

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002795-MR

BRIAN KELLY JONES

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 96-CR-000075

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: EMBERTON, MILLER, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Brian Kelly Jones appeals from the denial of his motion to vacate, modify or set aside sentence pursuant to RCr 11.42. As Jones's RCr 11.42 motion was not timely filed, we affirm.

Following a jury trial held September 17-19, 1996, Brian Kelly Jones was found guilty of first-degree robbery and being a first-degree persistent felony offender. The convictions resulted from a carjacking which occurred on the night of December 5, 1995. On November 11, 1996, the court entered its judgment of conviction and sentence, sentencing Jones to ten years for the robbery conviction enhanced to thirty years by the

PFO I conviction. Jones's conviction was affirmed by the Kentucky Supreme Court in an opinion rendered on September 4, 1997 and made final on September 25, 1997, 96-SC-1087-MR. In a letter dated September 29, 1997, Jones's public defender informed him that the opinion rendered by the Kentucky Supreme Court on September 4, 1997 had brought the direct appeal of his case to a close, and that he would no longer be representing Jones and that Jones's file would be closed.

On October 3, 2000, Jones filed an RCr 11.42 motion to vacate, modify or set aside sentence. On October 12, 2000, the trial court entered an order denying the motion. The court found that Jones's RCr 11.42 motion was not timely filed within three years per RCr 11.42(10), as the direct appeal became final September 25, 1997 and the RCr 11.42 motion was not filed until October 3, 2000. The court further found that the motion sought to readdress matters that should have been addressed on direct appeal. Jones appeals the trial court's October 12, 2000 order.

On appeal, Jones contends that his RCr 11.42 motion was timely filed, but that he experienced difficulties in filing as he was proceeding pro se, along with circumstances including closings of the prison library, unavailability of library staff and notaries, having no control of his own schedule, difficulty paying copying fees due to indigency, and the fact that as a prisoner proceeding pro se, he could not travel to the courthouse to deliver a pleading and ensure that it was file-stamped on a particular day. Jones contends that these difficulties interfere with when or how soon a prisoner is able get legal papers into

the hands of prison officials, or when prison officials can get around to processing a prisoner's paperwork. Jones further argues that the public defender's letter informing him of the Kentucky Supreme Court's denial of his direct appeal was dated September 29, 1997, and that the mailbox rule would allow for three days between the time the letter was mailed and when the mailing was received. Hence, Jones contends that this would extend his time for filing his RCr 11.42 motion until October 1, 2000, the day prison officials finally notarized, copied, and put Jones's motion in the prison mail.

RCr 11.42(10) states:

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.

RCr 11.42(10) clearly states that the motion must be filed within three years after the judgment becomes final. In Palmer v. Commonwealth, Ky. App., 3 S.W.3d 763 (1999), this Court interpreted the language of RCr 11.42(10) to mean that the time for filing an RCr 11.42 motion begins to run from the date of the final judgment on appeal. Jones does not cite and we are not aware of any authority which supports his contention that the time for filing begins to run when a defendant is notified of the final judgment. Further, the allegations in Jones's motion do

not fall under the exceptions provided for by RCr 11.42(10) (a) or (b). Therefore, Jones had three years from the Kentucky Supreme Court's entry of final judgment on September 25, 1997 in which to file his RCr 11.42 motion, making the deadline for filing the motion as September 26, 2000. The record indicates that Jones's RCr 11.42 motion was received by the Clerk of the Jefferson Circuit Court on October 3, 2000. As the RCr 11.42 motion was not timely filed, this Court is precluded from considering the merits thereof.

The order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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