

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000130-MR

TIMOTHY TERRELL BALLANGER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 97-CR-001766

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * **

BEFORE: GUIDUGLI, JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: Timothy Terrell Ballanger, pro se, has appealed from an opinion and order entered by the Jefferson Circuit Court on December 27, 2001, which denied his RCr¹ 11.42 motion to vacate, set aside or correct his 20-year sentence for robbery in the first degree,² criminal mischief in the first degree,³

¹ Kentucky Rules of Criminal Procedure.

² Kentucky Revised Statutes (KRS) 515.020.

operating a motor vehicle without an operator's license,⁴ and being a persistent felony offender in the first degree (PFO I).⁵ Having concluded that the trial court properly denied the motion as being untimely, we affirm.

On July 21, 1997, a Jefferson County grand jury indicted Ballanger under Indictment No. 97-CR-001766 on four counts of robbery in the first degree, one count of criminal mischief in the first degree, and one count of operating a motor vehicle without an operator's license involving several incidents occurring on July 14 and 15, 1997, and for being a PFO I. The PFO I count was based on his convictions in January 1997 on two counts of theft by unlawful taking over \$300,⁶ and his convictions in June 1989 for burglary in the first degree⁷ and burglary in the third degree.⁸ On December 4, 1997, Ballanger pled guilty to all six counts of the indictment pursuant to a plea agreement with the Commonwealth, which recommended sentences of ten years on each of the four counts of robbery in the first degree, one year for criminal mischief in the first degree, and 90 days for operating a motor vehicle without a

³ KRS 512.020.

⁴ KRS 186.410(1).

⁵ KRS 532.080(3).

⁶ KRS 514.030.

⁷ KRS 511.020.

⁸ KRS 511.040.

license, all to run concurrently, enhanced to 20 years for being a PFO I. On February 17, 1998, the trial court, consistent with the Commonwealth's recommendation, sentenced Ballanger to a total of 20 years' imprisonment.

On December 13, 2001, Ballanger filed an RCr 11.42 motion accompanied by motions for an evidentiary hearing and appointment of counsel. In the RCr 11.42 motion, he alleged that his guilty plea under Indictment No. 97-CR-1766 was not valid because his attorney was ineffective for not discovering that his prior 1989 convictions were constitutionally invalid under Boykin v. Alabama,⁹ and therefore, could not be used as predicate offenses for the PFO I conviction. He claimed counsel improperly coerced him to plead guilty without sufficiently investigating the validity of the convictions underlying the PFO I charge. Ballanger maintained that the three-year time limitation contained in RCr 11.42(10)(a) should be excused because of problems associated with his attorney and his inability to obtain court records due to lack of financial resources. On December 27, 2001, the trial court entered an opinion and order denying the RCr 11.42 motion as untimely and without substantive merit. The trial court further denied the motions for an evidentiary hearing and appointment of counsel. This appeal followed.

⁹ 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

Ballanger alleges on appeal that defense counsel rendered ineffective assistance of counsel by not adequately investigating his prior convictions. More specifically, Ballanger asserts that had counsel investigated his 1989 convictions, he would have discovered that the guilty plea in 1989 was invalid because the proceeding did not conform to the requirements of Boykin concerning a defendant's waiver of certain constitutional rights. Ballanger further asserts that had counsel advised him of the possible defense to the PFO I charge based on the alleged defect in the 1989 convictions, he would not have pled guilty to the PFO I charge and would have opted to go to trial.

The trial court ruled that Ballanger's motion was untimely because it was filed outside the three-year limitations period of RCr 11.42(10). Because there was no direct appeal of the 1997 convictions, the judgment became "final" and the limitations period started to run on February 17, 1998, when the trial court entered its Judgment of Conviction and Sentence.¹⁰

¹⁰ See Palmer v. Commonwealth, Ky.App., 3 S.W.3d 763 (1999). The trial court felt the judgment became final ten days after February 17, 1998, when it lost jurisdiction to amend its judgment. See CR 59.05. While we agree that a trial court retains jurisdiction to amend a judgment, the Palmer Court held that the "time begins to run from the date of the final judgment on appeal." Id. at 764. The Palmer Court did not recognize an extension of the accrual period based on the ten-day period available for a theoretical motion under CR 59.05, but rather recognized a date based on the actual appellate proceedings in each case. While the rules of appellate procedure, CR 73.02(1)(e), provide for extension or tolling of the time to file a direct appeal, there is no similar provision for collateral appeal motions or within RCr 11.42. Cf. 28 U.S.C. § 2244(d)(1)(A). It would appear that unless a CR

Ballanger filed his RCr 11.42 motion on December 13, 2001, approximately three years and ten months after the judgment became final. Ballanger recognized this problem but presented several excuses for the late filing by claiming: (1) trial counsel recently advised Ballanger that counsel knew the PFO law and that counsel also knew that Ballanger did not know how to collaterally attack the guilty plea; (2) counsel promised Ballanger that he would collaterally attack the guilty plea; (3) Ballanger had diligently requested but never received court records from trial counsel and only recently acquired the records from the court clerk; and (4) Ballanger was not "intellectually inclined to conjure such a complex and intricate argument of law until arrival and contact with an inmate legal aide upon arrival at Green River Correctional Complex."

RCr 11.42(10) provides in relevant part:

(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.

59.05 motion is filed, the accrual time for the limitations period is not extended. Nevertheless, the ten-day difference between the date utilized by the trial court and the correct date does not affect the outcome of this appeal.

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.

The trial court rejected Ballanger's reasons as insufficient to toll or excuse compliance with the limitations restriction. It noted that Ballanger had presented no evidence of contacts with his attorney, promises from counsel that he would initiate a collateral attack, or correspondence with the circuit court clerk's office. The trial court stated that the record did not contain any letter to or from Ballanger or the clerk's office and that Ballanger's prison account record showed no expenditure for court records.

None of the grounds presented by Ballanger falls within the tolling provisions of RCr 11.42(10). Subsection (b) clearly does not apply because the Boykin requirements have been established since 1969. Subsection (a) also provides Ballanger no relief because he was aware of the facts supporting his Boykin claim in 1989 at the time of entry of his guilty plea on the 1989 convictions. The fact that Ballanger may not have appreciated the legal significance of the facts supporting a Boykin claim does not affect application of subsection (a).

In this regard, a federal practice involving a tolling provision similar to RCr 11.42(10)(a) with respect to a one-year limitation on collateral attacks in criminal cases is instructive, albeit not binding on this Court.¹¹ For instance, in Owens v. Boyd,¹² the defendant sought relief from a state conviction for murder based on ineffective assistance of counsel at trial under 28 U.S.C. § 2254. Owens alleged that his filing of the petition was delayed because he did not realize that his attorney was not going to file the petition and had not filed a petition for collateral review, and he spent eight months investigating what he could do before concluding that he could seek collateral relief on the basis of ineffective assistance of counsel. In affirming the denial of the petition as untimely, the United States Court of Appeals for the Seventh Circuit held that the tolling provision extending accrual of the limitations period until "the date on which the factual predicate of the claim or claim's presented could have been discovered through the exercise of due diligence,"¹³ applies to knowledge of the facts supporting a claim, as opposed to awareness of the legal theories. The Court noted that the provision spoke in terms of

¹¹ See also Bowling v. Commonwealth, Ky., 964 S.W.2d 803, 805 (1998)(equating federal one-year limitations period in 28 U.S.C. § 2244 to three-year limitations period in RCr 11.42(10)).

¹² 235 F.3d 356 (7th Cir. 2000).

¹³ 28 U.S.C. § 2244 (d)(1)(D).

a "factual predicate," and not recognition of the facts' legal significance. It stated:

Time begins when the prisoner knows (or through diligence could discover) the important facts, not when the prisoner recognizes their legal significance. If § 2244(d)(1) used a subjective rather than an objective standard, then there would be no effective time limit, as Owens's case illustrates. Like most members of street gangs, Owens is young, has a limited education, and knows little about the law. If these considerations delay the period of limitations until the prisoner has spent a few years in the institution's law library, however, then § 2244(d)(1) might as well not exist; few prisoners are lawyers.¹⁴

The Court held that Owens knew the facts supporting his ineffective assistance of counsel claim at the time of the trial, even though he may not have understood the legal utility of the facts.

In the current case, Ballanger knew the facts supporting his claim of ineffective assistance of counsel due to counsel's failure to challenge the PFO charge based on an alleged Boykin violation at the time of his guilty plea in December 1997. Consequently, Ballanger has not shown that RCr 11.42(10)(a) should apply to postpone the accrual date for determining the three-year limitations period beyond that of the date the judgment became final in February 1998.

¹⁴ Owens, 235 F.3d at 359. See also Brackett v. United States, 270 F.3d 60 (1st Cir. 2001)(involving similar provision in 28 U.S.C. § 2255); and United States v. Pollard, 161 F.Supp.2d 1 (D.D.C. 2001).

While there are no Kentucky cases discussing the issue, a large number of federal courts have held that the limitations period for criminal collateral habeas relief is subject to the doctrine of equitable tolling.¹⁵ The majority of these cases emphasize that this doctrine should be invoked sparingly and apply an "extraordinary circumstances" test, which requires circumstances that are beyond the defendant's control and unavoidable even with due diligence.¹⁶ In Harris, supra, the Court stated:

But any invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes. To apply equity generously would loose the rule of law to whims about the adequacy of excuses, divergent responses to claims of hardship, and subjective notions of fair accommodation. We believe, therefore, that any resort to equity must be reserved for those rare instances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result.¹⁷

¹⁵ See, e.g., Dunlap v. United States, 250 F.3d 1001, 1004 n.1 (6th Cir. 2001)(listing cases), cert. denied, 534 U.S. 1057, 122 S.Ct. 649, 151 L.Ed.2d 566 (2001); Harris v. Hutchinson, 209 F.3d 325, 328 (4th Cir. 2000); Steed v. Head, 219 F.3d 1298, 1300 (11th Cir. 2000). This is based on an interpretation that the one-year period is a statute of limitations rather than a jurisdictional bar. We note that in Bowling, supra, the Court referred to RCr 11.42(10) as a "limitations" period serving the same purpose as the federal habeas corpus statute, 28 U.S.C. § 2244(d).

¹⁶ Sandvik v. United States, 177 F.3d 1269, 1271 (11th Cir. 1999); Kreutzer v. Bowersox, 231 F.3d 460, 463 (8th Cir. 2000); Smith v. McGinnis, 208 F.3d 13, 17 (2d Cir. 2000). But see Dunlap, supra (adopting a five factor test).

¹⁷ Harris, 209 F.3d at 330.

Although not explicit, Ballanger's reasons for extending the limitations period of RCr 11.42(10) attempt to invoke the Court's equitable powers. However, we believe there are insufficient grounds to do so. As Ballanger acknowledged in his motion, ignorance of the law, even for incarcerated pro se movants, does not excuse prompt filing of a post-judgment motion.¹⁸ Thus, his claim that he needed to acquire assistance from a prison legal aide before filing the motion does not constitute a valid excuse.¹⁹

Ballanger's alleged reliance on his attorney to file an RCr 11.42 motion and his alleged inability to obtain court records due to lack of funds also are inadequate grounds. First, he has not identified any court records that were necessary in order to file such a motion.²⁰ Second, reliance on an attorney or legal assistant does not necessarily justify equitable tolling.²¹ Ballanger was aware of the facts supporting

¹⁸ See Godoski v. United States, 304 F.3d 761, 762 (7th Cir. 2002); and Marsh v. Soares, 223 F.3d 1217, 1220 (10th Cir. 2000)(quoting Fisher v. Johnson, 174 F.3d 710, 714 (5th Cir. 1999));.

¹⁹ See, e.g., Harris, 209 F.3d at 328 (noting equitable tolling unavailable where delay due to result of movant's unfamiliarity with legal process or lack of legal representation); Kreutzer, 231 F.3d at 463 (equitable tolling unwarranted for pro se prisoner alleging lack of legal knowledge or legal resources).

²⁰ See Gassler v. Bruton, 255 F.3d 492 (8th Cir. 2001).

²¹ See, e.g., Taliani v. Chrans, 189 F.3d 597, 598 (7th Cir. 1999)(attorney's miscalculation of limitations period not a valid basis for equitable tolling); Sandvik, 177 F.3d at 1272 (no equitable tolling where delay

his claim that the 1989 guilty pleas were invalid and that counsel failed to raise this defense in 1997 when he entered his guilty plea. His alleged excuses for the delay in filing indicate that he could have filed his RCr 11.42 motion earlier through due diligence rather than relying on others. He was not prevented from filing his petition on time due to no fault of his own and cannot merely shift his personal responsibility for complying with the law to others.²² Ballanger had three years in which to file his motion.

We conclude that Ballanger has not presented sufficient grounds to justify his delay in filing the motion under RCr 11.42(10) or in support of the doctrine of equitable tolling. Thus, the trial court did not err or abuse its discretion by finding that Ballanger's RCr 11.42 motion was procedurally barred as untimely. In addition, neither a hearing nor appointment of counsel was necessary because the motion was clearly refuted on the record.²³ Given our ruling on this issue,

allegedly due to lawyer's decision to use regular mail rather than expedited deliver); and Harris, 209 F.3d at 330 (tolling not available for lawyer's innocent mistake in interpreting statutory provision).

²² See, e.g., Marsh, 223 F.3d at 1220; and Henderson v. Johnson, 1 F.Supp.2d 650, 655 (N.D. Tex. 1998)(defendant's reliance on prison legal aide did not relieve him from responsibility to comply with limitations period).

²³ See Fraser v. Commonwealth, Ky., 59 S.W.3d 448 (2001); and Haight v. Commonwealth, Ky., 41 S.W.3d 436, 442 (2001).

we need not decide whether the trial court correctly denied the motion on substantive grounds.²⁴

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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²⁴ We note, however, that Ballanger's claim of ineffective assistance for counsel's failure to challenge the PFO charge on the basis of a Boykin violation in an underlying felony would appear to be without merit. See, e.g., McGuire v. Commonwealth, Ky., 885 S.W.2d 931 (1994)(limiting challenge at PFO trial based on unconstitutionally of underlying felony to situations involving complete denial of counsel in prior proceeding); and Graham v. Commonwealth, Ky., 952 S.W.2d 206 (1997).