

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000198-MR

CARL GREEN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS WINE, SPECIAL JUDGE
INDICTMENT NO. 78-CR-000859

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: GUDGEL, Chief Judge; HUDDLESTON and SCHRODER, Judges.

HUDDLESTON, Judge: Carl Green appeals from a Jefferson Circuit Court order that denied his Kentucky Rule of Criminal Procedure (RCr) 11.42 motion to vacate his sentence. The sole issue is whether Green's RCr 11.42 motion was timely filed under RCr 11.42(10).

The jury convicted Green of wanton murder, burglary in the first degree and rape in the first degree. Green also pled guilty to three counts of burglary in the first degree, one count of criminal attempt to commit murder, three counts of robbery in the first degree and two counts of rape in the second degree. On

March 10, 1980, Green was sentenced to serve concurrent terms for the crimes, with the maximum sentence being life imprisonment for wanton murder. On that same day, Green waived his right to a direct appeal of his convictions.

Green filed his RCr 11.42 motion with the Jefferson Circuit Court on June 18, 1998. Without holding an evidentiary hearing, the circuit court denied his motion. This appeal followed.

RCr 11.42(10), upon which the circuit court relied, provides that:

Any motion under this rule [RCr 11.42] 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.

Rcr 11.42(10) became effective on October 1, 1994, and all RCr 11.42 motions challenging final judgments entered prior to that date must have been filed by October 1, 1997.

Green failed to timely file a RCr 11.42 motion. Because the judgment of conviction was entered on March 10, 1980, he was required to file his RCr 11.42 motion by October 1, 1997. Green has failed to adequately plead that his motion is governed by either of the two exceptions to the time limitation for filing a RCr 11.42 motion. Therefore, the circuit court did not have jurisdiction to consider his motion.

Accordingly, we affirm the order denying Green's RCr 11.42 motion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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