (5) days after return of the verdict. A motion for a new trial based upon the ground of newly discovered evidence shall be made within one (1) year after the entry of the judgment or at a later time if the court for good cause so permits.

“The rule clearly provides that, although a motion for a new trial premised upon newly discovered evidence may be filed within one year of the judgment, a motion premised upon any other grounds must be filed within five days of the verdict.”

*Johnson v. Commonwealth*, 17 S.W.3d 109, 112 (Ky. 2000). Fagan’s motions for a new trial were not filed within five days of the verdict and he makes no allegation of newly discovered evidence. Therefore, the motions were properly denied.

We also conclude Fagan is not entitled to RCr 11.42 relief. Pursuant to the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80

L.Ed.2d 674 (1984), a movant must “show both that counsel’s performance was deficient and that the deficient performance prejudiced the defense.” *Bowling v. Commonwealth*, 981 S.W.2d 545, 551 (Ky. 1998). A defendant is not entitled to an evidentiary hearing on an RCr 11.42 motion if the motion on its face does not allege facts that would entitle the defendant to a new trial even if true or if the allegations are refuted by the record itself. *Maggard v. Commonwealth*, 394 S.W.2d 893, 894 (Ky. 1965).

Fagan argues he received ineffective assistance of counsel because his counsel failed to argue his convictions for criminal mischief and theft by unlawful taking violated double jeopardy. Our Supreme Court addressed this precise issue when, despite the lack of preservation for review, it thoroughly reviewed his double jeopardy challenge and held there was no double jeopardy violation. *Fagan*, 374 S.W.3d at 278. Therefore, Fagan’s allegation of ineffective assistance of counsel in failing to present the issue in the trial court or any allegation of appellate counsel’s deficient performance for failing to adequately present the issue at the appellate level is refuted by the Supreme Court’s opinion.

Fagan’s remaining arguments are stated in convoluted terms amidst allegations of misconduct by the trial judge and vague allegations of error by trial counsel and appellate counsel. Fagan contends the trial court erred when it permitted the Commonwealth to amend the indictment to “complicity with unknown persons” and intersperses allegations of judicial misconduct and ineffective assistance of counsel.

The Commonwealth responds that Fagan should have and could have presented these issues on direct appeal and, therefore, relief is not available under RCr 11.42. *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). The Commonwealth is correct that Fagan's claims of error by trial counsel must fail on that basis alone. However, allegations appellate counsel was ineffective on appeal cannot be dismissed on the same procedural ground.

In *Hollon v. Commonwealth*, 334 S.W.3d 431, 436 (Ky. 2010), the Court departed from its prior view and held criminal defendants may collaterally attack their convictions on the grounds they received ineffective assistance of appellate counsel. However, Fagan's allegations of ineffective assistance of appellate counsel were not properly presented in his successive RCr 11.42 motion.

RCr 11.42(3) provides that "[t]he motion shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding." The rule requires that a defendant present all grounds for relief that were known to him or could have been presented in his first RCr 11.42 motion. *Case v. Commonwealth*, 467 S.W.2d 367, 369 (Ky. 1971). Fagan filed his first RCr 11.42 motion after the Supreme Court rendered its opinion on his direct appeal. Any allegations of ineffective assistance of appellate counsel should have been presented in his first RCr 11.42 motion.

Based on the foregoing, the orders of the McCracken Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE,  
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