

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2018-CA-000653-MR

MATTHEW JACKSON

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE JOHN R. GRISE, JUDGE  
ACTION NO. 03-CR-00333

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, NICKELL,<sup>1</sup> AND L. THOMPSON, JUDGES.

ACREE, JUDGE: Matthew Jackson, *pro se*, appeals from the Warren Circuit Court's order denying his RCr<sup>2</sup> 11.42 motion for post-conviction relief claiming he received ineffective assistance of counsel at trial and on appeal. We affirm.

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<sup>1</sup> Judge C. Shea Nickell concurred in this opinion prior to being sworn in as a Justice with the Supreme Court of Kentucky. Release of this opinion was delayed by administrative handling.

<sup>2</sup> Kentucky Rules of Criminal Procedure.

## **BACKGROUND**

This case arose from three late-night robberies of Blockbuster Video stores in Bowling Green, Kentucky, between July and October 2000. Similar robberies occurred at a Nashville, Tennessee<sup>3</sup> area Blockbuster store.<sup>4</sup> Officers apprehended Matthew Jackson at the scene of one of the Nashville robberies. During Tennessee's police investigation, Jackson admitted to the three Bowling Green robberies. He pleaded guilty to the Tennessee robbery and to raping a female store employee.

In Kentucky, Jackson was indicted on a myriad of charges.<sup>5</sup> A jury convicted him on three counts of first-degree robbery by complicity and three counts of burglary by complicity. He was sentenced to sixty years' imprisonment.

## **PROCEDURE**

The procedural timeline in Jackson's numerous appeals provides the basis for our denial of his pursuit of post-conviction relief.

The Warren Circuit Court entered a judgment of conviction on September 25, 2003. He took a direct appeal to the Kentucky Supreme Court

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<sup>3</sup> Nashville, Tennessee is approximately seventy miles south of Bowling Green, Kentucky.

<sup>4</sup> In fact, there were five separate but similar robberies in Nashville.

<sup>5</sup> Jackson was charged with: three counts of first-degree robbery; three counts of first-degree robbery by complicity; first-degree rape; six counts of kidnapping; six counts of kidnapping by complicity; three counts of first-degree burglary; three counts of first-degree burglary by complicity; and first-degree sexual abuse.

which affirmed his conviction on August 25, 2005. *Jackson v. Commonwealth*, No. 2003-SC-000777-MR, 2005 WL 2045482 (Ky. Aug. 25, 2005).

On December 4, 2006, Jackson returned to the Warren Circuit Court and sought post-conviction relief pursuant to RCr 11.42. *Jackson v. Commonwealth*, 03-CR-000333 (Warren Cir. Ct. Dec. 4, 2006) (motion to vacate sentence pursuant to RCr 11.42). The circuit court denied that relief on June 15, 2007, so Jackson appealed that denial to this Court. *Jackson v. Commonwealth*, No. 2007-CA-001396-MR (Ky. App. July 10, 2007) (notice of appeal).

In his first post-conviction appeal, the Department of Public Advocacy (DPA) was assigned to represent him but soon moved, and was granted leave, to withdraw as counsel. Jackson moved for appointment of new counsel, which this Court denied. The Court allowed him sixty (60) days to file a *pro se* brief. *Id.* (Nov. 2, 2007 orders granting/denying). Instead, Jackson filed a motion to dismiss the RCr 11.42 appeal, which was granted on February 13, 2008. *Id.* (Feb. 13, 2008 orders granting/dismissing).

Again, Jackson turned to Warren Circuit Court for relief. He filed a motion pursuant to CR 60.02 asking the circuit court to reconsider the denial of his first request for RCr 11.42 relief, but the court denied the motion. *Jackson v. Commonwealth*, 03-CR-000333 (Warren Cir. Ct. May 12, 2008) (order denying

motion to reconsider RCr 11.42 pursuant to CR 60.02). Jackson did not appeal that denial to the Court of Appeals.

He did, however, file a new CR 60.02 motion in Warren Circuit Court that was denied on November 3, 2008. *See Jackson v. Commonwealth*, No. 2009-CA-000329-MR (Ky. App. Nov. 3, 2008) (circuit court judgment). He appealed that order.

In his second post-judgment appeal, this time of the denial of his CR 60.02 motion, Jackson was represented by the DPA. He did not perfect that appeal but instead eventually moved to dismiss it. *Jackson v. Commonwealth*, No. 2009-CA-000329-MR (Ky. App. Sept. 21, 2009) (motion to dismiss). The Court granted that motion. *Id.* (Nov. 20, 2009 order granting/dismissing).

Jackson then caused a new file to be opened in the Court of Appeals by filing a motion for a belated appeal. *Jackson v. Commonwealth*, No. 2011-CA-002072-MR (Ky. App. Nov. 14, 2011) (motion for belated appeal). This motion identified the appealed judgment as the same November 3, 2008 circuit court order denying CR 60.02 relief. *Id.* (Nov. 3, 2008 circuit court judgment). Because the prior appeal was timely, his motion for a belated appeal was denied. *Id.* (Apr. 23, 2012) (order denying belated appeal).

On June 29, 2015, Jackson filed a motion for relief pursuant to RCr 11.42 and CR 60.02, or in the alternative pursuant to KRS<sup>6</sup> 419.020 for a writ of habeas corpus. *Jackson v. Commonwealth*, 03-CR-000333 (Warren Cir. Ct. June 29, 2015) (motion). On April 9, 2018, the Warren Circuit Court denied Jackson's motions. *Id.* (April 9, 2018 order).

On April 26, 2018, Jackson filed a notice of appeal with this Court in the instant case. Again, the DPA reviewed the file, then moved the Court to withdraw as counsel. Jackson proceeded *pro se* thereafter.

### **ANALYSIS**

Jackson makes three arguments which this Court can easily dispatch.

First, he claims trial counsel was ineffective for failing to present mitigating evidence. This claim unquestionably could have been pursued (and may have been pursued) in one of Jackson's previous quests for post-conviction relief. As we have said before:

Our case law has long held that we will not consider successive motions to vacate a conviction when those motions recite grounds for relief that have been or should have been raised earlier. *Butler v. Commonwealth*, 473 S.W.2d 108, 109 (Ky. 1971). "The courts have much more to do than occupy themselves with successive 'reruns' of RCr 11.42 motions stating grounds that have or should have been presented earlier." *Hampton v. Commonwealth*, 454 S.W.2d 672, 673 (Ky. 1970) (citing *Kennedy v. Commonwealth*, 451 S.W.2d 158, 159 (Ky.

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<sup>6</sup> Kentucky Revised Statutes.

1970)).

*Cardwell v. Commonwealth*, 354 S.W.3d 582, 585 (Ky. App. 2011).

Second, he claims his appellate counsel, in his direct appeal to the Supreme Court, failed to brief the trial court's error in admitting a photograph of Jackson wearing a mask. Jackson is barred from bringing the claim of ineffective assistance of appellate counsel. His direct appeal became final on September 15, 2005. The case that recognized the right of a convicted felon to pursue the claim of ineffective assistance of appellate counsel, *Hollon v. Commonwealth*, was rendered in 2010. 334 S.W.3d 431 (Ky. 2010), *as modified on denial of reh'g* (Apr. 21, 2011). *Hollon* does not apply retroactively. *Sanders v. Commonwealth*, 339 S.W.3d 427, 434-35 (Ky. 2011).

The Supreme Court in *Hollon* "held that ineffective assistance of direct appeal counsel 'may *henceforth* be pursued by motion in the trial court of conviction under RCr 11.42.'" *Id.* at 434 (emphasis added) (quoting *Hollon*, 334 S.W.3d at 439). The Court then expressly stated:

Our ruling is to have prospective effect only. It applies to this case, to cases pending on appeal in which the issue has been raised and preserved, and to cases currently in or hereafter brought in the trial court in which the issue is raised. Prospective application is appropriate because, although our courts have not until now provided a forum for [ineffective assistance of appellate counsel] claims based on an allegedly inadequate appellate brief, the federal courts have provided a forum through habeas review. *See Boykin v. Webb*, [541 F.3d 638 (6th Cir.

2008)]. Kentucky defendants have not, therefore, been denied an opportunity to vindicate their right to effective appellate counsel, and there is thus no need for our decision today to reach back and operate retroactively.

*Hollon*, 334 S.W.3d at 439.

Finally, Jackson claims his trial counsel was ineffective because he failed to file certain motions. As with his first claim, this is one that could have been presented in his previous post-conviction motions. We will not consider this successive motion.

### **CONCLUSION**

For the foregoing reasons the Warren Circuit Court's order denying Jackson's RCr 11.42 motion is affirmed.

ALL CONCUR.

**BRIEF FOR APPELLANT:**

Matthew Jackson, *pro se*  
Tiptonville, Tennessee

**BRIEF FOR APPELLEE:**

Andy Beshear  
Attorney General of Kentucky

Joseph A. Newberg, II  
Assistant Attorney General  
Frankfort, Kentucky