

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-001282-MR

DONALD RUCKER

APPELLANT

v. APPEAL FROM McCracken Circuit Court  
HONORABLE CRAIG Z. CLYMER, JUDGE  
ACTION NO. 95-CR-00275

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER, McANULTY, AND MINTON JUDGES.

McANULTY, JUDGE: This is the third time Appellant, Donald Rucker (Rucker), has been before this court with a RCr 11.42 motion. Because this RCr 11.42 motion presents the same issues that have already been decided by this Court in the previous two RCr 11.42 motions, we affirm the trial court's denial of leave for Rucker to file a third RCr 11.42 motion.

The appellate procedural history of this case is extensive. Rucker filed a direct appeal of his 1996 conviction for trafficking in marijuana five pounds or more, first-degree

wanton endangerment, attempting to elude, leaving the scene of an accident, and of being a persistent felony offender, first-degree (PFO I). The facts of the case require no further elaboration here. This Court affirmed the conviction in an unpublished opinion rendered December 24, 1997.

A year and a half after this Court affirmed the conviction on direct appeal; Rucker filed his first collateral attack on the judgment -- a RCr 11.42 motion to vacate his judgment on the basis that he received ineffective assistance of counsel. In an unpublished opinion rendered February 18, 2000, this Court affirmed the trial court's judgment denying Rucker's first RCr 11.42 motion. Upon review, this Court held that Rucker did not receive ineffective assistance of counsel and was not entitled to an evidentiary hearing on his claims.

Two years after his first collateral attack failed, Rucker filed a motion seeking leave to file a second RCr 11.42 motion. The trial court denied Rucker's motion, and he appealed to this Court. Again, he requested relief based on ineffective assistance of counsel; however, he argued different facts in support of his second attack than he did in his first attack. For the following reasons, this Court affirmed the trial court's order denying Rucker leave to file a second RCr 11.42 motion: (1) the issues could have and should have been raised in his direct appeal or his first RCr 11.42 motion; (2) he presented

only conclusory allegations unsubstantiated by the record; and (3) his constitutional claim had already been argued and failed in his initial RCr 11.42 motion.

Finally, in May of 2003, Rucker filed a pro se motion for leave to file a third RCr 11.42 on the grounds that this Court had previously relied on the case of Robbins v. Commonwealth, Ky. App., 719 S.W.2d 742 (1986). Rucker also believes that he is entitled to relief under CR 60.02(f), which states: "[O]n motion a court may, upon such terms as are just, relieve a party . . . from its final judgment" upon any "reason of an extraordinary nature justifying relief."

In his memorandum in support of his RCr 11.42/CR 60.02(f) motion, Rucker argued that because the Kentucky Supreme Court overruled portions of Robbins in Norton v. Commonwealth, Ky., 63 S.W.3d 175 (2001), his claims should be reviewed for a third time, this time under the proper standard of review for ineffective assistance of counsel claims. In Norton, the court reiterated that the proper standard for ineffective assistance of counsel claims is that promulgated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and overruled Robbins to the extent it inadvertently set a different and higher standard than did Strickland. See Norton, 63 S.W.3d at 177. Ultimately, the

trial court denied Rucker's third motion, precipitating this appeal.

A thorough reading of this Court's first opinion denying Rucker relief under RCr 11.42 shows that it correctly applied the Strickland standard in reviewing Rucker's claims of ineffective assistance of counsel. In the February 18, 2000 opinion, citing Strickland, this Court says: "In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing that counsel's performance was deficient and that the deficiency resulted in actual prejudice affecting the outcome." Later in the opinion, this Court did cite Robbins in its discussion pertaining to Rucker's claim that his counsel was ineffective for failing to call his twenty-seven witnesses, but ultimately considered Rucker's general, conclusory assertions as to the testimony of these witnesses and concluded that counsel's performance was not deficient in failing to call them. Thus, this Court determined that Rucker did not meet the first prong of the Strickland test.

Other than the Robbins argument, Rucker presents no claims or issues that have not already been considered and finally decided by this Court. So we affirm the trial court's order denying Rucker leave to file a successive RCr 11.42 motion. And we hold that Rucker presented no extraordinary grounds warranting relief under CR 60.02(f).

ALL CONCUR.

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