

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-001810-MR

DAVID LYNN MURPHY

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE JOHN D. MINTON, JR., JUDGE  
ACTION NO. 94-CR-00346

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: COMBS, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: David Murphy appeals the Warren Circuit Court's denial of his motion for Rule of Criminal Procedure (RCr) 11.42 relief. The trial court denied Murphy's motion for an evidentiary hearing because the motion was untimely filed. Murphy contends, however, that the motion was timely filed and that he should have been granted an evidentiary hearing. In particular, Murphy points to a pro se motion to modify his sentence as his request for relief pursuant to RCr 11.42. In the alternative, Murphy requests this Court to find the three-year time limit of RCr 11.42(10) was tolled during the period of Murphy's parole. Murphy also maintains the Commonwealth did not

properly assert the defense of timeliness and that defense should therefore be deemed waived. We disagree with each of these contentions and affirm.

On September 15, 1994, Murphy entered a plea of guilty to an amended charge of burglary in the second degree and was sentenced to six years in prison. On January 18, 1996, Murphy filed a pro se motion for modification of his sentence which was denied without a hearing on January 19, 1996.

On January 17, 1997, Murphy was released on parole. Although the record does not reflect the exact date of Murphy's return to prison, on November 19, 1998, he filed an amended pro se motion seeking RCr 11.42 relief. The Department of Public Advocacy was appointed to represent Murphy and filed a supplement to Murphy's motion on January 25, 1999. The Commonwealth responded to this supplement on March 16, 1999. It argued the RCr 11.42 motion was meritless and requested the trial court to overrule the motion without a hearing. The trial court, however, granted Murphy's motion for an evidentiary hearing which was originally scheduled for April 28, 1999, and then rescheduled for June 23, 1999.

On June 22, 1999, the Commonwealth filed a motion to strike Murphy's RCr 11.42 motion because it had not been filed within three years of the final judgment. The trial court sustained the Commonwealth's motion and dismissed the RCr 11.42 motion without a hearing. This appeal follows.

Murphy maintains his motion for sentence modification of January 18, 1996, was actually a motion for RCr 11.42 relief.

This may well be so, but the timeliness of Murphy's prior motion, the denial of which was not appealed, does not excuse the untimeliness of his present motion. On the contrary, if the prior motion was brought pursuant to RCr 11.42, then it provides an additional ground for rejecting the subsequent motion, because successive motions for RCr 11.42 relief are not allowed. Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983).

Anticipating this finding, Murphy urges us, in the alternative, to hold that his present motion is not successive and that the three-year limitation period was tolled while he was paroled. The rule's plain terms preclude our doing so, however. RCr 11.42 (1) provides in pertinent part that "[a] prisoner in custody under sentence or a defendant on probation, parole or, conditional discharge who claims a right to be released . . . may at any time proceed directly by motion in the court that imposed the sentence to vacate, set aside or correct it" (emphasis added). Because relief continues to be available during probation, parole, and conditional discharge, the limitations clock likewise continues to run during these periods. Although not addressing the precise issue, the Kentucky Supreme Court has stated, "that a defendant is required to avail himself of RCr 11.42 while in custody under sentence or on probation, parole or conditional discharge, as to any ground of which he is aware, during the period when this remedy is available to him" Gross 648 S.W.2d at 857 (emphasis added). We are persuaded that the period of availability is now three years from the finality of the

judgment and that it is not extended by periods of probation or parole.

Finally, we are unpersuaded by Murphy's claim that the Commonwealth waived its defense of timeliness because its answer and motion to strike were filed "at the eleventh hour." RCr 11.42 provides that an answer may be filed to a motion to vacate a judgment, but it does not require one. Polsgrove v. Commonwealth, Ky.App., 439 S.W.2d 776 (1969). Thus regardless of the timeliness of the Commonwealth's answer and motion to strike, the trial court was authorized to dismiss Murphy's RCr 11.42 if on its face the record clearly established that Murphy was not entitled to relief. Commonwealth v. Stamps, Ky., 672 S.W.2d 336 (1984); Robbins v. Commonwealth, Ky. App., 719 S.W.2d 742 (1986). RCr 11.42 (10) unequivocally states that any RCr 11.42 motion must be filed within three years of the final judgment. The record clearly establishes that Murphy's RCr 11.42 motion fell outside the three year window. The trial court's ruling was appropriate.

For the aforementioned reasons we hereby affirm the ruling of the Warren Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Tera M. Rehmel  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III  
Attorney General of Kentucky

John E. Zak  
Assistant Attorney General  
Frankfort, Kentucky