

RENDERED: MARCH 18, 2011; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2009-CA-002185-MR

SHANE DEVER

APPELLANT

v. APPEAL FROM NELSON CIRCUIT COURT  
HONORABLE DEBORAH DEWEESE, JUDGE  
ACTION NO. 95-CR-01202

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, CAPERTON, AND CLAYTON, JUDGES.

CLAYTON, JUDGE: This is an appeal of the denial of Appellant, Shane L.

Dever's, motion to vacate judgment of conviction and sentence pursuant to

Kentucky Rules of Criminal Procedure (RCr) 11.42. Based upon the foregoing, we

affirm the decision of the Nelson Circuit Court.

## BACKGROUND INFORMATION

Dever pled guilty to Kidnapping, Criminal Attempt to Commit Murder, Receiving Stolen Property over \$300 and Persistent Felony Offender II on October 11, 1996. This was in relation to the kidnapping and murder of Troy Finch. Dever received a life sentence without the possibility of parole for twenty-five (25) years.

On January 23, 2006, Dever filed a “Motion to Vacate Judgment of Conviction and Sentence Pursuant to CR 60.02(f).” In his motion, Dever contends that a competency evaluation had been ordered prior to his plea of guilty and that he was never evaluated nor was a competency hearing held. The trial court appointed Dever counsel, who entered an appearance but did not supplement Dever’s pleadings. The trial court denied the motion without a hearing on August 17, 2006, finding that Dever’s claims should have been raised in a direct appeal or Kentucky Rules of Criminal Procedure (RCr) 11.42 motion rather than a CR 60.02 motion.

Dever appealed this decision to a panel of our Court, which affirmed the trial court’s decision. In affirming the lower court’s decision, our Court found that “Dever is precluded from seeking relief under CR 60.02 because he could have sought relief by way of direct appeal or under RCr 11.42 but failed to do so.” On December 8, 2008, Dever filed an RCr 11.42 motion asserting ineffective assistance of counsel and that substantive error occurred in the trial court’s failure to hold a competency hearing before accepting his plea.

The trial court denied Dever's motion, finding that it was filed twelve years after he was convicted and that there was no reason for tolling the time limitations. Dever then filed this appeal.

Under established law, in order to prevail on an ineffective assistance of counsel claim, a movant must show that his counsel's performance was deficient and that but for the deficiency, the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). Courts must examine counsel's conduct in light of professional norms based on a standard of reasonableness. *Fraser v. Com.*, 59 S.W.3d 448, 452 (Ky. 2001).

#### STANDARD OF REVIEW

We review the trial court's denial of an RCr 11.42 motion for an abuse of discretion. An RCr 11.42 motion is limited to the issues that were not and could not be raised on direct appeal. *Sanborn v. Com.*, 975 S.W.2d 905, 908-909 (Ky. 1998) (Overruled on other grounds).

In order to prevail on an ineffective assistance of counsel claim, a movant must show that his counsel's performance was deficient and that but for the deficiency, the outcome would have been different. *Strickland*, at 687. With respect to a guilty plea, there is also a requirement that the movant show that counsel's performance so seriously affected the case, that but for the deficiency, the movant would not have pled guilty and would have insisted on going to trial. *Hill v. Lockart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985). Courts must also examine counsel's conduct in light of professional norms based

on a standard of reasonableness. *Fraser*, 59 S.W.3d at 452. With this standard in mind, we will examine the trial court's decision.

## DISCUSSION

The Commonwealth argues that the trial court did not err in denying the motion in that it was filed outside the three (3) year period. There are two exceptions to the rule. First, if the basis of the motion was unknown to the movant and could not have been discovered by due diligence, the time period may be tolled. The second exception is if the movant's constitutional right was not asserted because it did not exist during the three (3) year period. Clearly, neither of these exceptions apply in this case.

In affirming the denial of Dever's CR 60.02 motion, a panel of this Court found as follows:

Dever also states that he "could also not have brought his action under RCr 11.42 because the remedy for failure to conduct a competency hearing was not available until the time on his RCr 11.42 already tolled." Further, he states that "[t]he remedy for the failure to grant a competency hearing was not made available until 2001 when the Kentucky Supreme Court decided *Thompson v. Commonwealth*, 56 S.W.3d 406 (Ky. 1998), which became final in 2001."

During the time following Dever's conviction and the expiration of the time within which he could have filed an RCr 11.42 motion, reversal of conviction was the relief granted to defendants due to a court's failure to hold a competency hearing. See *Hayden v. Commonwealth*, 563 S.W.2d 720, 723 (Ky. 1978). In the *Thompson* case, *Hayden* was overruled to

the extent that reversal of the conviction was not required; rather, “a retrospective competency hearing is permissible depending on the facts of the case.” *Thompson*, 56 S.W.3d at 409. Therefore, Dever did have a remedy prior to *Thompson* and was not precluded from filing a direct appeal or an RCr 11.42 motion during that time.

*Dever v. Com.*, 2007 WL 2998374 (Ky. App. 2007)(2006-CA-002076-MR).

Thus, there is nothing that precluded Dever from filing his RCr 11.42 within the time frame allowed by the rule. Consequently, we affirm the decision of the trial court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Shane L. Dever, Pro se  
Central City, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

Ken W. Riggs  
Assistant Attorney General  
Frankfort, Kentucky