

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-000261-MR

GARY LEAP

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE, V, JUDGE
ACTION NO. 95-CR-00359

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, D. LAMBERT, AND NICKELL, JUDGES.

CLAYTON, JUDGE: Gary Leap, *pro se*, appeals the Campbell Circuit Court's January 5, 2015 denial of his motion to modify or amend his sentence. After careful consideration, we affirm.

Gary Leap was convicted after a jury trial of one count of first-degree rape, one count of first-degree sodomy, and one count of sexual abuse. A trial was held on September 16, 1996, at which his victim, C.L., testified. C.L. was born on January 3, 1984, and thus, was less than twelve years old when Leap was indicted for rape, sodomy, and sexual abuse. Leap was her stepfather. She described numerous incidents of rape, sodomy and sexual abuse.

Following the jury's verdict, Leap was sentenced to 45 years on October 16, 1996. Judgment was entered in accord with the jury's verdict sentencing him to twenty years for rape in the first-degree, twenty years for sodomy in the first-degree, and five years for sexual abuse in the first-degree, with all sentences to run consecutively. The judgment was affirmed by the Kentucky Supreme Court.

Leap had previously filed post-conviction motions including a joint Kentucky Rules of Civil Procedure (CR) 60.02 and a Kentucky Rules of Criminal Procedure (RCr) 11.42 motion, which were withdrawn at his request. Leap then filed an RCr 11.42 motion alleging ineffective assistance of counsel on December 16, 1999. After a hearing was held on March 23, 2000, the trial court denied all six claims of ineffective assistance of counsel on June 8, 2000. Our Court affirmed on November 19, 2002.

In this matter, Leap has filed a motion to modify or amend the sentence so that the twenty-, twenty-, and five-year sentences run concurrently for a total sentence of twenty years. The Campbell Circuit Court summarily denied

the motion for lack of timeliness and because it should have been made either on direct appeal or in the prior collateral attack. Leap now appeals from this decision.

On appeal, Leap argues to amend the sentence so that it runs concurrently rather than consecutively and that the appellate court consider the eleven arguments set forth in his original motion. With regard to the eleven arguments made in the motion to amend the sentencing, the trial court held that the arguments were not timely made as required by RCr 11.42(10) or that the arguments should have been made on direct appeal in earlier RCr 11.42 motion. In the motion, Leap maintained that he received ineffective assistance of counsel; he was prejudiced under *Strickland*; counsel did not perform to the prevailing professional standards; the judge violated the judicial code of conduct; judge should have disqualified himself; he should not have received maximum penalty for all three counts since he had no criminal history at the time of the indictment; counsel should have made a motion for a DNA test; counsel should have made motion for a rape kit; the judge who sentenced Leap should not have also presided at the May 28, 1998, RCr 11.42 motion; and, because the sentence was too harsh, the judge should have modified it.

We agree with the trial court that the claims should have been raised either on direct appeal or by timely filing an RCr 11.42 motion. *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983). An RCr 11.42 motion must be filed within three years after the judgment is final. RCr 11.42(10). In the case at bar, the judgment was entered in 1996.

Regarding Leap's contention that his sentence was too harsh, and hence, should be amended or modified, his argument, as pointed out by the trial court, is essentially a motion for shock probation, which must be made within 180 days of his sentencing. *See* Kentucky Revised Statutes 439.265(1). Moreover, the trial court lost jurisdiction to alter, amend or vacate his judgment ten days after the entry of the 1996 judgment. *Commonwealth v. Gross*, 936 S.W.2d 85, 87 (Ky. 1996).

Accordingly, we affirm the decision of the Campbell Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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