

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001913-MR

FREDDIE HAYES

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 7983

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: EMBERTON, MILLER, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Freddie Hayes appeals, pro se, from the denial of his "Motion to Correct Unlawful Sentence". As KRS Chapter 640 was not in effect at the time of Hayes's sentencing, and because the remainder of his claims could have been raised in his original RCr 11.42 motion, we affirm.

On April 22, 1968, Freddie Hayes was indicted by the Fayette County Grand Jury on one count of rape and one count of armed robbery, for crimes committed on March 5, 1968. At the time, KRS 435.090 permitted a life sentence for rape.¹ Hayes was

¹ KRS 435.090 was repealed in 1975 with the adoption of the penal code, and replaced by KRS 510.040. See Land v.

(continued...)

sixteen years old at the time he committed the crimes.² Hayes was tried by a jury and convicted of both charges. On April 30, 1970 the Fayette Circuit Court entered judgment sentencing Hayes to life imprisonment. Hayes's conviction was affirmed by the former Court of Appeals on March 26, 1971. Twenty years later, in 1991, Hayes filed an RCr 11.42 motion to vacate or set aside judgment, alleging ineffective assistance of counsel and improper jurisdiction. The motion was denied by the Fayette Circuit Court, and the denial affirmed by this Court in a published opinion, Hayes v. Commonwealth, Ky. App., 837 S.W.2d 902 (1992).

In 1995, Hayes filed a motion to vacate judgment pursuant to CR 60.02. The motion alleged defects in the indictment, and that the life sentence for rape exceeded the maximum of twenty years authorized by KRS 510.040. The motion was denied by the Fayette Circuit Court on March 25, 1995 and no appeal was taken therefrom. On June 17, 1998, Hayes filed a motion to vacate judgment pursuant to CR 60.03, alleging that the judgment was not effective because the trial court failed to sign the judgment. The motion was denied by the Fayette Circuit Court, and the denial affirmed by this Court in 1998-CA-002034-MR, rendered August 13, 1999. This Court held that the trial court's signing of the order book was sufficient to comply with RCr 11.04(3). Hayes subsequently filed an RCr 11.42 motion

¹(...continued)
Commonwealth, Ky., 986 S.W.2d 440 (1999).

² Hayes's reply brief states that he was 15 years old on March 5, 1968 and 17 years old at the time of sentencing. However, the record indicates, and Hayes states, that he was born on November 12, 1951.

raising the same issue. The Fayette Circuit Court denied the motion, and, in 1999-CA-000756-MR, rendered September 3, 1999, this Court affirmed the order of the Fayette Circuit Court, finding the issue raised in the appeal to be precisely the same issue raised in 1998-CA-002034-MR, and also finding the RCr 11.42 motion to be a successive motion and subject to dismissal on that ground.

On June 21, 2000, Hayes filed a "Motion to Correct Unlawful Sentence". Citing Britt v. Commonwealth, Ky., 965 S.W.2d 147 (1998), Hayes contended that he should have been sentenced as a juvenile, pursuant to the provisions of KRS Chapter 640, rather than as an adult. Hayes further argued that, because KRS 435.090 was repealed, his sentence of life imprisonment should have been commuted to twenty years pursuant to KRS 510.040. Additionally, Hayes argued that a life sentence for rape as a juvenile constitutes cruel and unusual punishment, and that his sentence is inequitable and arbitrary. On July 21, 2000 the Fayette Circuit Court denied the motion. The court noted that Hayes was sentenced on April 30, 1970, and found that while the sentence was harsh for a juvenile, it was lawful at the time that it was imposed, and that the court did not have the authority to modify the sentence thirty years after it was imposed. Hayes appeals from the court's July 21, 2000 order.

The record indicates that Hayes was sentenced on April 30, 1968. Britt is not applicable to Hayes's case, as KRS Chapter 640 was not effective until July of 1987. KRS Chapter 640 was not expressly declared by the legislature to apply

retroactively, and therefore cannot be construed to do so. Dennison v. Commonwealth, Ky. App., 767 S.W.2d 327 (1988); KRS 446.080(3); KRS 446.110. The remainder of Hayes's claims could have reasonably been raised in his original RCr 11.42 motion and will not be considered on appeal. Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983); Butler v. Commonwealth, Ky., 473 S.W.2d 108 (1971).

The order of the Fayette Circuit Court is affirmed.

EMBERTON, JUDGE, CONCURS.

MILLER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

MILLER, JUDGE, DISSENTING: I would remand this cause to the circuit court with directions to appoint the Department of Public Advocacy to assist appellant.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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