

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000790-MR

WILLIE R. TODD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES SHAKE, JUDGE
ACTION NOS. 01-CR-000972, 01-CR-002939,
03-CR-003353 & 04-CR-002938

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, LAMBERT, AND VANMETER, JUDGES.

DIXON, JUDGE: Willie Todd, proceeding *pro se*, appeals from a Jefferson Circuit Court order denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to vacate three prior judgments of conviction. The circuit court based its ruling upon Todd's failure to file the RCr 11.42 motion within the three-

year time limit prescribed by the rule. For the reasons stated herein, we affirm the Jefferson Circuit Court order.

On March 17, 2010, Todd filed an RCr 11.42 motion to vacate the judgment of conviction in three separate cases to which he had pled guilty in September and October of 2004, and had been sentenced in February 2005. Todd had received a total of 28 years' imprisonment which the trial court probated for a period of five years. This probated sentence was subsequently revoked on June 30, 2005, and Todd was sentenced to 28 years' imprisonment.

On March 17, 2010, Todd moved the trial court to vacate his judgments of conviction, pursuant to RCr 11.42.¹ The trial court subsequently denied Todd's motion based upon his failure to file within the three years of sentencing pursuant to subsection (10). This appeal follows.

First, Todd argues that his direct appeal tolled the statute of limitations for his RCr 11.42 claim. Todd claims that RCr 11.42 states, "As a general rule, you should not file a RCr 11.42 motion if your case is on direct appeal until such time as the direct appeal is concluded. Furthermore on occasion the appellate court decision/opinion may indicate possible RCr 11.42 issues." Todd also claims that RCr 11.42 states, "Your direct appeal becomes final once the Appellate Court has ruled on your appeal, or when the time to file a motion for reconsideration or discretionary review with the Kentucky Supreme Court has expired, whichever occurs later." Neither quote appears in the rule.

¹ Todd previously appealed the trial court's denial of his motion for a new trial under CR 59.01. A panel of this court affirmed the trial court in 2007-CA-001193, in an unpublished opinion.

Regardless, Todd did not directly appeal any of his convictions. As a condition of his guilty pleas, Todd waived the right to directly appeal. Instead, in 2007—almost two years after he was initially sentenced to probation and approximately a year and a half after his probation was revoked—Todd moved the trial court to grant him a new trial pursuant to CR 59.01. Contrary to Todd’s position, CR 59.02 is clear that a motion for a new trial must be served no later than 10 days after entry of a judgment. Todd’s motion was filed long after the judgments were final and cannot serve to toll the provisions of RCr 11.42(10).

Second, Todd argues that RCr 11.42 (10)(b) provides him with an exception to the limitation requirement of the rule because the trial court denied him his constitutional right to have a suppression hearing. RCr 11.42 (10) provides:

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.

This argument is also without merit.

Apparently, Todd contends that because his counsel filed a motion to suppress evidence in one of the criminal cases against him prior to the entry of his guilty plea, the trial court was thereby obligated to hold an evidentiary hearing on that motion. Certainly such is not the case. The record reflects that shortly after the suppression motion was filed, Todd withdrew his plea of not guilty and entered a guilty plea. Therefore, the trial court did not deny his motion to suppress. Thus, as Todd chose not to pursue the evidentiary motion, there can be no exception to RCr 11.42(10)'s three-year time limitation.

Based upon the foregoing, we affirm the Jefferson Circuit Court order.

ALL CONCUR.

BRIEF FOR APPELLANT:

Willie Todd, *Pro Se*
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BRIEF FOR APPELLEE:

Jack Conway
Attorney General

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