

# Commonwealth of Kentucky

## Court of Appeals

NO. 2007-CA-001249-MR

FRANKIE JONES

APPELLANT

v.

APPEAL FROM BATH CIRCUIT COURT  
HONORABLE WILLIAM B. MAINS, JUDGE  
ACTION NO. 04-CR-00025 AND 04-CR-00026

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: NICKELL, THOMPSON AND VANMETER, JUDGES.

NICKELL, JUDGE: Frankie Jones (“Jones”) *pro se*, appeals an order entered by the Bath Circuit Court on June 5, 2007, denying a successive motion to vacate a thirty-five year sentence resulting from entry of a guilty plea to drug charges in three separate indictments.<sup>1</sup> The order also denied several other motions filed by Jones including requests for an evidentiary hearing, appointment of post-conviction counsel, default

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<sup>1</sup> Kentucky Rules of Criminal Procedure (RCr) 11.42 sets forth Kentucky’s procedure for post-conviction relief.

judgment and imposition of sanctions against the prosecutor. Jones claims he received improper legal advice and his attorney failed to investigate his case and file appropriate motions. After reviewing the complete record, we affirm.

On July 15, 2004, a Bath county grand jury returned two indictments against Jones. Indictment No. 04-CR-00025 charged him with possession of a firearm by a convicted felon.<sup>2</sup> Indictment No. 04-CR-00026 charged him with two counts of trafficking in a controlled substance (cocaine), second offense;<sup>3</sup> one count of trafficking in marijuana;<sup>4</sup> one count of possession of drug paraphernalia, second offense;<sup>5</sup> and being a persistent felony offender in the first degree (PFO I).<sup>6</sup> All of the conduct alleged in both Bath county indictments occurred on June 3, 2004.

About the same time, Jones was also charged in Indictment No. 04-CR-000113 on three counts of trafficking in a controlled substance (cocaine), second offense; and one count of conspiracy to traffic in a controlled substance (cocaine)<sup>7</sup> in neighboring Montgomery county. All of the charges, from both Bath and Montgomery counties, were

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<sup>2</sup> Kentucky Revised Statutes (KRS) 527.040, a Class B felony.

<sup>3</sup> KRS 218A.1412, a Class B felony.

<sup>4</sup> KRS 218A. 1421, a Class D felony.

<sup>5</sup> KRS 218A.500, a Class D felony

<sup>6</sup> KRS 532.080.

<sup>7</sup> KRS 218A.1402; KRS 506.040, a Class B felony.

resolved by entry of a single guilty plea on November 23, 2004.<sup>8</sup> While Jones faced a life sentence on several of the charges because of his status as a PFO I, he accepted the Commonwealth's offer of a total of thirty-five years on all charges and was ultimately sentenced in conformity with the Commonwealth's offer.

On May 9, 2005, claiming ineffective assistance of counsel, Jones filed a single motion to vacate his sentence bearing the indictment numbers for both Bath county cases and for the Montgomery county case. The motion as to both Bath county case numbers was denied on July 28, 2005. We have no knowledge of how the court ruled on the motion to vacate in the Montgomery county case because that record is not before us.

On September 12, 2005, appellant filed a notice of appeal in both Bath county cases. On May 11, 2006, this Court dismissed that appeal as being untimely.

On January 12, 2007, Jones returned to the Bath Circuit Court and filed a second RCr 11.42 motion in both Bath county cases. He also requested an evidentiary hearing and appointment of counsel. When the Commonwealth did not respond within the allowed time, Jones sought a default judgment. The prosecutor subsequently explained he had never received the pleading, but after making copies from the court file in the circuit clerk's office, he responded to both the motion for default judgment and the motion to vacate. On June 5, 2007, the circuit court denied Jones' motions for default

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<sup>8</sup> Bath, Montgomery, Menifee and Rowan counties comprise the 21<sup>st</sup> Judicial Circuit. Judge William B. Mains presides in all four counties. He presided over all three indictments.

judgment, imposition of sanctions against the Commonwealth, appointment of counsel, an evidentiary hearing, and RCr 11.42 relief. This appeal followed.

RCr 11.42(3) requires that a motion to vacate, set aside or correct sentence “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.” The intent of the rule is to ensure “one careful and complete consideration of his application will conclude the litigation and the courts and the bar will not be required again to devote time and effort to his cause.” *Case v. Commonwealth*, 467 S.W.2d 367, 369 (Ky. 1971).

Jones’ second RCr 11.42 motion reiterated the claims he included in his original motion to vacate and incorporated some new claims, but alleged nothing that was not, or could not have been, argued in the first motion. This Court does not review claims that have or could have been raised in a prior motion. *McQueen v. Commonwealth*, 949 S.W.2d 70, 71 (Ky. 1997); *Shepherd v. Commonwealth*, 477 S.W.2d 798, 799 (Ky. 1972). Because some of the allegations in the second motion had already been raised and rejected, and the remaining allegations could have been raised in the initial pleading, there is simply nothing new for this Court to review.

This case is on point with *Lycans v. Commonwealth*, 511 S.W.2d 232 (Ky. 1974), involving a prisoner who filed a successive RCr 11.42 motion after failing to properly appeal the denial of his first motion to vacate. His second RCr 11.42 motion

was denied by the circuit court without an evidentiary hearing. *Lycans* compels the same result in this appeal.

For the foregoing reasons, the judgment is affirmed.

ALL CONCUR.

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