

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000655-MR

GREGORY BOYD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC J. COWAN, JUDGE
CASE NO. 99-CR-001841

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, NICKELL, AND VANMETER, JUDGES.

CLAYTON, JUDGE: Appellant, Gregory Boyd, *pro se*, appeals from the Jefferson Circuit Court's order denying him relief under Kentucky Rules of Criminal Procedure (RCr) 11.42, on the same grounds it denied his previous RCr 11.42 motion, which is, because it is time-barred by the three-year time limitation

contained in RCr 11.42(10) and Appellant produced no evidence that establishes a right to have the deadline tolled. After careful consideration, we affirm.

BACKGROUND

On July 26, 1999, in Jefferson County, Kentucky, Officer Kelly Hammond stopped a car, driven by Willie Houston, near the Outer Loop Exit on Interstate 65. Officer Hammond allegedly stopped the car because it was following a truck too closely. During the traffic stop, Officer Hammond pulled Houston from the car and patted him down. From the pat down, Officer Hammond found a small amount of marijuana located on his person. At this point, Officer Hammond pulled Appellant, who was in the passenger seat, and Tommy Houston, who was in the backseat, from the car and patted them down. Officer Hammond says he routinely does this with everyone he stops. From the pat down of Appellant, Officer Hammond found a cell phone case with approximately thirteen hundred dollars inside. However, at the time Officer Hammond pulled over the vehicle, Appellant had stated that he was heading to the bus station (as he is originally from Los Angeles, California) and was just visiting Kentucky, thus attempting to explain why he had possession of so much cash.

Following a canine search of the car, Officer Hammond recovered marijuana in the armrest of the car, several packages from under the rear of the backseat, and one package from the trunk. Consequently, all three occupants of the vehicle were arrested and indicted for trafficking in cocaine and trafficking in marijuana.

Appellant was originally charged with Trafficking in Marijuana, less than five pounds and Trafficking in a Controlled Substance, Cocaine. Prior to this trafficking charge, Appellant had been convicted of a felony by the New York Supreme Court in New York City. Appellant was found guilty of Trafficking in Marijuana, following a jury trial. Appellant entered a guilty plea to a Persistent Felony Offender in the second-degree (PFO 2). Subsequently, on May 1, 2001, Appellant was sentenced to a total of ten (10) years' imprisonment, enhanced by ten (10) years by the PFO 2 for a total sentence of twenty (20) years' imprisonment.

Appellant brought a direct appeal of the trial court's decision. Appellant's conviction and sentence were affirmed by a panel of this Court on November 22, 2002. After Appellant made parole and was sent back to prison as a parole violator in 2012, Appellant filed an RCr 11.42 motion, which was denied as the statute of limitations had run. RCr 11.42(10) precludes a party from bringing an RCr 11.42 motion outside the statute of limitations.

Appellant's present motion for relief, pursuant to RCr 11.42, was filed with the trial court on February 21, 2014. In March of 2014, the current RCr 11.42 motion was also denied on the same grounds that the trial court had denied the previous RCr 11.42 motion, i.e., that it was time-barred. Appellant produced no evidence that established a right to have the deadline tolled. Appellant now appeals the order on the present denial of his second RCr 11.42 motion.

STANDARD OF REVIEW

This Court's standard of review of a lower court's findings is the abuse of discretion standard. *Miller v. Eldridge*, 146 S.W.3d 909 (Ky. 2004). An abuse of discretion standard allows this Court to engage in methodical but deferential examination of the trial court's record and the trial court's finding of fact and rulings. This Court will reverse if the lower court's decision is plain error.

Additionally, with respect to RCr 11.42 motions, “[o]n March 13, 1964, the high court of Kentucky held that RCr 11.42 was the exclusive remedy for collateral attack on Kentucky criminal judgments.” John S. Gillig, *Kentucky Post-Conviction Remedies and the Judicial Development of Kentucky Rule of Criminal Procedure 11.42*, 83 Ky. L.J. 265, 272-73 (1995). The movant has the burden “to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceedings provided in RCr 11.42.” *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). In reviewing an RCr 11.42 motion, “our review is confined to whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction.” *Lewis v. Commonwealth*, 411 S.W.2d 321 (Ky. 1967). With these standards in mind, we turn to the matter before us.

ANALYSIS

In Appellant's brief he argues that he was denied his Constitutional rights when the prosecutor was permitted to amend the PFO indictment to substitute a completely different factual basis from that presented to the Grand

Jury. Appellant is appealing the Jefferson Circuit Court's Opinion and Order denying relief under RCr 11.42 as the trial court explained that his RCr 11.42 motion was untimely and successive. As a general rule, successive RCr 11.42 motions are not permissible. RCr 11.42 (3) provides that, "the motion shall state all grounds for holding the sentence invalid of which the movant has knowledge." Consequently, in the interest of judicial efficiency and because Appellant has brought prior RCr 11.42 motions, the present motion is barred as successive.

In addition, Appellant's motion is not only successive, it is also untimely. RCr 11.42 (10) requires that any motion brought under it "...shall be filed within three years after the judgment becomes final." Appellant's conviction and sentence were affirmed by this Court on November 22, 2002, and after the Kentucky Supreme Court denied discretionary review on October 17, 2003, Appellant's judgment of conviction in this case became final. Additionally, more than a decade passed before Appellant filed the present motion, as the present motion was filed in February 2014. Thus, the trial court properly denied Appellant's RCr 11.42 motion as successive and untimely, and we affirm the judgment.

ALL CONCUR.

BRIEF FOR APPELLANT:

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