

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002400-MR

JOHN D. SHORT

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURANCE B. VANMETER, JUDGE
ACTION NO. 98-CR-00635

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BARBER AND GUIDUGLI, JUDGES; AND MILLER, SENIOR JUDGE.¹
GUIDUGLI, JUDGE. John D. Short (hereinafter "Short") has
appealed from the Fayette Circuit Court's November 7, 2002,
order and opinion denying his RCr 11.42 motion to vacate. The
sole issue on appeal concerns the timeliness of Short's RCr

¹ Senior Status John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

11.42 motion. Having considered the parties' briefs, the record, and the applicable case law, we affirm.

As the facts underlying this appeal are not disputed, we shall only briefly outline the proceedings below. On December 29, 1998, the circuit court entered a Final Judgment and Sentence of Probation following its acceptance of Short's guilty plea. Short pled guilty as charged in the indictment to charges of Flagrant Non-Support² and for being a Persistent Felony Offender in the First Degree.³ The circuit court withheld imposition of his enhanced fifteen-year sentence, and placed Short on probation for five years, subject to several conditions. On May 11, 1999, the judgment was modified to include the condition that he successfully complete the Fayette County Drug Court program. Because Short failed to successfully complete this program, an affidavit to revoke was filed on July 20, 1999, by treatment coordinator Connie Reed. Subsequent to a probation revocation hearing, the circuit court entered a final judgment sentencing Short to fifteen years in the State Penitentiary on October 22, 1999, and then entered an amended order on October 26, 1999, revoking his probation and sentencing him to serve the original term of imprisonment due to his failure to complete the Drug Court program.

² KRS 530.050.

³ KRS 532.080.

On October 2, 2002, Short filed a motion to vacate pursuant to RCr 11.42, arguing that his guilty plea was not entered voluntarily, knowingly or intelligently due to ineffective assistance of counsel, and that he was coerced into accepting a sentence enhancement. On November 7, 2002, the circuit court entered an order and opinion denying his motion without an evidentiary hearing, on the basis that Short did not file his RCr 11.42 motion within the applicable three-year time limit. This appeal followed.

On appeal, Short argues that his motion to vacate was timely filed as the three-year time period in RCr 11.42(10) did not begin to run until the circuit court entered the October 22 and October 26, 1999, orders because the fifteen-year sentence was not imposed until that time. On the other hand, the Commonwealth argues that the December 29, 1998, order became final thirty days from its entry because he did not take a direct appeal and that the three-year period began running from that date.⁴ We agree with the Commonwealth that the three-year time limit began to run no later than thirty days from the entry of the original 1998 judgment.

RCr 11.42(10) provides that:

Any motion under this rule shall be filed
within three years after the judgment

⁴ We note that Short could not have taken a direct appeal from the December 29, 1998, judgment because he entered an unconditional guilty plea.

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.

The rule also provides that for those judgments that became final prior to the effective date of the rule,⁵ the three-year time period would begin to run from that date. This Court addressed the three-year time limitation of RCr 11.42(10) in Palmer v. Commonwealth, Ky.App., 3 S.W.3d 763 (1999). In Palmer, we held that by the phrase "the judgment becomes final," the Supreme Court was referring to "the conclusive judgment in the case, whether it be the final judgment of the appellate court on direct appeal or the judgment of the trial court in the event no direct appeal was taken. Id. at 765.

In the matter presently before us, the conclusive judgment was the circuit court's original judgment entered on December 28, 1998, adjudging Short guilty and probating his fifteen-year sentence. Whether that judgment became final upon entry, as Short entered an unconditional guilty plea, or at the end of the thirty-day period during which Short could have filed

⁵ October 1, 1994, is the effective date of the rule.

a direct appeal had he entered a conditional guilty plea or had he proceeded to trial and been convicted, Short did not file his RCR 11.42 motion until well after the expiration of the three-year period prescribed by the rule. Furthermore, Short has never argued that he would be subject to any of the exceptions to the three-year time limit. That Short failed to abide by the terms of his probation and eventually had his probation revoked is of no consequence. Therefore, we hold that the three-year period of RCr 11.42(10) began to run, at the latest, thirty days from the entry of the circuit court's December 29, 1998, judgment. Short did not file his RCr 11.42 motion until October 2, 2002, well over three years later. Therefore, the circuit court did not commit any error in denying Short's RCr 11.42 motion to vacate as untimely filed.

For the foregoing reasons, the November 7, 2002, order and opinion of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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