

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

NO. 2003-CA-001356-MR

JAMES L. MORROW

APPELLANT

V. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE GEOFFREY P. MORRIS, JUDGE  
INDICTMENT NO. 97-CR-000378

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI, McANULTY, AND MINTON, JUDGES.

MINTON, JUDGE: James L. Morrow appeals from orders of the Jefferson Circuit Court denying his motions made pursuant to RCr<sup>1</sup> 11.42 and CR<sup>2</sup> 59.05. The sole claim raised by Morrow that is not barred from our consideration on procedural grounds is whether his plea of guilty was involuntary as a result of

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<sup>1</sup> Kentucky Rules of Criminal Procedure.

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

ineffective assistance of counsel. As we have determined that it was not, we affirm.

Morrow was charged with trafficking in a controlled substance and with being a persistent felony offender. The Commonwealth's key witness could not be located for trial. So the indictment against Morrow was dismissed without prejudice. When the key witness was later apprehended, Morrow was re-indicted on the same charges.

At trial, the jury found Morrow guilty as charged. But before the sentencing phase of the trial began, Morrow struck a plea bargain with the Commonwealth in which he waived jury sentencing and entered a conditional plea of guilty. In exchange, he received a thirty-year sentence recommendation from the Commonwealth (twenty years on the trafficking charge as a subsequent offender, enhanced to thirty years by the second-degree persistent felony offender charge). There was some dispute as to whether Morrow could be subject to both the subsequent offender and persistent felony offender sentence enhancements. The Commonwealth's "Offer on a Plea of Guilty" stated that he reserved his right to "appeal this case to the Kentucky Ct. of Appeals<sup>3</sup> + argue legal argument on sub. Offender

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<sup>3</sup> Because of the length of sentence imposed, the appeal in this case was made directly to the Kentucky Supreme Court. See Kentucky Constitution § 110(1)(b).

status vs. PFO II Status - Conditional Plea on phase II on trial."

The record indicates that when Morrow appealed to the Kentucky Supreme Court, a dispute arose regarding precisely which issues had been preserved for appeal by the conditional guilty plea and which had been waived. The record further shows that on June 9, 2000, the Supreme Court entered an order granting the Commonwealth's motion to strike five arguments from Morrow's appellate brief. The only issue considered by the Supreme Court on appeal was the one specifically mentioned in Morrow's conditional guilty plea agreement as being reserved: whether he was subject to both the persistent felony offender and subsequent offender sentence enhancements. In a published opinion, the Supreme Court held that he was.<sup>4</sup>

Morrow next filed in the trial court the RCr 11.42 motion that is the subject of this appeal. The court denied the motion. Morrow then filed a motion in the trial court under CR 59.01, asking for a reconsideration of the RCr 11.42 motion and also requesting the court to make findings of fact and conclusions of law. This motion was also denied and this appeal followed.

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<sup>4</sup> See Morrow v. Commonwealth, Ky., 77 S.W.3d 558 (2002).

Morrow has raised the following substantive claims in his motion: (1) that his right to a speedy trial was violated when it took the Commonwealth over three years from the date of his initial arrest to bring him to trial; (2) that his acceptance of the Commonwealth's plea bargain involving the thirty-year sentence was not made knowingly, intelligently, and voluntarily due to ineffective assistance of counsel; (3) that the circuit court abused its discretion in failing to hold an evidentiary hearing regarding the suppression of evidence at trial; (4) that the prosecutor made improper statements to the jury; (5) that the prosecutor acted in a retaliatory manner in adding another charge upon Morrow's re-indictment; (6) that the Commonwealth withheld evidence at trial that could have been used to impeach the testimony of a witness for the Commonwealth; (7) that he received ineffective assistance of counsel when his attorney did not object when the charges in the initial indictment were dismissed without prejudice; (8) that the indictment was constitutionally deficient; and (9) that he was subjected to double jeopardy when he was sentenced under both the subsequent offender and persistent felony offender statutes.

In reviewing Morrow's claims, we are mindful of two principles: the limited scope of relief available under RCr 11.42 and the preclusive effect of Morrow's appeal to the Supreme Court.

The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping but is organized and complete.<sup>5</sup>

RCr 11.42 "provides a vehicle to attack an erroneous judgment for reasons which are not accessible by direct appeal."<sup>6</sup>

Since 1870, the highest court of Kentucky has "held that the Court of Appeals has no power on a second appeal to correct an error in the original judgment which either was, or might have been relied upon in the first appeal."<sup>7</sup> This constraint on our power is founded in the doctrine of "the law of the case," which establishes

that one adjudication settles all errors relied upon for a reversal, whether mentioned in the opinion of the court or not, and all errors lurking in the record on the first appeal which might have been, but were not expressly, relied upon as error.<sup>8</sup>

Therefore, keeping in mind these two principles: that RCr 11.42 may not be used to attack a judgment on grounds that could have been raised on appeal and that the law of the case doctrine has a preclusive effect even on claims that were not considered on appeal, Morrow's claims (1), (3), (4), (5) and (8)

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<sup>5</sup> Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856 (1983).

<sup>6</sup> *Id.*

<sup>7</sup> Commonwealth v. Schaefer, Ky., 639 S.W.2d 776, 777 (1982) (citation omitted).

<sup>8</sup> *Id.* (citation omitted).

are all barred because they could have been raised on direct appeal. Claim (9) is obviously barred because that issue was reviewed and resolved in the published opinion of the Supreme Court.

Claim (6) relates to newly-discovered evidence. Under RCr 10.06, a motion for a new trial on the grounds of newly-discovered evidence must be made within one year after entry of judgment. But, more importantly, the omission of the evidence described by Morrow does not rise to the level of a constitutional deprivation of due process warranting relief pursuant to RCr 11.42. Claim (7) is barred as untimely because it could and should have been raised after the initial dismissal of the indictment.

Although Morrow argues that he did not waive any of his rights to appeal by entering his conditional guilty plea, the point is moot. Although we do not have the full record of Morrow's first appeal, it appears (and Morrow acknowledges) that the Supreme Court decided that the only issue preserved for direct appeal was the dual sentence enhancement. Morrow is, in effect, asking us to do an "end run" around the determinations of our Supreme Court, in violation of the law of the case doctrine and the scope of RCr 11.42.

As part of the same argument, Morrow claims that his appellate counsel was ineffective for failing to challenge the

Commonwealth's claim that the only issue preserved for appellate review was whether Morrow was subject to the two sentencing enhancements. In general, a motion to vacate sentence made pursuant to RCr 11.42 is not an appropriate means by which to remedy the allegedly ineffective assistance of appellate counsel.<sup>9</sup> Our Supreme Court has explained the reason for this limitation as follows:

We think there is a substantial difference in the situation of a convicted defendant for whom no appeal was even taken or one whose appeal was dismissed solely due to neglect of counsel and the situation of a defendant whose appeal was completely processed and the judgment affirmed. In the first case, there was never any consideration of the merits of any substantive issue by the appellate court. In the latter case, the appellate court has considered and decided the merits of the appeal. We will not examine anew an appeal reviewed, considered and decided by this Court.<sup>10</sup>

The record indicates that Morrow's appeal was completely processed and that the Supreme Court fully considered the merits. RCr 11.42 cannot, therefore, be used to attack the effectiveness of appellate counsel.

The only issue that has not been precluded from our consideration is whether Morrow's plea of guilty was valid. Morrow claims that he accepted the plea offer of a thirty-year

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<sup>9</sup> Hicks v. Commonwealth, Ky., 825 S.W.2d 280, 281 (1992).

<sup>10</sup> *Id.*

sentence from the Commonwealth based on the ineffective assistance of his trial counsel.

Where an appellant challenges a guilty plea based on ineffective counsel, he must show both that counsel made serious errors outside the wide range of professionally competent assistance and that the deficient performance so seriously affected the outcome of the plea process that but for the errors of counsel, there is a reasonable probability that the defendant would not have pled guilty but would have insisted on going to trial.<sup>11</sup> In Morrow's case, since he had already been found guilty by a jury, the latter determination would be whether there was a reasonable probability that Morrow would have insisted on being sentenced by the jury.

We have reviewed the record and do not find any deficiency in the performance of Morrow's attorney, Frank Mascagni, sufficient to meet the first element of the test. Morrow claims that Mascagni deceived and tricked him into accepting the plea agreement. The main evidence Morrow provides to support this claim is a conversation that took place at the bench between Mascagni and the Commonwealth's attorney immediately before the entry of the conditional guilty plea. The Commonwealth's attorney offered a sentence of thirty years.

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<sup>11</sup> Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985); Russell v. Commonwealth, Ky.App., 992 S.W.2d 871, 874 (1999).

Mascagni said he would tell Morrow "to take that." The following exchange then took place:

Commonwealth: And then nine on Dancy [one of Morrow's co-defendants]. Can he just give us a minute?

Mascagni: He's pushing me, I think I got a error, he's making me . . . fu . . . he can't make me f---in' try this case without a error!

Commonwealth: Ask him.

Mascagni: I did, he said he's gonna f---in' try.

Commonwealth: Yeah, but now you got a term of years.

Mascagni: All right.

Morrow claims that a little over three minutes elapsed between the end of this exchange and the entry of the guilty plea during which time Mascagni relayed the Commonwealth's offer to Morrow. He claims that this was not a sufficient amount of time for him to consider the offer. But Morrow had already been found guilty by the jury, and he was aware of the potential penalty he faced. Indeed, he states in his brief that he had earlier told his attorney that he wanted the court to sentence him rather than the jury which strongly suggests that he believed the jury would impose a heavy sentence. Morrow does not explain how more time would have changed his decision. Most importantly, the record shows that the trial judge specifically

asked Morrow whether he had had enough time to talk with Mascagni about the plea offer and Morrow answered, "Yes sir."

His second argument concerns his attorney's conversation with the Commonwealth's attorney, specifically his allusions to an "error." Morrow argues that he would not have pled guilty if he had been told of this "error." We cannot determine what "error" was being referred to in the exchange or whether it related to Morrow or to Dancy's case. Even so, Morrow fails even to suggest what this error could possibly have been, how it would have influenced his decision regarding the plea of guilty, or how this error rendered his attorney's performance deficient in any way.

The record also indicates that the trial court conducted a plea colloquy with Morrow asking him whether he understood that he was giving up his right to have a jury recommend the sentence for him. The judge also ascertained that Morrow's attorney had reviewed the plea offer form with him, that he understood the rights he was waiving, and that he had willingly signed the form.

Finally, the vagueness of Morrow's claims fails to satisfy the specificity requirements of RCr 11.42(2)<sup>12</sup> and the

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<sup>12</sup> RCr 11.42(2) states in relevant part: "The motion 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."

circuit court, thus, correctly denied the motion without conducting an evidentiary hearing.<sup>13</sup>

For the foregoing reasons, the orders of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky

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Frankfort, Kentucky

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<sup>13</sup> See Hodge v. Commonwealth, Ky., 116 S.W.3d 463, 470 (2003).