

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000913-MR

TIMOTHY COCHRAN

APPELLANT

v. APPEAL FROM CASEY CIRCUIT COURT
HONORABLE PAUL BARRY JONES, JUDGE
ACTION NO. 80-CR-003

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: COMBS, BUCKINGHAM, and McANULTY, Judges.

COMBS, JUDGE: This is an appeal from an order of the Casey Circuit Court denying the motion of Timothy Cochran (Cochran) to vacate his 1980 robbery conviction pursuant to Kentucky Rules of Criminal Procedure (RCr)11.42 and Kentucky Rules of Civil Procedure (CR) 60.02. We affirm.

In February 1980, Timothy Cochran was convicted on one count of first-degree robbery and sentenced to twenty (20) years in the penitentiary. On March 5, 1997, Cochran filed an RCr 11.42 motion to vacate his sentence and conviction; on August 12, 1997, the trial court granted Cochran's motion to withdraw the petition. On September 29, 1997, Cochran filed an "official

letter of intent" notifying the Casey Circuit Clerk that he would file an RCr 11.42 motion sometime in October 1997. On October 14, 1997, Cochran filed a combined motion to modify, amend or vacate sentence pursuant to RCr 11.42 and CR 60.02. On January 6, 1998, the trial court issued an order denying Cochran's motion to vacate. This appeal followed.

At the time the present action was filed, it had been over seventeen (17) years since Cochran's conviction. The Commonwealth argues that the RCr 11.42 aspect of appellant's motion is time barred pursuant to RCr 11.42(10). We agree.

RCr 11.42(10), as amended effective October 1, 1994, provides generally that motions filed under RCr 11.42 "shall be filed within three years after the judgment becomes final. . . ." However, the rule further provides that "[i]f the judgment becomes final before the effective date of this rule, the time for filing the motion shall commence upon the effective date of this rule." Thus, Cochran had three years from October 1, 1994, in which to file his motion for relief under RCr 11.42. Since he did not file his petition until October 14, 1997, and since no exception to the three-year limitation applies, we are compelled to agree with the Commonwealth that Cochran's petition was not timely.

We also agree with the Commonwealth that the CR 60.02 aspect of Cochran's petition was not timely. CR 60.02 requires that the motion for relief be made within a "reasonable time." A party who has knowledge of the judgment against him must exercise reasonable diligence and promptness in seeking to have it opened,

vacated, or set aside. An unexcused delay in making application, amounting to laches, will justify the court in refusing the relief asked. See Huffaker v. Twyford, Ky., 445 S.W.2d 124 (1969).

More than seventeen (17) years elapsed before Cochran sought CR 60.02 relief. During those seventeen (17) years, witnesses have likely either moved or died; evidence may have been destroyed or altered; and memories may have faded. The reality of that generalization is well illustrated in the case before us. Based upon the correspondence between Cochran and the circuit court contained in the record on appeal, it appears that Cochran's original trial records cannot be located. We agree with the Commonwealth that appellant's motion was not filed within a reasonable time as required by the rule. See Ray v. Commonwealth, Ky. App., 633 S.W.2d 71 (1982) (holding that a gap of twelve (12) years was not a reasonable time). Consequently, appellant is not entitled to relief under CR 60.02.

For the foregoing reasons, the order of the Casey Circuit Court is affirmed.

ALL CONCUR.

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