

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002669-MR

JAMES WESLEY HEADY

APPELLANT

v. APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NO. 00-00-00549

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: JOHNSON, KNOX AND SCHRODER, JUDGES.

JOHNSON, JUDGE: James Wesley Heady (Heady) appeals from an order of the Whitley Circuit Court entered on October 6, 1997, that denied, without appointment of counsel or an evidentiary hearing, Heady's motion for post-conviction relief under Kentucky Rules of Criminal Procedure (RCr) 11.42. We affirm.

On January 19, 1973, Heady and three other men were indicted for the October 7, 1972, armed robbery of Esty Tompkins in Corbin, Kentucky. After Heady and his three co-defendants were tried by a jury and convicted, he was sentenced by a judgment entered on February 28, 1973, to prison for 21 years. Heady was released from prison on parole, but his parole was

revoked, whereby 26 years later he is still serving the unexpired portion of his prison sentence.

On September 11, 1997, Heady filed a motion to vacate his sentence pursuant to RCr 11.42.¹ On September 11, 1997, the same day the motion was filed, the circuit court denied the motion as untimely. The circuit court erroneously ruled that RCr 11.42(10)(a) and (b) require that "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 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 that the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively".² On October 6, 1997, the circuit court denied Heady's motion to reconsider the order denying the RCr 11.42 motion. This appeal followed.

The Commonwealth concedes in its brief that the circuit court erroneously applied the three-year limitation period contained in RCr 11.42(10). The applicable section of RCr

¹ The certificate of service and notice sections of Heady's RCr 11.42 motion indicate that his motion was mailed to the clerk on August 25, 1997.

² Although the circuit court did not rely on this additional ground for denying relief, it also stated: "It appears from the record that the Defendant, James Wesley Heady, was sentenced to 21 years on February 28, 1973, which is some twenty-four years ago. It would appear that the Defendant completed the service of his 21 year sentence." RCr 11.42(1) provides that relief is only available to "[a] prisoner in custody under sentence or a defendant on probation, parole or conditional discharge." However, as stated earlier in this opinion, because of the time he was previously paroled Heady was still "in custody under sentence" when he filed his RCr 11.42 motion.

11.42(10) states: "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." The Commonwealth agrees that the effective date of the relevant amendment to RCr 11.42 was October 1, 1994; that Heady's motion was filed on September 11, 1997, which was within the three-year period; and that the trial court's ruling on this issue was erroneous.

However, the Commonwealth contends that we should affirm the circuit court under the principle "that a correct decision will not be disturbed on appeal merely because it was based on an incorrect ground or reason. . . ." Haddad v. Louisville Gas & Electric Co., Ky., 449 S.W.2d 916, 919 (1969). The Commonwealth's position is that the trial court should have denied Heady's RCr 11.42 motion based upon the doctrine of laches. The Commonwealth relies upon the cases of Prater v. Commonwealth, Ky., 474 S.W.2d 383 (1971), and McKinney v. Commonwealth, Ky., 445 S.W.2d 874 (1969), for its statement that "[i]t has long been held that a defendant who slept on his rights is not given a free ride." However, these cases do not stand for the rule that a defendant cannot bring a RCr 11.42 motion after a delay of many years. Rather, the Court in Prater noted as follows:

In McKinney it was pointed out that at least to the extent of proof which would be required to sustain the motion for relief, a prisoner who has slept on his rights will bear a heavy burden to affirmatively prove the facts on which his relief must rest. A similar reference may be found in Desmond v. United States (1st Cir. 1964), 333 F.2d 378. However, in both McKinney and Desmond, an evidentiary hearing was afforded the prisoner. In Heflin v. United States, 358

U.S. 415, 79 S.Ct. 451, 3 L.Ed.2d 407 (1959), the Supreme Court noted that 28 U.S.C.A. Section 2255, authorizes a prisoner to seek postconviction relief "at any time." In Heflin the Supreme Court stated that the expression "at any time" simply means that, as in habeas corpus, there is no statute of limitations, no res judicata, and that the doctrine of laches is inapplicable.

Prater, supra, at 384. Thus, Prater, which was decided before RCr 11.42 was amended to specifically allow for the defense of laches, does not support the Commonwealth's position.³

However, we do find support for the Commonwealth's position in Hayes v. Commonwealth, Ky.App., 837 S.W.2d 902 (1992), a case cited by neither party. Hayes sought to have his prison sentence vacated pursuant to RCr 11.42 some 23 years after his conviction. Without holding an evidentiary, the circuit court denied Hayes' motion. This Court affirmed the denial of the RCr 11.42 motion on various grounds including the doctrines of laches. The Court stated as follows:

[A] defendant, whether represented by counsel or indigent, is under a duty to "bestir himself to some extent to protect his rights and remedies." Adams v. Commonwealth, Ky.App., 551 S.W.2d 249 (1977). Support for the Adams view can be found in the opinions of the several federal circuits, i.e., Baxter v. Estelle, 614 F.2d 1030 (5th Cir. 1980) cert. den., 449 U.S. 1085, 101 S.Ct. 873, 66 L.Ed.2d 810 (1981); Strahan v. Blackburn, 750 F.2d 438 (5th Cir.1985) (footnote omitted).

Whether it be a rule of court, a statute or a jurisprudential principle, the rule of

³ RCr 11.42(10) recognizes the defense of laches by stating: "Nothing in this section shall preclude the Commonwealth from relying on 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."

reason or reasonableness must be applied. It is not unreasonable to note that everything of which appellant complains was known to him in 1968 yet he waits until the victim and witnesses are unavailable and memories drastically dimmed. True enough, his lawyer is alive and active but the fact remains that neither we nor the trial courts are going to deal with delayed claims such as we have in this appeal. The post-conviction relief procedures have been the subject of such extensive abuse that the Supreme Court of the United States discussed the application of "inexcusable neglect" to post-conviction matters in McCleskey v. Zant, 499 U.S._____, _____, 111 S.Ct. 1454, 1468, 113 L.Ed.2d 517, 542 (1991). In that opinion Justice Kennedy, writing for the majority (p.____ of 499 U.S., p. 1469 of 111 S.Ct., p. 543 of 113 L.Ed.2d) pointed out that "[p]erpetual disrespect for the finality of convictions disparages the entire criminal justice system" and then quoted Bator 76 Harv.L.Rev., at 452-453 to the effect:

A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot war with the underlying substantive commands.... There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility.

Id. at 905-06.

While the circuit court made no findings as to the prejudice that may have been caused to the Commonwealth due to the 24-year delay in the case sub judice, we believe that Hayes stands for the rule that in this type of case a delay of this length is sufficient to satisfy the doctrine of laches as a matter of law. The law places the burden on the movant to "state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of

such grounds." RCr 11.42(2); See Brooks v. Commonwealth, Ky., 447 S.W.2d 614 (1969); and Burton v. Commonwealth, Ky., 394 S.W.2d 933 (1965).

Heady has met the first requirement by specifically alleging the following three grounds for relief: (1) a conflict of interest existed in trial counsel's joint representation of all four co-defendants based on the allegation that Heady disclosed to trial counsel during his initial interview that he was innocent of the armed robbery charge and was merely sitting in his car at the grocery store waiting for the three co-defendants and a 17-year-old juvenile to return from purchasing food and drinks when they informed him that they had committed the armed robbery, and that trial counsel when told of these events, allegedly told Heady "to remain quiet" because if the jury heard Heady's story it "would convict the other three men for sure"; (2) trial counsel was incompetent in allegedly advising Heady not to testify in his own defense; and (3) trial counsel allegedly told the jury in his closing argument that all four defendants, including Heady, were guilty of the armed robbery. However, in regard to the facts on which Heady relies in support of these grounds, we can only assume from his motion that he was relying upon his own testimony. While the fact-finder could certainly choose to accept Heady's version of events, therein lies the prejudice caused to the Commonwealth by the 24-year delay in asserting these claims. In an effort to more fully respond to Heady's brief, the Commonwealth sought and received an order from this Court that the record be supplemented with a copy of the trial transcript. This Court was advised by

the circuit court clerk that a trial transcript had not been previously prepared and that there was no information available at this time that would allow for its preparation some 24 years later. Thus, Heady has failed to demonstrate how he would prove his allegations, other than by his own testimony, and there is no indication that the testimony of anyone else, such as trial counsel or his co-defendants, would support his claims. Heady has not presented any reason for this 24-year delay, and simply stated, the delay is unfair to the Commonwealth's position.

Heady also claims that he was wrongly denied the appointment of counsel to assist him in pursuing his RCr 11.42 motion. KRS 31.110 and Commonwealth v. Ivey, Ky., 599 S.W.2d 456 (1980), provide that a "needy person" is entitled to appointed counsel at state expense in post-conviction proceedings. However, the Supreme Court in Commonwealth v. Stamps, Ky., 672 S.W.2d 336 (1984), held:

Indeed, after examination of the record, the trial court correctly concluded that application for RCr 11.42 relief in this case is an exercise in futility. Likewise, remanding this case for appointment of counsel to search for supplementary grounds for RCr 11.42 relief is also an exercise in futility. In such circumstances, the trial court's failure to follow the statutory mandate of KRS 31.110 is harmless error.

Stamps, supra, at 339. Since we have held as a matter of law that the RCr 11.42 motion is barred by laches, it only follows that the circuit court did not err in denying the appointment of counsel.

Similarly, it was within the discretion of the trial court to determine whether the facts presented in Heady's RCr

11.42 motion required an evidentiary hearing. An evidentiary hearing on an RCr 11.42 motion is not required if the record refutes the movant's factual allegations or if the movant's unrefuted allegations do not establish a right to relief. Again, since Heady's motion was barred by laches, he was not entitled to an evidentiary hearing. Hayes, supra, at 904.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Hon. Irvin J. Halbleib
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BRIEF FOR APPELLEE:

Hon. A.B. Chandler, III
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