

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000829-MR

RAYMOND CLUTTER

APPELLANT

v. APPEAL FROM GALLATIN CIRCUIT COURT
HONORABLE ANTHONY W. FROHLICH, JUDGE
ACTION NO. 98-CR-00007

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JONES, STUMBO AND VANMETER, JUDGES.

JONES, JUDGE: The Appellant, Raymond Clutter, brings this appeal challenging the Gallatin Circuit Court's dismissal of his Kentucky Rule of Criminal Procedure ("RCr") 11.42 motion as untimely. Clutter asserts that the trial court erred when it dismissed his petition as untimely because the Commonwealth did not assert the statute of limitations as a defense in its "answer." For the reasons more fully explained below, we AFFIRM.

I. Factual & Procedural Background

In June 2008, a Gallatin Circuit Court jury found Clutter guilty of second-degree rape, second-degree sodomy, and of being a persistent felony offender in the first degree ("PFO I"). The trial court sentenced Clutter to ten-years' imprisonment for the rape conviction and ten-years' imprisonment for the sodomy conviction, both enhanced to twenty years by his PFO 1 status. The trial court ordered Clutter's sentences to run concurrently for a total of twenty-years' imprisonment.

Clutter pursued a direct appeal as a matter of right to the Kentucky Supreme Court. On direct appeal, Clutter argued: "[First that] his case should have been dismissed due to prosecutorial delay in violation of the Interstate Agreement on Detainers (IAD), codified in Kentucky law by KRS 440.450; [and] second, he claim[ed] that the trial court erred when it refused to prohibit any reference to an incriminating statement attributed to Clutter, given that the Commonwealth did not provide notice regarding the statement until the evening before trial." Finding no merit in either of Clutter's claims, the Court affirmed his convictions and sentence. *Clutter v. Commonwealth*, 322 S.W.3d 59, 60 (Ky. 2010). The Court rendered its opinion on September 23, 2010. The opinion became final on October 14, 2010, twenty-one days after its rendition. CR¹ 76.30(2)(a).

¹ Kentucky Rules of Civil Procedure.

Clutter did not take any additional action in his criminal case until December 23, 2013, when he filed the RCr 11.42 motion at issue. Upon review, the circuit court dismissed Clutter's motion as untimely. This appeal followed. On appeal, Clutter maintains that the circuit erred because the Commonwealth did not plead the statute of limitations as a defense to Clutter's motion, thereby waiving the timeliness issue.

II. Analysis

Any motion filed pursuant to RCr 11.42(10) must be filed “within three years after the judgment becomes final,” within three years after the facts upon which a previously undiscovered claim is predicated became known, or within three years after the “fundamental constitutional right asserted” was created and held to apply retroactively. *Id.* In Kentucky, a judgment becomes final with “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).

Because Clutter's conviction became final on October 14, 2010, he had three years from that date to file an RCr 11.42 motion with the trial court. Thus, Clutter had until October 14, 2013, to file an RCr 11.42 motion. He did not file his motion until December 23, 2013, over two months past the deadline. Moreover, Clutter did not allege any facts in his motion to support the application of equitable tolling.

Clutter does not argue that his motion was timely or that equitable tolling applies. Rather, his sole argument on appeal is that the trial court was prohibited from relying on the timeliness issue to deny his motion because the Commonwealth did not raise timeliness as a defense in its response, choosing instead to defend Clutter's motion on the merits. Clutter asserts that the Commonwealth's failure to affirmatively assert the statute of limitations in its response waived the issue precluding the trial court from considering it. We disagree.

First, RCr 11.42 is not a pleading. It is a motion. "A motion is not a pleading and no written response is required to entitle a party to oppose it." *Ramsey v. Commonwealth*, 399 S.W.2d 473, 475 (Ky. 1966) (citation omitted). RCr 11.42 does not require the Commonwealth to file a response nor limit the trial court's consideration to matters set forth in any such response. Thus, we do not believe that the Commonwealth "waived" or otherwise conceded the timeliness issue by failing to include it in its response to Clutter's RCr 11.42 motion. *See Polsgrove v. Commonwealth*, 439 S.W.2d 776 (Ky. 1969). Likewise, since the timeliness issue was apparent from the face of Clutter's motion, we do not believe the trial court erred in denying Clutter's motion on the basis that his claims were not timely.

III. Conclusion

The fact that Clutter did not comply with the statute of limitations was evident from the face of his RCr 11.42 motion. Accordingly, we hold that the trial

court properly denied Clutter's request for relief from his conviction and sentence.

The decision of the Gallatin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Raymond Clutter
Pro se
Sandy Hook, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General

Jason B. Moore
Assistant Attorney General
Frankfort, Kentucky