

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001018-MR

WILLIAM EARL WARNER

APPELLANT

v. APPEAL FROM NELSON CIRCUIT COURT
HONORABLE CHARLES C. SIMMS, III, JUDGE
ACTION NO. 03-CR-00241

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON AND NICKELL, JUDGES; KNOPF,¹ SENIOR JUDGE.

KNOPF, SENIOR JUDGE: William Earl Warner appeals from the May 11, 2009, findings of fact, conclusions of law, and judgment of the Nelson County Court.

That judgment denied Warner's RCr² 11.42 motion for relief. Without addressing

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

² Kentucky Rules of Criminal Procedure.

the merits of Warner's appeal, but because we hold that Warner's RCr 11.42 motion was untimely filed, we affirm the trial court's denial of relief.

On August 15, 2003, Warner's wife, Jennifer Warner, was killed in the Warners' home when her throat was slashed. On September 3, 2003, Warner was indicted for murder and assault in the first degree. On January 27, 2005, Warner entered into a guilty plea to the murder charge. The assault in the first degree charge was dismissed, and Warner was sentenced to thirty years' imprisonment. The final judgment of conviction was entered on February 21, 2005.

On February 22, 2008, Warner filed a motion to vacate, set aside, or correct his sentence, pursuant to RCr 11.42. The Commonwealth filed a response to Warner's motion and moved that the motion to be denied. In support of its motion to deny relief, the Commonwealth argued that the RCr 11.42 motion was not timely filed. On October 9, 2008, an order was entered in which the trial court denied the Commonwealth's motion to deny relief, stating that the February 21, 2005, judgment did not become final until ten days after its entry. An evidentiary hearing was held on Warner's RCr 11.42 motion, and that motion was subsequently denied in the trial court's findings of fact, conclusions of law, and judgment, entered on May 11, 2009. This appeal followed.

An RCr 11.42 "motion is limited to [the] issues that were not and could not be raised on direct appeal." *Sanborn v. Commonwealth*, 975 S.W.2d

905, 909 (Ky. 1998) (*overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)). We review a trial court's judgment on an RCr 11.42 motion for an abuse of discretion. *Bowling v. Commonwealth*, 981 S.W.2d 545, 548 (Ky. 1998).

On appeal, Warner makes several arguments regarding ineffective assistance of counsel and further argues that his guilty plea was not made knowingly, voluntarily, and intelligently. In response, the Commonwealth reiterates that Warner's RCr 11.42 motion was time-barred. We agree.

RCr 11.42(10) specifically 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.

(Emphasis added).

In its order denying the Commonwealth's order to deny relief, the trial court stated:

This Court believes that Warner had ten (10) days to file a motion to alter, amend, or vacate his Final Judgment of Conviction. After those ten (10) days expired, this Court finds that the judgment was final.

We assume that the motion to which the trial court is referencing is CR³ 59.05, which states: “[a] motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be served not later than 10 days after the entry of the final judgment.” We believe that the trial court is mistaken in its understanding of what constitutes a judgment’s finality for purposes of filing an RCr 11.42 motion. It is true that a timely filed CR 59.05 motion can function to toll the time within which an appeal must be filed. *See* CR 73.02(1)(e). However, no such precedent exists for tolling the time requirements of an RCr 11.42 motion. Instead, for the purposes of RCr 11.42, the date that the “judgment becomes final” refers to “the conclusive judgment in the case, whether it be the final judgment of the appellate court on direct appeal or the judgment of the trial court in the event no direct appeal was taken.” *Palmer v. Commonwealth*, 3 S.W.3d 763, 765 (Ky. App. 1999). In the case *sub judice*, the trial court’s judgment was entered on February 21, 2005, and no direct appeal was taken by Warner. Therefore, the judgment’s finality is February 21, 2005. Accordingly, Warner’s RCr 11.42 motion was untimely filed making it unnecessary for us to address the merits of his appeal.

In conclusion, the May 11, 2009, judgment of the Nelson County Court is affirmed, inasmuch as it denied Warner relief pursuant to his RCr 11.42 motion.

ALL CONCUR.

³ Kentucky Rules of Civil Procedure.

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