

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001099-MR

DONALD E. FLANIGAN

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HON. CRAIG Z. CLYMER, JUDGE
INDICTMENT NO. 08-CR-00348

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KRAMER, CHIEF JUDGE; NICKELL AND THOMPSON.

THOMPSON, JUDGE: Donald E. Flanigan appeals from the McCracken Circuit Court's order denying motion to vacate judgment pursuant to RCr¹ 11.42. We affirm.

Flanigan entered a plea of guilty on August 31, 2009, to one count of first degree sodomy, victim under 12 years of age. As part of his plea agreement

¹ Kentucky Rules of Criminal Procedure.

with the Commonwealth, three other charges (first degree rape and two counts of incest with a minor) were dismissed. Flanigan was sentenced to twenty-five years' imprisonment on September 2, 2009.

On May 5, 2015, Flanigan filed a motion to vacate judgment pursuant to RCr 11.42. The circuit court denied the motion. This appeal followed.

Flanigan argues trial counsel was ineffective for failing to seek a private mental health examination and failing to inform and advise him of viable defenses. The circuit court deemed the motion was untimely. We agree with the circuit court on the threshold issue of timeliness of the motion and, therefore, decline to address Flanigan's claims.

RCr 11.42(10) requires that the motion be presented to the court within three years of final judgment. The only two exceptions to the time limit within RCr 11.42(10) are:

- (a) 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; or
- (b) that the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

Neither of these exceptions apply to Flanigan's case.

Flanigan argues that the statute of limitations should be equitably tolled, on the basis of mental illness. Under proper circumstances, our Supreme

Court has recognized the doctrine of equitable tolling may be applicable to post-conviction motions. *Commonwealth v. Carneal*, 274 S.W.3d 420, 429 (Ky. 2008).

There is no evidence of Flanigan's mental incompetence and, in fact, the record refutes Flanigan's mental illness claim. A report from a clinical psychologist at the Pennyroyal Center to the circuit court, dated May 28, 2009, indicates that Flanigan was competent to stand trial. There is nothing in the record indicating extraordinary circumstance, including mental illness, justifying noncompliance with the three-year statute of limitations. We hold that equitable tolling does not apply, and affirm the circuit court's finding that Flanigan's motion was untimely.

For the foregoing reasons, we affirm the McCracken Circuit Court's order denying Flanigan's RCr 11.42 motion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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