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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001303-MR

WILLIAM BECKERMAN

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 99-CR-00169

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND SCHRODER, JUDGES; MILLER, SENIOR JUDGE.¹

MILLER, SENIOR JUDGE: William Beckerman (Beckerman) brings this appeal of an order of the McCracken Circuit Court, entered May 25, 2005, summarily denying his motion for relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. We affirm.

On July 23, 1999, Beckerman was indicted for operating a motor vehicle while under the influence (DUI), fourth offense.²

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

Seven months later, a superceding indictment was returned adding the charge of first-degree persistent felony offender (PFO I).³ On May 29, 2001, Beckerman entered an unconditional⁴ guilty plea to fourth-offense DUI, agreeing to the Commonwealth's offer of five years' imprisonment to run consecutive to all other offenses to which he had pleaded guilty including five years he was currently serving in Missouri, with the PFO I charge dismissed. On June 1, 2001, judgment was entered and Beckerman was sentenced consistent with his plea.

Just one month short of four years later, on May 10, 2005, Beckerman, through counsel, filed the RCr 11.42 motion that underlies this appeal, claiming a lack of jurisdiction and multiple instances of ineffective assistance of counsel. He also claimed that his motion was timely filed within the three year time period set by RCr 11.42(10)(a). Specifically, he claimed that the three year time period for filing his RCr 11.42 motion commenced on November 19, 2002, when he began serving his sentence on the instant judgment in Kentucky after having previously been incarcerated in Missouri, and not on May 29, 2001,⁵ when final judgment was rendered. He also requested an

² Kentucky Revised Statutes 189A.010, class D felony.

³ Kentucky Revised Statutes 532.080.

⁴ Kentucky Rules of Criminal Procedure 8.08.

⁵ The Order and Judgment on Plea of Guilty, Final Judgment/Sentence of Imprisonment became effective upon entry on June 1, 2001.

evidentiary hearing. In summarily denying Beckerman's motion, the trial court found the claims time-barred. This appeal followed.

Before us, Beckerman claims that the trial court erred in denying his RCr 11.42 motion 1) as time-barred, contending that the three-year period commenced on the date that he started serving his sentence in Kentucky; 2) as to proper jurisdiction; and 3) as to ineffective assistance of counsel. We review questions of fact under the clearly erroneous standard of Kentucky Rules of Civil Procedure (CR) 52.01 and questions of law *de novo*. See generally Brown v. Commonwealth, 40 S.W.3d 873, 875 (Ky.App. 1999). As we conclude that the trial court's finding and conclusion that Beckerman's RCr 11.42 motion was time-barred are supported by substantial evidence and are not an abuse of discretion, and the court correctly applied the law, we affirm.

Pursuant to RCr 11.42:

(10) Any motion under this rule shall be filed within three years after the judgment becomes final.

Beckerman's judgment became final upon entry on June 1, 2001.⁶ The filing of his RCr 11.42 motion on May 10, 2005, was, on its face, almost a year beyond the three-year time limit.

⁶ As a judgment on an unconditional guilty plea, Beckerman did not appeal. Pursuant to Palmer v. Commonwealth, 3 S.W.3d 763, 765 (Ky.App. 1999), a

Of the two exceptions to three-year filing limit in RCr 11.42(10), Beckerman argues that RCr 11.42(10)(a) applies, "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." The basis for this exception is his claimed inability to have access to Kentucky law based on his incarceration in Missouri; his reliance upon appointed counsel's advice that he had no further avenues of relief; and his ignorance of the avenue of RCr 11.42 relief until a February 5, 2005, decision in a Kentucky state habeas corpus action.

Since the filing of the briefs in this case, in Robertson v. Commonwealth, 177 S.W.3d 789, 792 (Ky. 2005), the Kentucky Supreme Court has adopted the five-factor test promulgated by the United States Court of Appeals for the Sixth Circuit in Dunlap v. United States, 250 F.3d 1001, 1008-09 (6th Cir. 2001), "for determining whether equitable tolling is applicable to an otherwise limitation-barred RCr 11.42 motion." The test involves an examination of (1) the petitioner's lack of notice of the filing requirement; (2) the petitioner's lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the respondent; and (5) the petitioner's reasonableness in remaining ignorant of the legal requirement for filing his claim.

judgment of the trial court for RCr 11.42 purposes becomes final when no appeal is taken.

According to Robertson, because Dunlap factors one, two, and five are essentially incorporated within RCr 11.42(10)(a), the primary considerations adopted from Dunlap are factors three (diligence) and four (prejudice). Although the factual issue in Robertson is distinguishable from herein as it pertained to the timely filing of an RCr 11.42 motion in the prison mail system by an incarcerated inmate, it appears that Beckerman's situation can be similarly analyzed by the five-factor test.

The record before us refutes Beckerman's claims. Although Beckerman obtained counsel twice for the purpose of filing shock probation⁷ motions, in the twenty-three months between entry of final judgment on June 1, 2001, and April 29, 2003, Beckerman moved, *pro se*, for a free copy of his court file for the purpose of filing post-conviction remedies; for removal of his counsel, so that he could "seek other counsel to pursue post-conviction remedies;" for appointment of counsel "to seek post-conviction remedies;" for correction of a clerical error on his final judgment;⁸ for custody credit; and for shock probation. And, sometime before the circuit court entered an order denying same on October 19, 2004, Beckerman filed a *pro se* petition in

⁷ Kentucky Revised Statutes 439.265.

⁸ The *pro se* motion for correction of a clerical error was granted and the order amending same entered on September 6, 2002. This amended order, however, had no effect on the timing of the final judgment, which remained June 1, 2001. See generally United Tobacco Warehouse, Inc. v. Southern States Frankfort Cooperative, Inc., 737 S.W.2d 708, 709-10 (Ky.App. 1987).

state court for a writ of habeas corpus. Four of his *pro se* motions were made while he was incarcerated in Missouri.

Based on Beckerman's actions, therefore, and looking at Beckerman's claims under the Robertson "equitable tolling" analysis, it is difficult to conclude otherwise than that Beckerman was sufficiently knowledgeable of the availability of post-conviction remedies; able to access Kentucky law on post-conviction remedies; and was diligent in pursuing post-conviction remedies, despite his incarceration in Missouri. As the record refutes Beckerman's allegations, there is no need for an evidentiary hearing. See generally Robertson, supra at 792; Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001). It is clear that the finding of the trial court is supported by substantial evidence, and the court correctly applied the law.

Given our conclusion that the trial court's finding and conclusion that the RCr 11.42 motion was time-barred is correct, we need not address the remainder of the issues.

For the foregoing reasons, the order of the McCracken Circuit Court is affirmed.

ALL CONCUR.

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