

RENDERED: February 18, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-001138-MR

JAMES FRANKLIN PAYTON, JR.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 89-CR-000290

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from an order denying appellant's CR 60.02 motion seeking to have his 1990 conviction overturned because the grand jury that indicted him in 1989 was illegally empanelled. Because appellant previously raised this issue in a motion filed pursuant to RCr 11.42, he is barred from raising it in a subsequent CR 60.02 motion. Hence, we affirm.

In 1989, appellant, James Payton, was indicted by the Jefferson County Grand Jury on charges of trafficking in a schedule II controlled substance and being a persistent felony offender in the second degree ("PFO II"). Pursuant to a plea agreement, Payton pled guilty to the trafficking charge in exchange for the Commonwealth's agreement to dismiss the PFO II charge. On November 9, 1990, final judgment was entered sentencing Payton to five years' imprisonment, probated for five years.

On March 17, 1994, Payton filed a motion to vacate judgment pursuant to RCr 11.42. One of the arguments raised in that motion was "[t]hat the Jefferson County Circuit Court Grand Jury, which returned the indictment against the Movant, was illegally constituted and empanelled, in violation of the Kentucky Constitution, the United States Constitution, and any and all applicable statutes and rules governing selections of Grand/Petit Juries." The lower court denied the RCr 11.42 motion on March 30, 1994, and Payton subsequently filed an appeal from that order to this Court. On August 23, 1994, this Court entered an order directing Payton to show cause why his appeal should not be dismissed for failure to file a brief. On October 10, 1994, the appeal was dismissed because of Payton's failure to respond to the show cause order.

On October 9, 2002, Payton filed a motion to vacate judgment under CR 60.02. The main argument in this motion was that the grand jury that indicted him was illegally empanelled. From the October 25, 2002 order denying this motion, Payton now appeals.

In Gross v. Commonwealth, 648 S.W.2d 853 (Ky. 1983), the Court held that a defendant is precluded from raising any issues via a CR 60.02 motion that could have or should have been raised in his RCr 11.42 motion. In short, the defendant is not allowed a second bite at the apple. Since Payton already raised the issue of the propriety of his grand jury's empanelment in his RCr 11.42 motion, he is barred from raising it again in a subsequent CR 60.02 motion. Hence, his CR 60.02 motion was properly denied.

For the reasons stated above, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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