

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-000074-MR  
AND  
NO. 2004-CA-000075-MR

LESTER WAGNER

APPELLANT

APPEALS FROM BELL CIRCUIT COURT  
v. HONORABLE JAMES L. BOWLING, JR., JUDGE  
ACTION NOS. 01-CR-00129, 01-CR-00130 AND  
02-CR-00021

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI, McANULTY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: These two appeals are from orders denying appellant's third CR 60.02 motion and his second RCr 11.42 motion. We adjudge that the trial court properly denied the CR 60.02 motion because the allegation contained in the motion (unlawful search) could not be properly raised via a CR 60.02 motion. The second RCr 11.42 motion was properly denied because all of the issues raised could have and should have been raised in the first RCr 11.42 motion. Hence, we affirm.

On February 10, 2001, appellant, Lester Wagner, was arrested for rape in the second degree and sodomy in the second degree, based upon sexual acts he committed with a thirteen-year-old girl on February 9, 2001. Wagner was also charged with possession of marijuana and felony possession of drug paraphernalia at the time of his arrest. Wagner was ultimately indicted on the above charges in Indictment No. 01-CR-130.

On April 27, 2001, Wagner was arrested for driving while his license was suspended for a DUI conviction. During a search incident to the arrest, marijuana and drug paraphernalia were found in Wagner's possession. Pursuant to that arrest, Wagner was indicted in Indictment No. 01-CR-129 for driving on a license suspended for DUI, felony possession of drug paraphernalia, and possession of marijuana.

On September 13, 2001, Wagner was arrested for possession of controlled substances, possession of drug paraphernalia, and possession of marijuana. Wagner was ultimately indicted on three counts of possession of a controlled substance in the second degree (second offense), possession of marijuana, and felony possession of drug paraphernalia in Indictment No. 02-CR-21.

Pursuant to a plea agreement, Wagner entered a guilty plea on February 14, 2002, encompassing all the charges in the three indictments. As to Indictment No. 01-CR-129, Wagner

received five years for felony possession of drug paraphernalia, twelve months for possession of marijuana, and ninety days for driving on a license suspended for DUI, the sentences to run concurrently with each other and to the sentences in Indictment No. 01-CR-130, and consecutive to the sentences in Indictment No. 02-CR-21.

As to Indictment No. 01-CR-130, Wagner was sentenced to five years for rape in the second degree and five years for sodomy in the second degree, to be served concurrently with each other and with the sentences in Indictment No. 01-CR-129, and consecutive to the sentences in Indictment No. 02-CR-21. The possession of marijuana and felony possession of drug paraphernalia charges were dismissed.

Relative to Indictment No. 02-CR-21, Wagner received two years each for the three counts of possession of a controlled substance, to be served concurrently with each other and consecutive to the sentences in Indictment Nos. 01-CR-129 and 01-CR-130. The possession of marijuana and felony possession of drug paraphernalia charges were dismissed.

On April 26, 2002, the trial court entered the final judgments and sentences in all three indictments. In accordance with the plea agreement, Wagner was sentenced to a total of seven years on all of the offenses. No direct appeal was filed from any of the judgments.

Wagner filed a CR 60.02 motion on January 6, 2003, claiming that he was not aware of the sex offender treatment program requirement for parole eligibility at the time he pled guilty, so the court should have run all of his sentences concurrently. The court denied the motion on February 11, 2003, and Wagner did not appeal the ruling.

Wagner filed a second CR 60.02 motion on March 14, 2003, alleging that he was denied due process because the trial court did not consider probation in his sentencing. On March 18, 2003, the court denied the motion, pointing out that each judgment indicated that the court had considered probation and gave the reasons why imprisonment was warranted.

On May 15, 2003, Wagner filed an RCr 11.42 motion alleging that his counsel was ineffective for allowing him to plead guilty to the controlled substance charges when the nature of two of the three substances was unknown, and for failing to raise the defense that one of the controlled substances belonged to Wagner's father. The court denied the motion, noting that the indictments identified each of the three controlled substances and that his plea was entered knowingly, voluntarily, and intelligently. Wagner appealed the denials of both his second CR 60.02 motion and the RCr 11.42 motion. In a single opinion, this Court affirmed the denial of both motions,

specifically noting that the CR 60.02 motion raised an issue that could have been brought on direct appeal.

On August 5, 2003, Wagner filed a third CR 60.02 motion alleging that the controlled substance charges in Indictment No. 02-CR-21 were the result of an unlawful search of his father's home. The court denied the motion on August 14, 2003.

Wagner filed a second RCr 11.42 motion on October 29, 2003, alleging that his attorney on the guilty plea in Indictment No. 01-CR-130 was ineffective because: he misadvised him regarding his parole eligibility as a sex offender; he failed to inform him of the possibility that he could be convicted by a jury of lesser offenses; he failed to obtain a DNA expert; and he did not investigate a mental health defense. Wagner now appeals the denial of that motion and the denial of his third CR 60.02 motion.

We shall first address the appeal of the denial of the CR 60.02 motion alleging that the controlled substance charges in Indictment No. 02-CR-21 stemmed from an unlawful search of his father's home. A guilty plea waives all defenses except that the indictment charged no offense. Bush v. Commonwealth, 702 S.W.2d 46 (Ky. 1986). Thus, unless Wagner entered a conditional guilty plea, which he did not, any issue regarding the search could not be appealed. See RCr 8.09. Even then, it

should have been raised on direct appeal. CR 60.02 is not for relief available by direct appeal. Gross v. Commonwealth, 648 S.W.2d 853 (Ky. 1983). The issue regarding the allegedly unlawful search would have been known to Wagner at the time of his plea and during the time period for his direct appeal. There was no allegation of newly discovered evidence, mistake, fraud, perjury or any of the grounds set forth in CR 60.02. Accordingly, the claim of error is not properly before us in a CR 60.02 motion.

We now turn to the appeal of the denial of Wagner's second RCr 11.42 motion alleging ineffective assistance of counsel. RCr 11.42(3) states:

The motion shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding.

All of Wagner's claims of ineffective assistance of counsel in his second RCr 11.42 motion either were known or should have been known to Wagner at the time of his first RCr 11.42 motion. In fact, Wagner raised the issue of his counsel's ineffectiveness for failing to advise him regarding the sex offender treatment program in his first CR 60.02 motion. Accordingly, the claims of error cannot now be raised in a

successive RCr 11.42 motion. Case v. Commonwealth, 467 S.W.2d  
367 (Ky. 1971).

For the reasons stated above, the orders of the Bell  
Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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