

RENDERED: DECEMBER 18, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000079-MR

HOWARD WOMACK

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR, JUDGE
ACTION NO. 02-CR-00135

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, CAPERTON AND THOMPSON, JUDGES.

ACREE, JUDGE: Appellant, Howard R. Womack, seeks reversal of the Bell County Circuit Court's decision declining an evidentiary hearing requested in his Rule of Criminal Procedure (RCr) 11.42 motion. The RCr 11.42 motion was barred by the statute of limitations, therefore the decision of the circuit court is affirmed.

On September 18, 2002, appellant was indicted by a Bell County Grand Jury on one count of murder. On June 9, 2003, Appellant entered a plea with a recommended sentence of thirty-five years' imprisonment. The final sentence and judgment were entered on July 17, 2003. On December 10, 2008, the appellant filed a RCr 11.42 motion requesting an evidentiary hearing claiming ineffective assistance of counsel. The circuit court denied the motion because it was statutorily time barred.

RCr 11.42 (10) instructs 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:

(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) (emphasis added). As noted above, final judgment was entered against the appellant on July 17, 2003. On October 20, 2004, the appellant was mailed a copy of his case file. The appellant's RCr 11.42 motion was not filed until December 10, 2008, exceeding the three-year limit set forth under RCr 11.42 (10). Further, the appellant does not argue that he meets the exceptions set forth under RCr 11.42 (10)(a)-(b). Therefore, the decision of the circuit court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Howard Randall Womack, *Pro se*
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BRIEF FOR APPELLEE:

Jack Conway
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