

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2014-CA-001822-MR

CRAIG EDWARD BASSHAM

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE BARRY WILLETT, JUDGE  
ACTION NO. 05-CR-003593 AND NO. 06-CR-002159

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, KRAMER AND STUMBO, JUDGES.

KRAMER, JUDGE: Craig Edward Bassham, Appellant, brings this pro se appeal from the Jefferson Circuit Court's order denying his motion to file a belated motion pursuant to RCr<sup>1</sup> 11.42. We affirm.

On April 1, 2008, Appellant was convicted of rape in the first degree, terroristic threatening in the third degree and carrying a concealed weapon

<sup>1</sup> Kentucky Rules of Criminal Procedure.

following a jury trial. On June 9, 2008, Appellant also pled guilty to promoting contraband in the first degree, two (2) counts of illegal possession of a controlled substance (marijuana), possession of drugs not in original container, and being a persistent felony offender in the second degree. He was sentenced to serve twenty-two years in prison pursuant to a plea agreement. Appellant's conviction was affirmed on direct appeal by the Kentucky Supreme Court in an unpublished opinion.<sup>2</sup>

Appellant's counsel for his direct appeal sent him a letter on November 20, 2009, stating that she could not file a RCr 11.42 on his behalf because the attorney who represented Appellant at trial worked in her office. The letter also explicitly stated that Appellant would need to file his appeal three years after the end of his direct appeal on October 29, 2009, and informed Appellant that "[i]f you wish to proceed under [RCr 11.42], you may either file the first pleading yourself or you may consult with an attorney or paralegal from the Kentucky Department of Public Advocacy, post-conviction." Appellant did not file his motion to file a belated RCr 11.42 motion until September 14, 2014, almost five years after his appeal became finalized.

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 . . . 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[.]

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<sup>2</sup> *Bassham v. Commonwealth*, No. 2008-SC-000511-MR, 2009 WL 3526647 (Ky. Oct. 29, 2009).

The burden is on movant to offer proof that his claim falls within this provision of the rule. *Commonwealth v. Stacey*, 177 S.W.3d 813, 817 (Ky. 2005). In determining whether a defendant complied with this provision, a court may consider whether a defendant had reason to know of the time period in RCr 11.42 from alternative sources. *See Commonwealth v. Carneal*, 274 S.W.3d 420, 430 (Ky. 2008) (“Considering the numerous sources informing [the defendant] of his mental condition, we cannot conclude that any alleged incompetence was ‘unknown’ to [the defendant] or could not have been ascertained through the exercise of due diligence.”).

Appellant’s sole contention on appeal<sup>3</sup> is that he could not have filed his RCr 11.42 motion sooner because he was not aware that the Department of Public Advocacy (“DPA”) provided quality legal representation at no cost. This claim is clearly refuted by the record and is absolutely without any merit.

Appellant did not file inside of the time frame explicitly stated in the letter from his former counsel, but waited almost five years after his appeal became final before filing his motion to file a belated RCr 11.42 motion. Surely, in the exercise of due diligence Appellant should have discovered that the Department of Public Advocacy provided free legal services during that period of time, in light of the

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<sup>3</sup> Appellant argues separately in his brief that we should construe the law liberally in his favor because he is pro se. Although it is true that trial courts should “liberally construe pro se pleadings to extract the appellant’s intent and bring about a full adjudication of the relevant issues[.]” *Taylor v. Commonwealth*, 354 S.W.3d 592, 594 (Ky. App. 2011), this does not affect our holding in the present case.

fact that Appellant's trial counsel informed Appellant in writing that he could consult with an attorney from the DPA's post-conviction branch. Additionally, Appellant was represented on direct appeal by the DPA,<sup>4</sup> and so he certainly knew of the DPA's existence; he was also presumably not charged for their services, and so he should have known that the DPA offered free legal services. Finally, we note that even if Appellant could not have discovered the fact that the DPA provides free legal representation with the exercise of due diligence, this could in no way toll his appeal because that is not a "fact[]" upon which [his] claim is predicated" pursuant to RCr 11.42(10)(a); Appellant could have still filed his motion pro se, as he has done in this appeal.

Appellant contends that because the Commonwealth did not respond to his pro se RCr 11.42 at the trial court level to argue untimeliness, the Commonwealth should be barred from arguing untimeliness now. Appellant, however, did not file a substantive RCr 11.42 motion, but only a motion to file a belated RCr 11.42. As such, the timeliness of Appellant's RCr 11.42 had been presented to, and ruled on by, the trial court in the present case.

The order denying Appellant's motion to file a belated RCr 11.42 motion is therefore affirmed.

ALL CONCUR

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<sup>4</sup> Appellant was represented in his direct appeal by Daniel T. Goyette, Louisville Metro Public Defender, Elizabeth B. McMahon, Office of the Jefferson District, Louisville Metro Public Defender, Louisville, KY, Counsel for Appellant. *Bassham v. Commonwealth*, No. 2008-SC-000511-MR, 2009 WL 3526647 (Ky. Oct. 29, 2009).

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