

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001042-MR

GARY M. AULT

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 96-CR-002162

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING
* * * * *

BEFORE: BARBER, GUDGEL, AND KNOPF, JUDGES.

KNOPF, JUDGE: Gary M. Ault appeals from an April 5, 2001, order by the Jefferson Circuit Court which denied his RCr 11.42 motion as untimely. He contends that the Commonwealth had agreed to waive any objection to the timeliness of his motion. We find that if the Commonwealth made such an agreement, the trial court would have jurisdiction to consider the merits of the motion despite its untimeliness. Hence, we vacate the trial court's order and remand for further proceedings.

On August 27, 1997, Ault entered a guilty plea to the charges of second degree manslaughter;¹ six counts of wanton endangerment in the first degree;² two counts of criminal mischief in the first degree;³ and one count each of operating a motor vehicle under the influence of intoxicants, first offense (DUI 1st),⁴ and operating a motor vehicle on a suspended or revoked licence.⁵ The charges stemmed from an August 10, 1996, incident in which Ault, while he was driving a car under the influence of alcohol, drove the wrong way on Interstate 64 in Louisville. He narrowly missed and sideswiped several vehicles, and then collided with another vehicle, causing the death of the driver, Richard Melson. On October 6, 1997, the trial court sentenced Ault to ten years for manslaughter, three years on each count of wanton endangerment and criminal mischief, and six months for driving on a suspended or revoked licence. The trial court merged the DUI 1st penalty with the manslaughter sentence. It further directed that the three-year sentences would run concurrently with each other but consecutive to the manslaughter sentence, for a total of thirteen years. The trial court denied Ault's later motion for shock probation.

¹ KRS 507.040.

² KRS 508.060.

³ KRS 512.820.

⁴ KRS 189A.010.

⁵ KRS 186.620.

In August of 2000, Ault retained new counsel to represent him on a motion to alter, amend or vacate the conviction pursuant to RCr 11.42. However, his counsel initially concluded that the motion would not be timely, miscalculating the three-year period from the date that Ault entered his guilty plea rather than from the date of his sentencing. Counsel avers that he met with the prosecutor upon discovering the error. The prosecutor allegedly agreed that he would not oppose a motion to enlarge the time for filing Ault's RCr 11.42 motion. Pursuant to this agreement, the trial court entered an order extending the deadline for filing the motion until January 1, 2001.

Ault filed his RCr 11.42 motion on December 29, 2000, alleging ineffective assistance of trial counsel. In its response, the Commonwealth argued, among other things, that the motion had not been filed within three years after the judgment became final. The trial court agreed and, by order entered on April 5, 2001, it denied the motion. Thereafter, in a motion to reconsider, Ault pointed out the prosecutor's agreement and the trial court's prior order extending the time for filing the motion.

However, prior to the trial court ruling on this motion, Ault's counsel filed a notice of appeal from the court's April 5, 2001, order. Ault then filed a motion with this Court, asking that the matter be remanded back to the trial court for an evidentiary hearing. The Commonwealth opposed the motion, contending that the circuit court no longer had jurisdiction following the filing of the notice of appeal, and that even if

there were an agreement to extend the time for filing the RCr 11.42 motion, the trial court had no authority to extend the time for filing. This Court denied the motion to remand on September 14, 2001.

In 1994, our Supreme Court added subsection 10 to RCr 11.42. That section provides in pertinent part:

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.

There is no dispute that the three-year time limit for filing a RCr 11.42 motion is mandatory. Rather, the central question in this case is whether the time limit is jurisdictional and cannot be waived. The Commonwealth compares the time limit in RCr 11.42(10) to the thirty-day period allowed for filing a notice of appeal under RCr 12.04(3). Like the latter time-limit, the Commonwealth asserts that the three-year time limit is jurisdictional and cannot be waived or extended by agreement or by an order of the trial court. Since jurisdiction cannot be conferred by agreement of the parties,⁶ the Commonwealth contends that even if the prosecutor had agreed not to oppose an extension of time, the trial court would not have jurisdiction to entertain the merits of the RCr 11.42 motion. In contrast, Ault argues

⁶ Demoss v. Commonwealth, Ky. App., 765 S.W.2d 30, 32 (1989).

that the time limit is not jurisdictional, and therefore could be waived by the prosecutor's agreement and by the trial court's order.

We disagree with the Commonwealth that the time provided for filing a RCr 11.42 motion is jurisdictional and cannot be extended. First, the courts' jurisdiction is prescribed by the Kentucky Constitution, not by the rules of procedure. While the courts have the authority to deny or dismiss an appeal if the rules are not followed, the courts have no power to create or deny jurisdiction. Thus, the time-limit provided under the rules does not create jurisdiction, but only prescribes the method by which the jurisdiction of an appellate court is invoked.⁷

Moreover, this matter does not involve the filing of a notice of appeal, but the filing of a motion to alter, amend or vacate a judgment of conviction under RCr 11.42. The clear language of the rule allows for exceptions from the mandatory three-year limit on filing a motion for relief. Although there is no allegation that any of the exceptions apply in this case, their inclusion indicates that the Supreme Court intended to allow for waiver of the time limit under certain circumstances. Such an intention is inconsistent with the Commonwealth's argument that the time limit is jurisdictional.

Consequently, we conclude that the trial court improperly denied Ault's RCr 11.42 motion as untimely. Ault asserts that the prosecutor agreed not to oppose his RCr 11.42

⁷ Johnson v. Smith, Ky., 885 S.W.2d 944, 949-50 (1994).

motion on the grounds that it was untimely. The Commonwealth does not concede that such an agreement existed. Nonetheless, the existence of such an agreement by the Commonwealth is an issue of fact which, if proven, could justify the trial court's consideration of the merits of Ault's untimely motion.

The Commonwealth further asserts that even if the prosecutor had made such an agreement, Ault would not be prejudiced by the Commonwealth's failure to perform it because his motion would still have been untimely at the time the agreement was made. However, we find that a showing of unfair prejudice is not necessary in this case. Where the Commonwealth has agreed not to object to an untimely motion under RCr 11.42, the Commonwealth will be held to that agreement.⁸ Moreover, the prosecutor's representations apparently induced the trial court to sign an order granting the motion for an extension of time.⁹ Although the trial court's decision to grant Ault's motion for an extension of time was not based upon any of the exceptions set out in RCr 11.42(10), that order is not the subject of this appeal. So long as Ault is able to prove the existence of an agreement with the Commonwealth to waive any objection to the

⁸ Workman v. Commonwealth, Ky., 580 S.W.2d 206, 207 (1979), *overruled on other grounds* Morton v. Commonwealth, Ky., 817 S.W.2d 218 (1991). *See also* Matheny v. Commonwealth, Ky., 37 S.W.3d 756, 758 (2001); Commonwealth v. Reyes, Ky., 764 S.W.2d 62, 68 (1989).

⁹ We do note that there appear to be some irregularities with this order as well. As noted above, the trial court allowed Ault until January 1, 2001, to file his RCr 11.42 motion. But while the order is signed by the trial judge, it is not dated, and there is no indication that it was entered until May 7, 2001, when it was filed as an attachment to Ault's motion to reconsider. Yet even if the order was not properly entered, it may still serve as evidence of the existence of an agreement between Ault and the Commonwealth.

timeliness of his RCr 11.42 motion, he is entitled to proceed on the merits of his motion.

Accordingly, the order of the Jefferson Circuit Court denying Ault's RCr 11.42 motion is vacated, and this matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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