

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-001858-MR

EARL RAY ALLEN

APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT  
HONORABLE HON. CHARLES W. BOTELEER, JR., JUDGE  
INDICTMENT NOS. 007422 AND 007443

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: HUDDLESTON, McANULTY AND SCHRODER, JUDGES.

McANULTY, JUDGE: This is a *pro se* appeal from the trial court's order denying Appellant's motion styled as a Petition for Amendment of Judgment. Because we find that this motion was not timely filed, the trial court is affirmed.

Appellant entered a guilty plea on May 5, 1972 to two counts of Forgery and was sentenced to ten years on each count, to be served consecutively. Thereafter on June 20, 1978 Appellant filed a Motion to Vacate Judgment pursuant to RCr 11.42. The trial court held a hearing on the issues raised in Appellant's motion and, on July 17, 1978, issued an order denying the motion.

In 1997 Appellant filed the Petition for Amendment of Judgment. For an unknown reason, this motion is not included in the record sent by the Hopkins County Circuit Clerk but we have determined that Appellant relied on CR 59.01(d) (e) and (g) in his petition for relief. The trial court summarily denied the motion in an order entered July 15, 1997. This appeal followed.

In Appellant's brief to this court, he challenges the validity of his guilty plea and asks this court to grant relief under CR 59.01 and amend the judgment to reflect that the two ten year terms be served concurrently rather than consecutively. Appellee correctly states that Appellant has previously litigated, through his RCr 11.42 motion, the validity of his guilty plea and is precluded from raising this issue again. RCr 11.42(3).

Appellant requests relief pursuant to CR 59.01. This rule affords parties a new trial should one of the enumerated circumstances exist. Appellant suggests that he receive relief under subsections (d) (excessive or inadequate damages), (e) (error in the assessment in the amount of recovery) and (g) (newly discovered evidence). There are several problems with Appellant's request.

Firstly, and most importantly, the motion is not timely filed. CR 59.02 mandates that motions for a new trial must be filed within 10 days from the entry of judgment. The judgment in this case was entered in 1972 and the motion was filed twenty-five years later in 1997. There is no question that the motion was not timely filed according to the rules.

Secondly, had this motion been timely filed, Appellant could not have received his requested relief. CR 59.01 is more commonly used in civil litigation rather than criminal where the references to damages and similar language is more applicable. Moreover, Appellant is unable to be granted a new trial under CR 59.01 because he never had a trial in the first place. Appellant waived his right to a trial and entered a guilty plea. There can be no new trial.

Thirdly, the proper vehicle for a motion to amend a judgment is no longer available to Appellant. CR 59.05 provides that a motion to alter or amend a judgment shall be served not later than ten days after the entry of judgment. As previously explained, more than twenty-five years passed between entry of the judgment and the filing of the motion.

For the foregoing reasons, the order of the Hopkins Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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