

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001799-MR

JASON RUSSELL

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 04-CR-00246

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KELLER, TAYLOR AND VANMETER, JUDGES.

KELLER, JUDGE: Jason Russell (Russell) appeals from the trial court's denial of his Kentucky Rule of Criminal Procedure (RCr) 11.42 motion as being untimely filed. On appeal, Russell argues that the trial court should have tolled the period within which he was required to file his motion because of his alleged mental incompetence. Furthermore, Russell argues that his alleged mental incompetence

presented issues that could not be resolved without a hearing. The Commonwealth argues to the contrary. For the following reasons, we affirm.

FACTS

On September 30, 2005, against the advice of counsel, Russell pled guilty to the murder of a retired priest and convicted pedophile, Joseph Pilger (Pilger). In exchange for Russell's plea, the Commonwealth agreed to forego the death penalty and recommended a life sentence without the possibility of parole. Prior to accepting Russell's plea, the trial judge questioned him at length regarding his mental condition, his awareness of the plea process and its implications, and his motivation for pleading. In doing so, the judge noted that Russell had written several letters complaining about his treatment at the Fayette County Detention Center and indicating that he would do anything to get out of that facility. Apparently being assured that Russell entered his plea freely, knowingly, and voluntarily, the judge accepted it. On October 26, 2005, the court, choosing to disregard the Commonwealth's sentence recommendation, sentenced Russell to thirty years' imprisonment. In doing so, the court noted Russell's history of mental illness and of being abused and that one of Pilger's victim's had asked the court to be lenient.

On April 23, 2010, Russell filed a motion to vacate the court's judgment, arguing that trial counsel had been ineffective because he: permitted Russell to plead despite knowing Russell was under stress because of conditions at the Fayette County jail; failed to file necessary pre-trial motions to suppress, for a

change of venue, and for expert witnesses; refused to consider extreme emotional distress as a defense; did not address the refusal of jail officials to provide appropriate medications to Russell; and did not fully advise Russell of the issues and defenses. Without holding a hearing, the trial court denied Russell's motion, noting that it was not filed within the three-year time limit set forth in RCr 11.42(10).

Russell filed a motion to alter, amend, or vacate, arguing the court should have tolled the three-year limitation because he had been incompetent at the time he entered his plea and his "incompetence continued well into his incarceration, and in fact continues today, due to the fact that EKCC [Eastern Kentucky Correctional Complex] refuses to properly medicate him."

Without an evidentiary hearing, the court denied Russell's motion, noting that Russell had not offered any evidence that he did not know of his incompetence prior to his plea or prior to the expiration of the RCr 11.42(10) time limit. Furthermore, the court noted that Russell had not offered any evidence that his incompetence prevented him from timely filing his RCr 11.42 motion. We set forth additional facts as necessary below.

STANDARD OF REVIEW

On appeal, Russell states that the only issue before this Court is whether the trial court should have granted him an evidentiary hearing on his claim that his incompetence tolled the three-year limitation for filing his RCr 11.42 motion. We

will not disturb a trial court's findings regarding an RCr 11.42 motion absent clear error. *Commonwealth v. Payton*, 945 S.W.2d 424, 425 (Ky. 1997). Failure to hold a hearing prior to ruling on an RCr 11.42 motion is clear error if the motion "states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967). In other words, a trial court is only required to hold a hearing if an RCr 11.42 motion raises an issue that cannot be determined on the face of the record. RCr 11.42(5); *Stanford v. Commonwealth*, 854 S.W.2d 742, 743 (Ky. 1993).

ANALYSIS

Pursuant to RCr 11.42(10), a motion for relief

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.

Russell's judgment became final on October 26, 2005, when the court sentenced him. Therefore, Russell was required to file his RCr 11.42 motion by October 26, 2008, which he failed to do. As set forth above, Russell's dilatoriness may be excused for one of two reasons - he did not become aware of facts to support his motion until after the time expired, or a constitutional right was

established after the time expired. The constitutional right Russell asserted in his RCr 11.42 motion - the right to effective trial counsel - was established long before the timeframe for filing expired. Thus, the time limit can only be extended if Russell did not become aware of facts to support his motion within the three-year limitation.

Russell argues that his time limit should have been tolled because he had never received appropriate medication, thus rendering him incompetent throughout his incarceration. Furthermore, as we understand it, Russell argues that his incompetence prevented him from realizing he was incompetent and from timely filing his RCr 11.42 motions. Thus, Russell characterizes, somewhat hyperbolically, the trial court's finding that he knew he was incompetent and should have acted on that knowledge as "absurd." As set forth below, Russell's reliance on these arguments is flawed both factually and legally.

Factually, Russell supports his arguments by noting the following. In a September 1998 medical record, a physician diagnosed him with "undifferentiated schizophrenia." After his indictment and arrest for the murder of Pilger, Russell underwent a psychiatric evaluation at the Kentucky Correctional Psychiatric Center (KCPC). Based on that evaluation, a physician noted that Russell was competent, if medicated. The physician recommended a medication regimen that included Seroquel for "severe anxiety." While awaiting trial, Russell was incarcerated at the Fayette County detention facility. During that incarceration, Russell wrote several letters to the trial judge complaining that he was not receiving his medication and

was being abused by facility personnel. Apparently, based on these letters and on a request by Russell's counsel, the trial judge issued an order directing personnel at the Fayette County detention facility to medicate Russell consistent with the KCPC recommendations. The court noted in that order that Russell was competent, if medicated but "becomes incompetent when his medication is altered." After sentencing, Russell was transferred from the Fayette County detention facility, but he continued to have problems getting his medication. An October 12, 2009, medical record indicates that Russell had been off his medication for two years. Despite the lack of medication, the physician noted that Russell was oriented to time, place, person, and situation; cooperative; coherent; logical; non-delusional; and had appropriate affect. Finally, in a May 13, 2010, medical record, a physician noted that Russell demanded Seroquel, had "signed off resperidone" because of dry sinuses/congestion, had been prescribed "depakote thorazine," and had to cooperate with this medication regimen before a "nonformulary" medication (presumably Seroquel) could be considered.¹

Russell's factual argument, that he has been incompetent since his arrest and initial incarceration, is not persuasive. He has not put forth any evidence of the nature of his incompetence and how it limited him from timely filing his RCr 11.42 motion. Nor has he put forth any evidence that Seroquel, his medication of choice,

¹ Resperidone, Depakote, and Thorazine, like Seroquel, are psychotropic medications used to treat various mental disorders.

would have had any greater impact on his competence than the psychotropic medications being prescribed.

Furthermore, Russell's argument regarding his continuous incompetence, is inconsistent with his *pro se* filing of the RCr 11.42 motion. He has not explained how, if he was incompetent to the point of being incapable of filing his motion between October 25, 2005, and October 25, 2008, he became competent enough to file it on April 23, 2010. Russell has also not explained how, despite his continuous incompetence, he was capable of filing well written and concise *pro se* motions to change venue, to suppress evidence, and for appointment of expert witnesses.

Russell's legal argument is also not persuasive. Legally, Russell supports his case primarily by citing to *Ata v. Scutt*, 662 F.3d 736 (6th Cir. 2011).² In that case, Ata, who had a long history of mental illness, shot and killed a neighbor after an argument with the neighbor's mother and sister. *Id.* 738-39. Following a bench trial, the judge found Ata guilty of intentional murder and sentenced him to life imprisonment without the possibility of parole. *Id.* 739. Ata unsuccessfully appealed his conviction and unsuccessfully sought post-conviction relief in the Michigan courts. He then sought *habeas* relief in federal court. Recognizing that his petition was time barred, Ata also filed a motion for equitable tolling of the statute of limitations. In that motion, Ata stated that he failed to timely file his

² We note that, when Russell cited this case, it apparently had not been published.

habeas petition because his mental incompetence and numerous hospitalizations for psychiatric treatment made it impossible for him to do so. *Id.* at 739-40.

The federal district court denied Ata's petition without a hearing finding that: he had failed to establish he was incompetent during the statutory filing period; he supported his petition with only conclusory allegations; and he failed to show that he had "diligently pursued his rights." *Id.* at 740. The Sixth Circuit reversed, holding that, to equitably toll the statute of limitations, a petitioner must show he had pursued his rights diligently, and he was prevented from timely filing by "some extraordinary circumstance" *Id.* at 741. Examining the record, the Court concluded that Ata was entitled to a hearing on his motion to equitably toll the statute of limitations because he made specific allegations of mental incapacity; he causally tied his mental incapacity to his late filing; and his allegations were consistent with the record. *Id.* at 743-45.

Although *Ata* has some instructive language, we are bound by the rulings of our Supreme Court. Rule of the Supreme Court 1.030(8)(a). In *Commonwealth v. Stacey*, 177 S.W.3d 813 (Ky. 2005), Stacey pled guilty to a number of charges. Subsequent to his plea, Stacey filed a motion for relief under RCr 11.42; however, because his motion was not timely, Stacey sought to toll the three-year limitations period. In support of his motion to toll the limitations period, Stacey relied on a medical report indicating that he suffered from a "vast array of neuropsychological deficits" as a result of a head injury that occurred before he committed his crimes.

Id. at 814. Stacey argued that his "ongoing incompetency" explained and should excuse his failure to timely seek RCr 11.42 relief. *Id.* at 815.

The Supreme Court of Kentucky held that Stacey could not rely on his alleged incompetence to toll the limitations period because: he knew of his mental incapacity when he pled and during the three-year limitations period; and he failed to show how his mental "impairment prevented him from complying with the three-year limitations requirement." *Id.* at 816. The Court went on to note that "a claim of mental incompetence does not constitute a *per se* reason to toll a statute of limitations." *Id.* at 817. Furthermore, the Court held that, while it was not required to determine if the federal concept of equitable tolling had any application to state RCr 11.42 claims, its application would not have saved Stacey's claim. As the Court noted, "the critical inquiry remains whether the circumstances preventing a petitioner from making a timely filing were both beyond the petitioner's control and unavoidable despite due diligence." *Id.* The Court concluded that, because Stacey knew of his condition, he could not meet the requirement that the delay was beyond his control or unavoidable. Thus, the trial court's denial of Stacey's motion without a hearing was appropriate. *Id.*

We agree with the Commonwealth and the trial court that *Stacey* is on point and controlling. As in *Stacey*, Russell pled guilty knowing that he was operating under a mental impairment and sought to excuse his untimely filing for RCr 11.42 relief based on that impairment. Additionally, like Stacey, Russell failed to put

forth any evidence showing how, or even if, his impairment prevented him from timely seeking relief.

We agree with Russell that his case differs from *Stacey* in that the trial court judge stated Russell "becomes incompetent when his medication is altered."

However, because incompetence does not constitute a *per se* reason to toll a statute of limitations, Russell cannot rely solely on that statement to excuse his dilatoriness in filing his RCr 11.42 motion. He must show that there is a causal connection between his incompetence and his dilatoriness. This he has failed to do.

Russell did file several medical records in an apparent attempt to make that connection. However, those records indicate Russell becomes violent if not appropriately medicated, they do not indicate he lacked the ability to understand his situation and to timely file his motion. In fact, the October 12, 2009, medical record indicates that, after two years without any medication, Russell had appropriate cognition; thought processes; orientation to time, person, place, and situation; and intelligence. Therefore, rather than supporting, the record refutes Russell's claim that his incompetence interfered with his ability to timely file his RCr 11.42 motion.

CONCLUSION

Based on the preceding, the trial court properly determined, from the record, that Russell was not entitled to a tolling of the three-year limit to file his

RCr 11.42 motion. Therefore, the trial court properly denied Russell's motion without conducting a hearing.

ALL CONCUR.

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