

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002430-MR

WAYNE GRAHAM

APPELLANT

v. APPEAL FROM HENRY CIRCUIT COURT
HONORABLE DENNIS A. FRITZ, JUDGE
ACTION NO. 91-CR-00004

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GUDGEL, CHIEF JUDGE; GUIDUGLI AND TACKETT, JUDGES.

TACKETT, JUDGE. Appellant, Wayne T. Graham, appeals from a Henry Circuit Court order entered on July 6, 1998, which denied his Kentucky Rule of Criminal Procedure (RCr) 11.42 motion. After reviewing the record, we affirm the circuit court's decision to deny appellant's motion, but on different grounds than those relied upon by the trial court.

In September 1991, appellant pled guilty to and was convicted of one count of first-degree robbery, Kentucky Revised Statute (KRS) 515.010, one count of first-degree burglary, KRS 511.010, and was found to be a persistent felony offender in the first degree, KRS 532.080. On November 6, 1991, appellant was

sentenced to forty years in the penitentiary. On January 15, 1998, appellant filed a motion to vacate or set aside the judgment pursuant to RCr 11.42. On July 6, 1998, the circuit court denied appellant's RCr 11.42 motion. This appeal followed.

RCr 11.42 allows individuals in custody under sentence to collaterally attack the judgment entered against them. The circuit court, in its order denying appellant's RCr 11.42 motion, addressed the merits of appellant's motion. After reviewing the record, we agree with the circuit court's order and are inclined to affirm on the grounds stated therein. However, upon further review, we find that appellant has untimely filed his RCr 11.42 motion.

RCr 11.42(10), as amended effective October 1, 1994, provides generally that motions filed under this rule "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."

The judgment appellant seeks to have set aside pursuant to RCr 11.42 became final before October 1, 1994, the effective date of RCr 11.42(10). Therefore, appellant had until October 1, 1997, to file his RCr 11.42 motion. The record clearly establishes that appellant filed his RCr 11.42 motion on January 15, 1998, more than three months after the October 1, 1997, deadline. Appellant's RCr 11.42 motion was not timely filed.

The order denying appellant's RCr 11.42 motion is hereby affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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