

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-001827-MR

GERALD SMITH

APPELLANT

V. APPEAL FROM CAMPBELL CIRCUIT COURT  
HONORABLE LEONARD L. KOPOWSKI, JUDGE  
INDICTMENT NOS. 99-CR-00298 AND 99-CR-00391

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DYCHE, KNOPF, AND MINTON, JUDGES.

MINTON, JUDGE: Gerald R. Smith was convicted of one count of first-degree rape and one count of first-degree sexual abuse and sentenced to 55 years in prison. After an unsuccessful direct appeal, the circuit court denied Smith's collateral attack on the judgment via an RCr<sup>1</sup> 11.42 motion to vacate his conviction and sentence. The circuit court ruled without a hearing that Smith had failed to file this motion in a timely manner and that the claims raised in the motion had either been rejected or

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

waived in his direct appeal. We agree with the circuit court's conclusion that Smith's arguments were not proper for RCr 11.42 relief, and we affirm the circuit court's decision even though it erroneously found Smith's motion to be untimely.

Smith was indicted in 1999 on allegations of sexual contact with three female children, J.C., S.S., and D.S. J.C. was Smith's niece. S.S. and D.S. were J.C.'s stepsisters. The charges against Smith in relation to his contact with J.C. were severed from the charges relating to the others, and the case proceeded to a jury trial. Trial testimony from J.C., an eleven-year-old, revealed that Smith had a history of inappropriate sexual contact with her for over five years. J.C. further testified that on one occasion, Smith had sexual intercourse with her. The two stepsisters also described at trial Smith's sexual touching of them.

Smith testified on his own behalf. He denied ever touching any of the girls and "swore before God" that he had not committed any of the charges for which he was indicted. Nevertheless, the jury convicted Smith and recommended 55 years in prison. Ultimately, the trial court entered judgment accordingly.

On direct appeal, Smith claimed that the trial court erred by permitting the stepsisters to testify regarding similar acts committed against them by Smith. He also argued that he

should have been granted a directed verdict of acquittal based on the victims' alleged lack of credibility and competency to testify. The Kentucky Supreme Court affirmed his conviction in an unpublished opinion, rendered August 22, 2002.<sup>2</sup>

On July 14, 2003, Smith filed an RCr 11.42 Motion to Vacate Sentence and Conviction in the trial court. Smith's motion contained the following arguments: that his defense counsel was ineffective, that the child victims were incompetent to testify, and that there was never a final judgment on the sexual abuse charge. Less than a month later, Smith's motion was denied. He appealed from the circuit court's order; this opinion follows.

We note at the outset that Smith's arguments on appeal differ vastly from the arguments brought in his original RCr 11.42 motion. On appeal, Smith makes four arguments: first, that his indictment is "bad, void, for the reason that it doesn't Charge a Felony offense"; second, that the testimony of Dr. Lichtenstein, the doctor who examined the three children following the allegations of sexual abuse, failed to establish that there had been any penetration of J.C.; third, that the prosecutor "planted prejudice in the minds of the jurors" in his closing statement; and fourth, that there should have been a

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<sup>2</sup> Gerald R. Smith v. Commonwealth, 2000-SC-0364-MR.

competency hearing to determine if J.C., S.S., and D.S. were fit to testify.

Only the fourth issue regarding the competency of the child witnesses was presented to the circuit court. Smith's remaining arguments were never presented before Smith's brief in this appeal. This Court is charged with reviewing issues decided by the trial court. Since these matters were never given prior consideration, we decline to review them now. Therefore, our scope of review in this matter is limited to the issues actually raised in Smith's original RCr 11.42 motion before the circuit court.<sup>3</sup>

The circuit court denied Smith's motion primarily on the basis that the motion was not timely filed. RCr 11.42(10) states that "any motion under this rule shall be filed within three years after the judgment becomes final . . . ." The final judgment before the circuit court was entered on April 13, 2000; thus, the trial court held that Smith's RCr 11.42 motion, which was filed on July 14, 2003, was untimely.

We must disagree with the trial court's conclusion on this point. In Palmer v. Commonwealth,<sup>4</sup> this Court held that

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<sup>3</sup> We also note that Smith raises a novel issue in his reply brief regarding the trial court's alleged failure to arraign him on the charges in the indictment. Because this issue was not before the trial court, we decline to address it now.

<sup>4</sup> 3 S.W.3d 763 (Ky.App. 1999).

"[o]ur interpretation of RCr 11.42(10) is in line with a number of cases in Kentucky wherein it has been held that a judgment of conviction is not final until judgment has been entered in the final appeal of the case."<sup>5</sup> The rationale for this interpretation is that the issues raised in an RCr 11.42 motion are often dependent on the outcome of a defendant's direct appeal.<sup>6</sup> The Supreme Court's affirmation of Smith's conviction was not rendered until August 22, 2002; therefore, Smith's motion was timely filed within the three-year limitations period.

The circuit court's order also denied Smith's motion on the following basis:

Many of the claims raised in the Defendant's motion were rejected on direct appeal or waived by virtue of not being raised upon appeal. The remaining claims are conclusory allegations that failed to demonstrate any degree of prejudice sufficient to justify a hearing. Defendant's claim [sic] lack any basis under Kentucky law and fail to show any facts that would lead to different results.

In his motion before the circuit court, Smith argued that the child witnesses were incompetent to testify and that there was never a final judgment on the sexual abuse charge. However, the bulk of Smith's substantive argument was centered

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<sup>5</sup> *Id.* at 765.

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

on the alleged ineffective assistance of his trial counsel. Specifically, Smith alleged that his defense counsel "acted as a second prosecutor when questioning defendant of prior convictions"; that counsel created unfair prejudice against Smith by "injecting a fifteen year old conviction" into his testimony at trial; that counsel failed to object to the Commonwealth's use of the prior conviction as an aggravating circumstance during the sentencing phase of the trial; that counsel was ineffective "due to not demanding the the [sic] court to rule upon the objection"; that he was denied due process because counsel failed to object to the Commonwealth's suggestion during closing arguments that the jury convict him on the "indicted charges"; and that counsel was ineffective "for not requesting a reliability hearing."

In Sanborn v. Commonwealth,<sup>7</sup> the Kentucky Supreme Court elucidated the standard of review for an RCr 11.42 motion. The Court stated that "[s]uch a motion is limited to issues that were not and could not be raised on direct appeal. An issue raised and rejected on direct appeal may not be relitigated in these proceedings by claiming that it amounts to ineffective assistance of counsel."<sup>8</sup>

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<sup>7</sup> 975 S.W.2d 905 (Ky. 1998).

<sup>8</sup> *Id.* at 908, 909; see also, Brown v. Commonwealth, 788 S.W.2d 500 (Ky. 1990); Stanford v. Commonwealth, 854 S.W.2d 742 (Ky. 1993).

The first two issues raised by Smith—the competency of the child witnesses and the failure of the trial court to enter a final judgment on the sexual abuse charge—should have been raised in his direct appeal. As the Court articulated in Sanborn, an RCr 11.42 motion is limited to issues that were not and could not be raised on direct appeal. The competency of witnesses and the finality of a judgment are both issues that should have been previously addressed. Smith's failure to mention the issues in his direct appeal amounts to a waiver of these arguments; moreover, the arguments are not the proper subject matter of an RCr 11.42 motion. Therefore, we agree with the circuit court that Smith waived these issues; and we decline to review his arguments.

With regard to Smith's claims of ineffective assistance of counsel, it is clear that his arguments consist of issues that, again, should have been raised on direct appeal. Smith attempts to couch his arguments in terms of "ineffective assistance" in order to draw the issues within the realm of his RCr 11.42 motion. Smith's allegations consist of claims that counsel was ineffective for introducing otherwise inadmissible evidence, creating prejudice, failing to object to evidence introduced by the Commonwealth, failing to demand that the court rule upon an objection, failing to object to closing statements, and for not requesting a "reliability hearing."

All of these issues are essentially evidentiary issues that could have been, but were not, raised on direct appeal. In his brief, Smith concedes that "some" of his arguments were already addressed on direct appeal. But he claims that the only reason he "used" these arguments "was to try to prove that his Counsel was Ineffective, in this area." He argues that if he cannot assert the ineffectiveness of his trial lawyer in this motion, he is without a venue to prove such allegations.

While we agree with Smith that an RCr 11.42 is typically the proper forum for bringing a claim of ineffective assistance of counsel, none of his arguments actually alleges ineffective assistance. Rather, Smith has attempted to disguise arguments that could have been raised on direct appeal as ineffective assistance issues. This is precisely the type of action prohibited by Sanborn. So we, again, agree with the decision to deny Smith's motion; and we decline to review his arguments.

On a final note, the court's order also stated that Smith's motion was denied because those claims that were not previously adjudicated in the direct appeal or otherwise waived were "conclusory allegations that failed to demonstrate any degree of prejudice sufficient to justify a hearing." In Sanborn, the Court held that "[c]onclusionary allegations which are not supported by specific facts do not justify an

evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of a discovery deposition.”<sup>9</sup> We agree with the circuit court’s assessment that the remainder of Smith’s allegations were without a factual basis; therefore, based on the standard set forth in Sanborn, the decision to deny his motion was proper.

For these reasons, we hold that Smith’s RCr 11.42 motion was timely filed; but because his arguments were either waived by his failure to mention them in his direct appeal or amounted to conclusory allegations, we affirm the decision of the Campbell Circuit Court.

ALL CONCUR.

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<sup>9</sup> *Id.* at 909.