

RENDERED: NOVEMBER 14, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001129-MR

GARY WILFRED BYRD

APPELLANT

APPEAL FROM WARREN CIRCUIT COURT
v.
HONORABLE JOHN R. GRISE, JUDGE
ACTION NOS. 00-CR-00316, 00-CR-00629 AND 00-CR-00629-0

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

*** * * * *

BEFORE: KELLER AND WINE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

WINE, JUDGE: Gary Wilfred Byrd appeals *pro se* from an order of the Warren Circuit Court dismissing his post-conviction Kentucky Rules of Criminal Procedure (RCr) 11.42 motion. Finding no error, we affirm.

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

In May 2000, Byrd was indicted for first-degree trafficking in a controlled substance, a class C felony, and for being a persistent felony offender in the first degree (PFO I). Several months later, a second indictment was returned against Byrd charging him with the same offenses. As court proceedings progressed, the trial court expressed a desire to give Byrd another chance, and to prevent Byrd from being sent to prison despite the Commonwealth's objections.

In due course and with the approval of the trial court, the Commonwealth offered Byrd a plea agreement to resolve all of his charges. In exchange for pleading guilty, the Commonwealth recommended that Byrd receive ten years on each trafficking offense and that the PFO charges be dismissed. The trafficking convictions would be served consecutively, for a total of twenty years' imprisonment.

Most significantly, the plea agreement provided Byrd with a unique opportunity to avoid imprisonment if he successfully completed "judge court." "Judge court" was a unique program established by Judge Thomas R. Lewis. Under the program, the court would accept a guilty plea but withhold final sentencing subject to a defendant's continued compliance with the conditions established in his plea agreement, including weekly visits to court and continued good behavior. If the defendant failed to comply with his plea agreement, the court would sentence the defendant and remand him to the custody of the Department of Corrections.

In February 2001, Byrd appeared in court under the influence of cocaine, in violation of his plea agreement. Consequently, the court sentenced Byrd to twenty years' imprisonment.

On February 8, 2002, Byrd filed a *pro se* motion to vacate his conviction pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. The Department of Public Advocacy was appointed to represent Byrd, and appointed counsel successfully obtained a reduction of Byrd's sentence from twenty years to ten years by reducing the trafficking charges to the statutory minimum. The order reducing Byrd's sentence was entered on December 17, 2002.

On April 23, 2004, Byrd filed another motion to vacate his ten-year sentence pursuant to CR 60.02. After conducting a hearing, the trial court denied his motion for relief on December 28, 2004. This Court affirmed that decision. Byrd also filed a separate federal habeas action pursuant to 28 U.S.C. § 2254 in February 2006.

Thereafter, on October 18, 2006, Byrd filed the instant RCr 11.42 motion. In its response, the Commonwealth argued Byrd's motion should be dismissed because it was untimely filed. Byrd was appointed counsel on his RCr 11.42 motion on January 29, 2007. In his supplemental motion, Byrd's appointed counsel conceded that the RCr 11.42 motion was filed outside the three-year statute of limitations. Byrd also admitted that his motion was untimely at a hearing before the trial court on May 14, 2007. Based on these admissions, the trial court denied the motion. This appeal followed.

In his brief, Byrd reiterates his arguments as to the merits of his motion but fails to address the issue of its untimely filing. However, RCr 11.42(10) clearly provides that “[a]ny motion under this rule shall be filed within three years after the judgment becomes final[.]” Byrd’s initial judgment was entered on February 20, 2001. No direct appeal was filed. However, an amendment to the judgment was made on December 17, 2002, after Byrd received relief under CR 60.02 and his sentence was reduced to ten years. Again, no direct appeal was filed. By any measure, Byrd’s RCr 11.42 motion, filed on October 18, 2006, was clearly outside the three-year statute of limitations contained in RCr 11.42.

Furthermore, Byrd makes no allegation that the underlying facts were unknown or could not have been ascertained by reasonable diligence, or that the motion concerned a new constitutional right that had arisen and held to apply retroactively. Thus, the exceptions to the three-year limitation period contained in RCr 11.42(10)(a)-(b) do not apply. Therefore, Byrd’s motion was clearly untimely.

Accordingly, the Warren Circuit Court's denial of the motion for RCr 11.42 relief is affirmed.

ALL CONCUR.

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