

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001884-MR

TONY OLDHAM

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NO. 86-CR-00035

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BARBER, BUCKINGHAM AND COMBS, JUDGES.

BARBER, JUDGE: Tony Oldham ("Oldham"), currently incarcerated at the federal correctional institution in Manchester, Kentucky, appeals *pro se* from an August 3, 2001 order of the Henderson Circuit Court, denying his petition for post-conviction relief. Oldham's petition concerns the validity of a 1986 judgment, wherein he was convicted of two counts of second-degree burglary and one count of theft by unlawful taking over one hundred dollars. After reviewing the record and applicable law, we affirm.

On March 4, 1986, Oldham was indicted for the offenses of burglary in the first-degree, burglary in the second-degree,

theft by unlawful taking over one hundred dollars and two counts of theft by unlawful taking under one hundred dollars. Oldham pled guilty on March 19, 1986 to amended charges of two counts of second-degree burglary and one count of theft by unlawful taking over one hundred dollars. The trial court determined that Oldham's plea was knowingly, intelligently, and voluntarily entered with the advice of counsel. The Commonwealth subsequently dismissed the remaining charges to conform with Oldham's plea.

Oldham was sentenced to five years in prison for each count of second-degree burglary and five years in prison for the theft by unlawful taking charge. The trial court ordered these sentences to run concurrently, giving Oldham a total of five years to serve. Oldham's motion for shock probation was denied on July 24, 1986. Oldham completed his sentence on December 14, 1990.

Apparently, after being released from prison, Oldham committed a federal offense, was adjudged guilty of committing that offense, and sentenced to a period of incarceration in a federal penitentiary. The nature of this offense was not disclosed in the record, nor was it provided to us by the appellant in his briefs. Oldham filed a petition for post-conviction relief on June 25, 2001, approximately fifteen years after his conviction in the Henderson Circuit Court and eleven years after completing that sentence. Oldham alleged that his 1986 conviction is invalid because his guilty plea was not intelligently, knowingly, or voluntarily entered as required by

Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Oldham, however, failed to specify which rule, RCr 11.42 or CR 60.02, he was using to pursue post-conviction relief.

On August 3, 2001, the trial court denied Oldham's motion for post-conviction relief. The court stated that this motion was untimely under RCr 11.42 and CR 60.02. Further, the trial court stated that Oldham failed to demonstrate extraordinary circumstances warranting relief pursuant to CR 60.02(f). This appeal followed.

We agree with the trial court that Oldham's motion for post-judgment relief was untimely. RCr 11.42(10), as amended effective October 1, 1994, provides that a motion filed under this rule "shall be filed within three years after the judgment becomes final . . ." For judgments made final before the rule's amendment, the rule provides that "the time for filing the motion shall commence upon the effective date of this rule." Under the amendment to RCr 11.42, Oldham received the benefit of notice of three years, commencing on October 1, 1994, within which to file his motion. Thus, Oldham had until October 1, 1997 to file a motion for post-conviction relief pursuant to RCr 11.42. Unfortunately for Oldham, he waited until June 2001 to file his motion. The filing occurred well beyond the deadline established by the rule itself.

In addition to this procedural bar relied upon by the trial court, there is yet another more fundamental reason for denying Oldham's motion pursuant to RCr 11.42. The record reveals that Oldham's sentence was completed on December 14,

1990. This is significant because Oldham was no longer in custody on the 1986 sentence. Rather, at the time this appellant filed his motion, he was incarcerated in federal prison as a result of another, unrelated conviction. RCr 11.42 does not "provide, expressly or by implication, for the review of any judgment other than the one or ones pursuant to which the movant is being held in custody." See Sipple v. Commonwealth, Ky., 384 S.W.2d 332 (1964).

Oldham argues that his federal sentence was enhanced as a result of the 1986 state conviction. Citing Custis v. United States, 511 U.S. 485, 114 S.Ct. 1732, 128 L.Ed.2d 517 (1994), Oldham maintains that he can re-open his federal sentence should he be successful in attacking the validity of the 1986 conviction. However, Oldham's reliance on Custis is misplaced. While that case suggests the possibility of the re-opening of a federal sentence when and if a prior state conviction used for enhancement purposes has been vacated, it pre-supposes that a collateral attack would still be available in state court. We find nothing in Custis which enlarges the scope of RCr 11.42 to allow for a collateral attack of a sentence already served. Therefore, the fact that Oldham's federal sentence may have been increased by virtue of his 1986 conviction in the Henderson Circuit Court does not alter the fact that an RCr 11.42 motion is proper only if the movant is incarcerated, on probation, parole, or conditional discharge as a result of the sentence being attacked at the time the motion is filed. See Wilson v. Commonwealth, Ky., 403 S.W.2d 710 (1966).

Oldham's motion for post-judgment relief was also untimely pursuant to CR 60.02. CR 60.02(f) allows a movant to ask the trial court to set aside a final judgment, if some reason of an extraordinary nature justifies relief. Motions made under CR 60.02(f) must be filed within a reasonable time. In this case, Oldham's motion was not made within a reasonable time in light of the fact that the conviction he seeks to set aside is fifteen years old and has been completely served. This Court has previously held that twelve years removed from the conviction is not a reasonable time. Ray v. Commonwealth, Ky. App., 633 S.W.2d 71, 73 (1982). Also, the record does not reveal, nor does Oldham provide us with any facts of an extraordinary nature justifying relief under CR 60.02(f).

Since Oldham's motion was not timely filed or provided for in RCr 11.42 and CR 60.02, it is unnecessary to examine Oldham's appeal on the merits. Therefore, the judgment of the Henderson Circuit Court is affirmed.

ALL CONCUR.

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