

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000208-MR

WILLIAM DAUGHERTY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, SENIOR JUDGE
ACTION NO. 02-CR-01190

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS AND DIXON, JUDGES; ISAAC,¹ SENIOR JUDGE.

DIXON, JUDGE: Appellant, William Daugherty, appeals *pro se* from an order of the Jefferson Circuit Court denying his motion for post-conviction relief pursuant to RCr 11.42. For the reasons stated below, we affirm.

¹ Senior Judge Sheila Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

In May 2002, Appellant and William Brooks were jointly indicted for two counts of rape, acting alone or in complicity, and two counts of sodomy, acting alone or in complicity, stemming from an attack on a female victim in Louisville, Kentucky. Subsequently, Brooks pled guilty to all charges. Following a trial in February 2004, a jury found Appellant guilty of first-degree rape as a principal, first-degree rape by complicity, and first-degree sodomy by complicity. He was sentenced to a total of thirty years' imprisonment. Appellant's convictions and sentence were affirmed on direct appeal to the Kentucky Supreme Court.

Daugherty v. Commonwealth, 2004-SC-000198-MR (June 16, 2005).

On January 10, 2008, Appellant filed a *pro se* RCr 11.42 motion raising various direct appeal issues. The trial court denied the motion and Appellant thereafter appealed to this Court. However, on July 16, 2008, this Court granted Appellant's motion to dismiss his appeal. On February 25, 2009, Appellant filed a second *pro se* RCr 11.42 motion raising claims of ineffective assistance of counsel, trial error, and again, direct appeal issues. Appellant also moved for the appointment of counsel and an evidentiary hearing. The trial court denied all motions in March 2009. This appeal ensued.

RCr 11.42(10) provides, in relevant part, as follows:

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.

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

Herein, Appellant did not file his second RCr 11.42 motion until February 25, 2009, nearly four years after the judgment and sentence became final. Moreover, the motion did not allege that the claims were based upon facts unknown to Appellant or that a fundamental constitutional right was involved. As such, we are of the opinion that Appellant's second RCr 11.42 motion was time-barred under RCr 11.42(10).

Furthermore, the claims asserted in Appellant's second RCr 11.42 motion either were asserted or could have been asserted in his first RCr 11.42 motion. Pursuant to RCr 11.42(3), "The motion shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding." Clearly, a defendant "is required to avail himself of RCr 11.42 as to any ground of which he is aware, or should be aware, during the period when the remedy is available to him." *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997), cert. denied, 521 U.S. 1130 (1997). Our case law has long held that we will not consider successive motions to vacate a conviction when those motions recite grounds for relief that have been or should have been raised earlier. *See Butler v. Commonwealth*, 473 S.W.2d 108, 109 (Ky. 1971); *Hampton v.*

Commonwealth, 454 S.W.2d 672, 673 (Ky. 1970); *Kennedy v. Commonwealth*, 451 S.W.2d 158, 159 (Ky. 1970).

Notwithstanding its procedural deficiency, Appellant's motion does not raise any meritorious claims of ineffective assistance of counsel. It is Appellant's belief that his trial counsel should have requested DNA tests to prove that he did not rape the victim. However, by Appellant's own admission he had sexual intercourse with the victim, which he claimed was consensual rather than forcible. DNA evidence would have done nothing more than confirm that which Appellant admitted. Thus, we fail to perceive how trial counsel's performance fell below the objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Although the trial court did not render an opinion, we presume that the denial of Appellant's motion was because it was outside the three-year limitations period. We affirm the denial of relief as Appellant's second motion failed to comport with the requirements of RCr 11.42(10).

The order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

William Daugherty, *pro se*
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Joshua D. Farley
Assistant Attorney General
Frankfort, Kentucky