

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2010-CA-000258-MR

MORRIS RICHARD EDWARDS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE  
ACTION NO. 146646

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON AND NICKELL, JUDGES; SHAKE,<sup>1</sup> SENIOR JUDGE.

NICKELL, JUDGE: Morris Richard Edwards appeals from an order entered by the Jefferson Circuit Court on January 15, 2010, denying his motion for reinstatement of appeal proceedings *nunc pro tunc*. Upon review of the briefs, the record and the law, we affirm.

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<sup>1</sup> Senior Judge Ann O'Malley Shake 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.

## PROCEDURAL HISTORY

In 1972, a jury convicted Edwards of multiple sex crimes against three victims and sentenced him to concurrent sentences of life imprisonment without parole on each of two counts of rape<sup>2</sup>; five years' imprisonment on each of two counts of indecent and immoral practices<sup>3</sup>; up to five years' imprisonment on another count of indecent and immoral practices; and five years' imprisonment on each of two counts of buggery.<sup>4</sup> He filed a direct appeal of the conviction alleging:

(1) the sentences of life imprisonment without parole constitute cruel and unusual punishment; (2) the trial court abused its discretion in denying Edwards' motion to sever the offenses for trial; (3) the failure to remand for a preliminary examination violated Edwards' constitutional rights; (4) there was an abuse of discretion in denying Edwards' motion for a postponement in order to determine his competency to stand trial; (5) it was prejudicial error to permit the husband of one of the victims, in identifying the pistol, to state that he was a police officer; and finally (6) KRS 435.105, which denounces indecent and immoral practices, is void for vagueness and overbreadth.

*Edwards v. Commonwealth*, 500 S.W.2d 396, 397 (Ky. 1973). The conviction was affirmed.

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<sup>2</sup> KRS 435.090.

<sup>3</sup> KRS 435.105.

<sup>4</sup> KRS 436.050.

A motion to vacate the sentence under RCr<sup>5</sup> 11.42 was filed in July of 1978 alleging: wrongful exclusion of all black jurors; improper comment by the prosecutor on Edward's right to remain silent; improper comment that Edwards had been arrested for multiple rapes in the area; improper comment by a police officer that Edwards had requested an attorney and refused to speak to police; and, denial of a fair and impartial trial by the cumulative effect of trial errors. None of these issues was raised on direct appeal, even though all were preserved by objection at trial. Relief was denied by the trial court because an RCr 11.42 motion is not a substitute for an appeal. We affirmed the trial court in 1980, holding that a motion to vacate cannot be used to raise issues that could and should have been raised on direct appeal. Discretionary review was denied in 1981. In December of 1983, an executive order was entered commuting Edwards' two life sentences without possibility of parole to straight life sentences.

On December 31, 2007, Edwards mailed a pleading styled "Successive Motion to Vacate, Correct or Set Aside Convictions and Sentences of Imprisonment Pursuant to RCr 11.42/CR<sup>6</sup> 60.02(f), CR 60.03" to the Jefferson Circuit Court Clerk alleging errors in jury selection and instructions, claims of ineffective assistance of counsel, trial errors, and a claim that his sentence, though commuted, was still cruel and unusual. The motion, which was amended by post-

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<sup>5</sup> Kentucky Rules of Criminal Procedure.

<sup>6</sup> Kentucky Rules of Civil Procedure.

conviction counsel in 2008, was denied by the trial court on February 17, 2009, as successive, untimely and wholly without merit.

On March 12, 2009, the Clerk of the Kentucky Court of Appeals received a copy of a notice of appeal of the order entered on February 17, 2009. However, it was not until April 15, 2009, nearly sixty days after entry of the February 17 order, that the *trial court* entered the notice of appeal. The circuit court docket sheet does not reveal the date on which Edwards' documents were received or tendered.

We entered an order on April 27, 2009, giving Edwards an opportunity to show cause why his appeal should not be dismissed for failure to file a timely notice of appeal. Edwards responded that he had mailed the notice of appeal to the Jefferson Circuit Court Clerk on March 10, 2009. Finding insufficient cause from Edwards' response and the limited record before us, a motion panel of this Court dismissed the appeal for failure to timely file a notice of appeal.

Months later, in December of 2009, Edwards mailed a "*Kurtsinger*<sup>7</sup> motion for reinstatement of appeal proceedings *nunc pro tunc*" to the Jefferson Circuit Court Clerk which filed the motion on January 26, 2010, after the grant of *in forma pauperis* status. The motion for reinstatement offered no explanation for the delay between his mailing of the notice of appeal to the circuit

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<sup>7</sup> A reference to *Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454 (Ky. 2002).

court and its filing of the notice of appeal, and asked that the trial court enter a *nunc pro tunc* order based on this Court's receipt of a copy of the notice of appeal on March 12, 2009.

On January 15, 2010, an order was entered by the Jefferson Circuit Court denying the motion for reinstatement of the appeal noting that Edwards had allowed four months to pass between dismissal of his appeal by the Court of Appeals and submission of his motion for reinstatement to the Jefferson Circuit Court; he had not claimed untimely receipt of the order dismissing the appeal; nor had he offered any excuse for his four-month delay in seeking relief. It is from this order that Edwards now appeals.

#### ANALYSIS

CR 73.02(1)(a) mandates that a "notice of appeal shall be filed within 30 days after the date of notation of service of the judgment or order under Rule 77.04(2)." CR 73.02(2) mandates that "[t]he failure of a party to file timely a notice of appeal . . . shall result in a dismissal or denial." Edwards' notice of appeal was filed well outside the thirty-day window allowed for such filing by CR 73.02. Furthermore, he has offered no explanation for the untimely filing.

Therefore, the order of the Jefferson Circuit Court denying the motion for reinstatement of the appeal is AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

Morris Richard Edwards, *pro se*  
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

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