

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-002774-MR

DWAYNE ARVIN

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT  
HONORABLE WILLIAM T. JENNINGS, JUDGE  
ACTION NO. 90-CR-000090

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: BUCKINGHAM, JOHNSON, AND KNOX, JUDGES.

KNOX, JUDGE: Appellant, Dwayne Arvin, appeals the Madison Circuit Court's denial of his motion for relief under RCr 11.42.

In July 1990, appellant was indicted for two (2) counts of attempted murder and one (1) count of first-degree wanton endangerment. At trial in November 1990, appellant was found guilty of the offenses of second-degree assault, second-degree wanton endangerment, and first-degree wanton endangerment. He was sentenced to a total of ten (10) years. On appeal, this Court affirmed appellant's convictions on August 26, 1992.

The issues in this appeal are both procedural and substantive in nature. Procedurally, appellant argues that the

trial court erred: (1) in refusing to appoint counsel to aid him in pursuit of his RCr 11.42 motion; and, (2) in ruling that his motion for RCr 11.42 relief was not timely filed. Substantively, appellant argues that, in several respects, his trial counsel failed to render effective assistance.

Since the issue relating to the timeliness of appellant's filing is a threshold issue, we will address it first. Appellant's RCr 11.42 motion was endorsed by the Madison Circuit Court Clerk as having been filed on October 3, 1997. The trial court ruled that, considering RCr 11.42(10), appellant's motion was not timely filed.

RCr 11.42(10), which became effective on October 1, 1994, reads:

Any motion under this rule shall be filed within three years after the judgment becomes final, unless the motion alleges and the movant proves either:

- (a) that the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence; or
- (b) that the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

If the judgment becomes final before the effective date of this rule, the time for filing the motion shall commence upon the effective date of this rule. If the motion qualifies under one of the foregoing exceptions to the three year time limit, the motion shall be filed within three years after the event establishing the exception occurred. Nothing in this section shall preclude the Commonwealth from relying upon the defense of laches to bar a motion upon the ground of unreasonable delay in filing when the delay has prejudiced the

Commonwealth's opportunity to present relevant evidence to contradict or impeach the movant's evidence.

Since appellant's conviction became final on August 26, 1992, well before the effective date of RCr 11.42(10), appellant was required by that rule to file his RCr 11.42 motion no later than Wednesday, October 1, 1997. However, his motion was filed two days later, on Friday, October 3, 1997.

Appellant argues that because he is confined in a private prison,<sup>1</sup> he does not have access to the assistance of the Department of Public Advocacy. He further argues that he mailed his RCr 11.42 motion to the Madison Circuit Court Clerk on September 28, 1997, and should not be penalized for the mail delay which resulted in his late filing.

First, appellant makes no argument that the exceptions stated in RCr 11.42(10)(a) and (b) extend the time for him to file his RCr 11.42 motion. Second, RCr 1.08(2)(d)(ii) and (iii)<sup>2</sup> clearly provide that in this case, the clerk's endorsement of the

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<sup>1</sup>Otter Creek Correctional Center, which is operated by United States Correction Corporation.

<sup>2</sup>RCr 1.08(2)(d)(ii) and (iii) read:

(ii) The filing of papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

(iii) The clerk shall endorse upon every paper filed with him in an action the date of its filing. Such endorsement shall constitute the filing of the pleading or other paper, and no order of court shall be required.

date October 3, 1997, on appellant's motion is conclusive of the date on which the motion was "filed," regardless of when appellant actually served it. We agree with the trial court that because appellant's motion was not timely filed, it must be dismissed. See Wadsworth v. Commonwealth, Ky., 505 S.W.2d 28 (1968).

In view of our ruling that appellant did not timely file his RCr 11.42 motion, it is not necessary to address the other issues he has raised in his appeal.

Accordingly, the judgment of the Madison Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Dwayne Arvin, Pro Se  
Wheelwright, Kentucky

BRIEF FOR APPELLEE:

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