

RENDERED: JANUARY 25, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000990-MR

EDWIN JOHN RUSSELL III

APPELLANT

v. APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 12-CR-00081

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: CLAYTON, CHIEF JUDGE; GOODWINE AND THOMPSON,
JUDGES.

CLAYTON, CHIEF JUDGE: Edwin John Russell III appeals pro se from a
Graves Circuit Court order denying his motion for relief pursuant to Kentucky
Rules of Criminal Procedure (RCr) 11.42. He argues that the circuit court lacked
subject matter jurisdiction to address the merits of his motion. We affirm.

Following a jury trial, Russell was convicted of complicity to murder, attempted murder, and two counts each of first-degree robbery, first-degree burglary, and first-degree wanton endangerment, for which he was sentenced to a total of twenty-five years in prison. The judgment was affirmed on direct appeal except as to one of the counts of wanton endangerment which was reversed for insufficient evidence. *Russell v. Commonwealth*, 2013-SC-000811-MR, 2016 WL 1127878, at *1 (Ky. Feb. 18, 2016).

On March 10, 2017, Russell filed a pro se motion to vacate his convictions pursuant to RCr 11.42, alleging numerous instances of ineffective assistance of trial counsel. He failed to verify the motion. Russell also moved for the appointment of counsel and an evidentiary hearing.

The trial court entered an order denying the motion on the merits without a hearing. This appeal by Russell followed.

Russell argues that the trial court was without subject matter jurisdiction to address the merits of his motion because it was not verified in accordance with RCr 11.42(2), which states: “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.” RCr 11.42(2). Russell contends that the trial court was

obliged by the mandatory language of the Rule to dismiss his unverified motion. He seeks reversal of the trial court's order and leave to file a verified motion.

“Subject matter jurisdiction of each Court within the Court of Justice is established by the constitutional provisions and statutes assigning to the courts specific types of claims and causes of action (‘kinds of cases’).” *Daugherty v. Telek*, 366 S.W.3d 463, 466 (Ky. 2012) (footnotes omitted). Under Section 112(5) of the Kentucky Constitution, circuit courts are vested with subject matter jurisdiction over felony prosecutions. *See Commonwealth v. Steadman*, 411 S.W.3d 717, 723 (Ky. 2013). “Whether a court has subject-matter jurisdiction is determined at the beginning of a case, based on the type of case presented. . . . [A] court will retain jurisdiction over such a case so long as jurisdiction was proper in the first place. . . . A court, once vested with subject matter jurisdiction over a case, does not suddenly lose subject matter jurisdiction by misconstruing or erroneously overlooking a statute or rule governing the litigation.” *Kelly v. Commonwealth*, 554 S.W.3d 854, 860 (Ky. 2018) (internal quotation marks and citations omitted). “We have often noted . . . that subject matter jurisdiction does not mean ‘this case’ but ‘*this kind of case.*’” *Daugherty*, 366 S.W.3d at 466 (italics in original) (internal quotation marks and citation omitted).

“Defects in subject-matter jurisdiction may be raised by the parties or the court at any time and cannot be waived. . . . Specifically, subject-

matter jurisdiction may be raised for the first time on appeal.” *Commonwealth v. Groves*, 209 S.W.3d 492, 496 (Ky. App. 2006) (citation omitted.)

By contrast, particular-case jurisdiction “refers to a court’s authority to determine a specific case (as opposed to the class of cases of which the court has subject matter jurisdiction).” *Steadman*, 411 S.W.3d at 722 (citation omitted).

Particular-case “jurisdiction often turns solely on proof of certain compliance with statutory requirements and so-called jurisdictional facts, such as that an action was begun before a limitations period expired.” *Kelly*, 554 S.W.3d at 861-62 (internal quotation marks and citation omitted).

There is no question the Graves Circuit Court has subject matter jurisdiction over Russell’s case because the circuit courts have subject matter jurisdiction over this type of case, *i.e.* felony criminal proceedings. It lacked particular-case jurisdiction because the RCr 11.42 motion did not comply with the requirement of verification. “However, unlike subject-matter jurisdiction, particular-case jurisdiction is subject to waiver.” *Id.* at 861. “Thus, while a reviewing administrative body and/or court is obligated to dismiss an action where there is no subject-matter jurisdiction, even if the issue of jurisdiction has never been asserted by the parties, particular-case jurisdiction is waived if not properly presented at the trial court level.” *Basin Energy Co. v. Howard*, 447 S.W.3d 179, 184-85 (Ky. App. 2014). Thus, while the trial court did not have particular-case

jurisdiction to address the merits of Russell's motion, it did not lose subject matter jurisdiction. This is fully in accordance with the holding of the unpublished opinion relied upon by Russell, which speaks only of the circuit court losing jurisdiction, not subject matter jurisdiction, to reach the merits of an unverified RCr 11.42 motion. *Singleton v. Commonwealth*, 2003-CA-000204-MR, 2005 WL 1593773, at *2 (Ky. App. July 8, 2005).

Russell has provided no reason why particular-case jurisdiction was not waived in his case. He was responsible for failing to verify his motion. He never brought the lack of verification to the trial court's attention, choosing instead to raise the matter for the first time on appeal. Under these circumstances, his allegation that the trial court erred in failing to summarily dismiss the motion is waived.

The order of the Graves Circuit Court denying the motion for RCr 11.42 relief is affirmed.

ALL CONCUR.

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