

RENDERED: DECEMBER 16, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001209-MR

SHAWN M. MALONE

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 01-CR-00197

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KELLER, THOMPSON AND WINE, JUDGES.

THOMPSON, JUDGE: Shawn M. Malone appeals from an order of the Laurel Circuit Court denying his request for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. We affirm.

On August 17, 2001, Malone was indicted by a Laurel County grand jury on charges of murder, first-degree robbery, first-degree burglary, felony theft

by unlawful taking, and being a second-degree persistent felony offender. His charges stemmed from Malone and his co-defendant's prison escape during which they broke into a home, murdered the owner, and stole his automobile. The two were eventually apprehended in Tennessee as a result of a sting operation.

After Malone's arrest, the Commonwealth filed notice of its intent to seek the death penalty. Malone's defense counsel then filed a motion to suppress evidence seized from the search of the motel room where Malone was apprehended. Subsequently, the Commonwealth offered to recommend a sentence of thirty-five years in exchange for Malone's guilty plea to murder, burglary, and robbery, and his waiver of his suppression motion. After Malone accepted the guilty plea and following a *Boykin* hearing, the trial court accepted Malone's plea and sentenced him in accordance with the Commonwealth's recommendation.

On April 25, 2005, Malone filed a motion for post-conviction relief pursuant to RCr 11.42, alleging ineffective assistance of counsel because his defense counsel erroneously informed him that he would be eligible for parole after serving only seven years of his thirty-five year sentence. Malone further claimed that his defense counsel improperly advised him to waive his suppression motion regarding the evidence in the Tennessee motel room. The trial court then appointed Malone counsel and scheduled an evidentiary hearing.

At an evidentiary hearing, Malone's defense counsel testified that he did not advise Malone that he would be eligible for parole in seven years. Counsel further testified that, even if Malone's suppression motion was successful, Malone

was found in possession of other evidence belonging to the murder victim, namely his vehicle. After the evidentiary hearing, the trial court denied Malone's motion by ruling that Malone was not denied effective assistance of counsel. In Case No. 2006-CA-001308-MR, this Court affirmed the trial court's judgment.

Before this Court ruled on Malone's RCr 11.42 appeal, he filed a motion for relief pursuant to CR¹ 60.02(e) and (f). He alleged that he was subjected to an illegal wiretap during the sting operation, the trial court's plea colloquy was insufficient, and various claims of ineffective assistance of counsel. The trial court issued an order holding Malone's CR 60.02 motion in abeyance pending the decision of this Court regarding Malone's RCr 11.42 appeal.

After this Court rendered its decision rejecting Malone's claims of ineffective assistance of counsel, the trial court issued an order denying Malone's CR 60.02 motion and supplemental motion, which was entered on March 30, 2009. Malone did not appeal. On April 27, 2010, Malone filed a motion to vacate or correct his plea agreement as a result of fraud or non-compliance. By a *sua sponte* order, the trial court denied Malone's motion. This appeal followed.

Malone contends that his guilty plea provided that he was eligible for probation after serving twenty years in prison, but that he is being required by the Department of Corrections to serve twenty-four years before becoming eligible for parole. He further argues that the violent offender statute is unconstitutional. Thus, he argues that his probation eligibility must be permitted after serving twenty

¹ Kentucky Rules of Civil Procedure (CR).

years or, in the alternative, he should be permitted to withdraw his guilty plea. We disagree.

In *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983), the court wrote the following:

The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete. That structure is set out in the rules related to direct appeals, in RCr 11.42, and thereafter in CR 60.02. CR 60.02 is not intended merely as an additional opportunity to raise *Boykin* defenses. It is for relief that is not available by direct appeal and not available under RCr 11.42. The movant must demonstrate why he is entitled to this special, extraordinary relief. Before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.

Additionally, a defendant is precluded from litigating issues which were or could have been brought in an earlier action. *McQueen v. Commonwealth*, 949 S.W.2d 70, 70-71 (Ky. 1997). Because Malone's motion to vacate, set aside, or correct his guilty plea was a successive motion, which contained issues that were or could have been litigated in his two earlier actions, we conclude that the trial court's order denying Malone post-conviction relief was not erroneous.

Furthermore, we conclude that Malone's motion for post-conviction relief was untimely because it was filed outside of the three-year limitations period. RCr 11.42(10), in pertinent part, 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.

Under Kentucky law, a “judgment of conviction is not final until judgment has been entered in the final appeal of the case.” *Palmer v. Commonwealth*, 3 S.W.3d 763, 765 (Ky.App. 1999). However, when there is no direct appeal taken, a judgment of conviction becomes final at the time it is entered. *Id.*

In this case, Malone pled guilty to the charged crimes, and the trial court entered his conviction and sentence on April 22, 2002, and no direct appeal was taken by Malone. From the time of his final judgment on April 22, 2002, Malone had three years to file an RCr 11.42 motion before the limitations period expired. However, Malone’s RCr 11.42 motion filed on April 27, 2010, over eight years beyond his final judgment date and five years after the three-year limitations period has expired. Therefore, because Malone’s case does not involve any issues related to RCr 11.42(10)(a) and (b), we conclude that Malone’s RCr 11.42 action is untimely and, thus, improper.

For the foregoing reasons, we affirm the Laurel Circuit Court’s order denying Malone’s post-conviction motion for relief.

ALL CONCUR.

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