

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002803-MR

GARY LEE HASTY

APPELLANT

v. APPEAL FROM MARION CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 89-CR-00021

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: BARBER, HUDDLESTON, AND MILLER, JUDGES.

BARBER, JUDGE. Gary Lee Hasty appeals from an order of the Marion Circuit Court denying his motion to vacate, alter, amend or correct sentence brought pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. After reviewing the record, we affirm.

In April 1989, Hasty left the Marion County Adjustment Center, where he was serving a nine year sentence for two burglary convictions, without authorization. He was arrested a few days later on a charge of escape. In May 1989, the Marion County Grand Jury indicted Hasty on one felony count of escape in the second degree (Kentucky Revised Statute (KRS) 520.030) and

one count of being a persistent felony offender in the first degree (PFO I) (KRS 532.080). On September 25, 1989, Hasty entered a plea of guilty pursuant to a plea agreement with the Commonwealth to second-degree escape and the amended count of being a persistent felony offender in the second degree (PFO II). Under the agreement, the Commonwealth moved to amend the PFO I count to PFO II and recommended a sentence of seven years enhanced by the PFO conviction. At that time, Hasty waived preparation of a presentence investigation report and the trial court sentenced him consistent with the Commonwealth's recommendation to serve seven years in prison for second-degree escape and being a PFO II.

On July 30, 1998, Hasty filed an RCr 11.42 motion seeking to correct his sentence. He alleged that the trial court failed to sentence him on the PFO II conviction and that the sentence of seven years violated KRS 532.060(2) because the maximum sentence for second-degree escape was five years. Hasty also asked the court to consider his RCr 11.42 motion despite the fact that it was untimely under Subsection 10 because he did not have access to an adequate law library. He stated that he had attempted to pursue vindication of his rights prior to his release on parole in July 1997, but he did not have access to Kentucky case law while in prison. Therefor, he maintained that the time limitation for filing his RCr 11.42 should be tolled.¹

¹In support of his tolling claim, Hasty submitted affidavits from Juliana Weber, the custodian of the Legal Library at the Green River Correctional Complex (GRCC), and Doug Ward, another inmate at GRCC. Both stated that Hasty did not have access to the published Kentucky cases for general research during a four
(continued...)

He also filed accompanying motions for appointment of counsel and an evidentiary hearing. On September 18, 1998, the trial court summarily overruled the motions. This appeal followed.

RCr 11.42 provides persons in custody under sentence a procedure for raising collateral challenges to judgments entered against them. A movant, however, is not automatically entitled to an evidentiary hearing on the motion. Wilson v. Commonwealth, Ky., 975 S.W.2d 901, 904 (1998), cert. denied, ___ U.S. ___, 119 S. Ct. 1263, 143 L. Ed. 2d 359 (1999). An evidentiary hearing is not required on an RCr 11.42 motion where the issues raised in the motion are refuted on the record, or where the allegations, even if true, would not be sufficient to invalidate the conviction. Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 908 (1998), cert. denied, ___ U.S. ___, 119 S. Ct. 1266, 143 L. Ed. 2d 361 (1999); Harper v. Commonwealth, Ky., 978 S.W.2d 311, 314 (1998), cert. denied, ___ U.S. ___, 119 S. Ct. 1367, 143 L. Ed. 2d 527 (1999). Similarly, a person is not constitutionally entitled to appointment of counsel in a post-conviction collateral proceeding. Bowling v. Commonwealth, Ky., 981 S.W.2d 545, 552 (1998), cert. denied, ___ U.S. ___, 119 S. Ct. 2375, 144 L. Ed. 2d 778 (1999). A movant also is not entitled to appointment of counsel on an RCr 11.42 motion under state law where the substantive claim is refuted on the face of the record or appointment of counsel would be futile. Commonwealth v. Stamps, Ky., 672 S.W.2d 336 (1984); Maggard v. Commonwealth, Ky., 394 S.W.2d 893 (1965).

¹(...continued)
month period in 1997 while he was imprisoned at GRCC.

Given the trial court's failure to provide an explanation for its denial, we will first address the procedural issue in this case. The 1994 amendments created a three year time limitation for the filing of RCr 11.42 motions. Subsection 10 states as follows:

(10) Any motion under this rule shall be filed within three years after the judgment becomes final, unless the motion alleges and the movant proves either:

- (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.

If 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. If the motion qualifies under one of the foregoing exceptions to the three year time limit, the motion shall be filed within three years after the event establishing the exception occurred. Nothing in this section shall preclude the Commonwealth from relying upon the defense of laches to bar a motion upon the ground of unreasonable delay in filing when the delay has prejudiced the Commonwealth's opportunity to present relevant evidence to contradict or impeach the movant's evidence.

Hasty was convicted and sentenced on the second-degree escape and PFO II offenses involved in his RCr 11.42 motion on September 25, 1989. Since his conviction occurred prior to October 1997 and he did not appeal the conviction, Hasty was obligated to file his RCr 11.42 motion on or before October 1, 1997. RCr 11.42(10)(b). See, e.g., Palmer v. Commonwealth, Ky.

App., 3 S.W.2d 763, 765 (1999) (stating that "final judgment" for purposes of RCr 11.42(10) refers to the judgment of the trial court where no direct appeal is taken). Hasty did not file his motion until July 30, 1998; therefore, it was untimely and he has not presented any evidence that the exceptions contained in Subsection 10(a) or (b) apply.

Indeed, Hasty has recognized that his motion was untimely, but he argued in the circuit court that the limitations period should be tolled because he did not have access to necessary legal materials. Hasty has presented no statutory or case law to support his tolling argument. The three-year limitations period in RCr 11.42(10) is akin to a statute of limitations. Generally, the person seeking to take advantage of equitable tolling bears the burden of proof on that issue. See Southeast Kentucky Baptist Hospital v. Gaylor, Ky., 756 S.W.2d 467, 469 (1988). The principle of equitable tolling permits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim. See EEOC v. Kentucky State Police Dept., 80 F.3d 1086, 1095 (6th Cir.), cert. denied, 519 U.S. 963, 117 S. Ct. 385, 136 L. Ed.2d 302 (1996). Factors relevant to the application of equitable tolling include: 1) lack of actual notice of filing requirement; 2) lack of constructive notice of filing requirement; 3) diligence in pursuing one's rights; 4) absence of prejudice to defendant; and 5) a plaintiff's reasonableness in remaining ignorant of the filing requirements. Id. at 1094 (citing Andrews v. Orr, 851 F.2d 146 (6th Cir. 1988)).

Hasty's argument lacks merit for several reasons. First, he had actual knowledge of the alleged illegal sentence from the date of sentencing in September 1989. Second, he has not alleged that he was not aware of the claim he now raises. Third, and most importantly, he was not diligent in pursuing his claim. The affidavits indicate that Hasty had restricted access to Kentucky case law between March and July 1997. Hasty's limitations during this short period of time clearly would not justify tolling the time limitations which allowed him a three year period to file the RCr 11.42 motion. In fact, he waited almost nine years to file the motion. He has not shown why he did not or could not have filed his motion at some point prior to the end of the limitations period. Accordingly, he has not established sufficient grounds to toll the three year limitations period of RCr 11.42 (10) and his motion was subject to dismissal for being untimely.

In addition, Hasty's motion lacks merit on substantive grounds. He makes two inconsistent assertions that the trial court failed to sentence him on the escape conviction and that it sentenced him to seven years on the escape conviction. In fact, in response to an inquiry from the trial judge during the guilty plea hearing, Hasty acknowledged that the maximum sentence for second-degree escape was five years. While the record does not reveal that the trial judge imposed a sentence on the escape conviction for a precise number of years, Hasty has not demonstrated any prejudice from the omission. His enhanced seven year sentence on the PFO II conviction in lieu of a sentence on the escape conviction was within the statutory guidelines set out

in KRS 532.080(6). Thus, Hasty has failed to establish a sufficient claim justifying relief. See Hulett v. Commonwealth, Ky. App, 834 S.W.2d 688 (1992); Montgomery v. Commonwealth, Ky., 819 S.W.2d 713 (1991) (failure of jury to fix sentence on underlying principle offense in addition to sentence on PFO was mere procedural error).

Furthermore, Hasty's reliance on Davis v. Manis, Ky., 812 S.W.2d 505 (1991) and Commonwealth v. Hayes, Ky., 734 S.W.2d 467 (1987) is misplaced. Both of those cases dealt with situations in which the defendants received fines, rather than imprisonment on the underlying principal offenses. Those cases are distinguishable from the present situation because Hasty knowingly pled guilty to second-degree escape with a possible sentence of 1-5 years imprisonment. See Hulett, 834 S.W.2d at 690.

In conclusion, Hasty's RCr 11.42 motion was subject to dismissal on both procedural and substantive grounds. The trial court did not err in denying his request to vacate the sentence.

For the foregoing reasons, we affirm the order of the Marion Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gary Lee Hasty - *Pro Se*
West Liberty, Kentucky

BRIEF FOR APPELLEE:

A. B. Chandler III
Attorney General

Kent T. Young
Assistant Attorney General
Frankfort, Kentucky