

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001173-MR

RICKY ALLEN HAYS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ERNEST A. JASMIN, JUDGE
ACTION NO. 85-CR-0578

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: GUDGEL, CHIEF JUDGE; HUDDLESTON AND KNOPF, JUDGES.

KNOPF, JUDGE. Appellant, Ricky Allen Hays, appeals pro se from a Jefferson Circuit Court order entered on December 2, 1997, which denied his motion to vacate, set aside or correct sentence pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. After reviewing the record, we affirm.

In April 1985, appellant was indicted in Jefferson County for the sale or possession with intent to sell marijuana, possession of a controlled substance (methamphetamine), possession of a controlled substance (cocaine), and possession of drug paraphernalia. In both counts of possession of a controlled substance, appellant was charged as a second or subsequent offender of KRS 218A, the Controlled Substances Chapter. On July

11, 1985, appellant filed a motion to enter a plea of guilty in Jefferson Circuit Court. The circuit court accepted appellant's guilty plea and sentenced him to a five-year term of imprisonment.

On September 29, 1997, while incarcerated in federal prison, appellant deposited in the prison mailing system his RCr 11.42 motion. Appellant's RCr 11.42 motion was stamped "RECEIVED" and was entered by the Clerk of the Jefferson Circuit Court on October 2, 1997. On December 2, 1997, the circuit court denied appellant's RCr 11.42 motion on grounds that it was filed outside the three-year time limit imposed by RCr 11.42(10). On December 11, 1997, appellant filed a pleading in circuit court styled, "Motion For Reconsideration or in the Alternative Notice of Appeal." On March 4, 1998, the circuit court denied appellant's motion for reconsideration. This appeal followed.

RCr 11.42 allows prisoners in custody under sentence to raise a collateral attack on the judgment entered against them. In September 1994, RCr 11.42 was amended in order to limit a prisoner's right to file a motion to three years after the judgment becomes final. See RCr 11.42(10). RCr 11.42(10) also 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." Because appellant's judgment of conviction became final on September 10, 1985, he had three years from the effective date of the rule, October 1, 1994, to file his RCr 11.42 motion.

Appellant argues that his RCr 11.42 motion was timely filed on September 29, 1997, when he deposited the motion in the prison mailing system. The Commonwealth argues that appellant's RCr 11.42 motion was filed outside the three-year time period provided in RCr 11.42(10) because it was not received by the Clerk of the Jefferson Circuit Court until October 2, 1997.

For authority, appellant cites Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245 (1988), which involved an appeal by a state prisoner after a federal district court dismissed his habeas corpus petition. The prisoner deposited his notice of appeal in the prison mailing system 27 days after the judgment of dismissal. However, the notice of appeal was not received by the district court until the 30-day filing period for taking an appeal under the Federal Rule of Appellate Procedure 4(a)(1) had expired. The Supreme Court held that the prisoner's notice of appeal was filed, for the purposes of the Rule, when he delivered it to prison authorities for forwarding to the court clerk.

The Supreme Court's decision was based on Justice Stewart's concurring opinion in Fallen v. United States, 378 U.S. 139, 84 S. Ct. 1689, 12 L. Ed. 2d 760 (1964). That case involved the filing of a notice of appeal by a prisoner who had been convicted of violating postal laws. The prisoner deposited his notice of appeal in the prison mailing system within the 10-day deadline required by Federal Rule of Criminal Procedure 37(a), which now appears in Federal Rule of Appellate Procedure 4(b), but the district court did not receive it until the 10-day period

had expired. The Supreme Court held that Rule 37(a) should not be read so rigidly as to bar the appeal when the circumstances indicated that the prisoner did "all that could reasonably be expected to get the letter to its destination within the required 10 days." Fallen, 378 U.S. at 144, 84 S. Ct. at 1692. Justice Stewart, in his concurring opinion, stated that:

"[A] defendant incarcerated in a federal prison and acting without the aid of counsel files his notice of appeal in time, if, within the 10-day period provided by the Rule, he delivers such notice to the prison authorities for forwarding to the clerk of the District Court. In other words, in such a case the jailer is in effect the clerk of the District Court within the meaning of Rule 37." Id.

Appellant urges this Court to adopt the same interpretation for filing a motion under RCr 11.42.

Both Houston, supra, and Fallen, supra, concerned the interpretation of federal rules of procedure and are distinguishable from the case sub judice. Here, our query relates to the filing of a motion under RCr 11.42(10) in state court, rather than the filing of a notice of appeal in federal court. Our rule relating to the filing of papers is RCr 1.08. RCr 1.08(2) applies whenever the rules fail to specify the manner of filing and service of papers. RCr 11.42(10) does not specify the manner in which an inmate should file his motion, therefore, RCr 1.08(2) applies. RCr 1.08(2)(d)(ii) states that "[t]he filing of papers with the court as required by these Rules shall be made by filing them with the clerk of the court" Upon receiving the paper, the clerk "shall endorse. . . the date of its filing" and "[s]uch endorsement shall constitute the filing of the pleading or other paper." Thus, an RCr 11.42 motion is

not "filed" until it is endorsed by the clerk of court. RCr 1.08(2)(d)(iii). Because appellant's RCr 11.42 motion was endorsed by the Clerk of the Jefferson Circuit Court on October 2, 1997, his motion was filed outside the three year time limit established in RCr 11.42(10) and was properly dismissed by the circuit court. While we are not unmindful of the fact that inmates are not free to use alternate avenues to ensure that documents are received by courts in a timely manner, any change in policy relating to the filing of papers by inmates in our Rules of Criminal Procedure should come from the Kentucky Supreme Court and not from this court.

For the reasons stated above, the Jefferson Circuit Court order which dismissed appellant's RCr 11.42 motion is hereby affirmed.

ALL CONCUR.

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