

RENDERED: DECEMBER 20, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001341-MR

JUAN SANDERS-EL

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 02-CR-002491

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION DISMISSING APPEAL FOR LACK OF JURISDICTION

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; JONES AND VANMETER, JUDGES.

JONES, JUDGE: The Appellant, Juan Sanders-El, appeals *pro se* from the Jefferson Circuit Court order denying his Kentucky Rule of Criminal Procedure (RCr) 11.42 motion. We conclude that Appellant's RCr 11.42 motion was untimely, and therefore, we lack jurisdiction over this appeal. Consequently, we must dismiss this appeal.

I. Factual and Procedural Background

On October 6, 2006, in the Jefferson Circuit Court, following a jury trial, Sanders-El was convicted of Planting, Cultivating or Harvesting with Intent to Sell Marijuana and Illegal Use or Possession of Drug Paraphernalia pursuant to KRS 218A.1423; Complicity pursuant to KRS 502.020; Illegal Use or Possession of Drug Paraphernalia pursuant to KRS 218A.500; and Persistent Felony Offender in the second degree pursuant to KRS 532.080. The trial court sentenced him to ten years.¹

With the assistance of counsel, Sanders-El filed a timely direct appeal challenging his conviction. In an unpublished opinion, a panel of this court affirmed his conviction and sentence on May 30, 2008, and denied rehearing on September 11, 2008. Sanders-El then petitioned the Supreme Court of Kentucky for discretionary review. The Supreme Court denied review on November 6, 2008. *See Sanders-El v. Commonwealth*, 2008-SC-000764 (November 6, 2008).

While his direct appeal was still pending before us, with the assistance of counsel, Sanders-El filed a Kentucky Rule of Civil Procedural ("CR") 60.02 (b) and (d) motion with the trial court seeking to have his conviction vacated.

Following a hearing, the trial court denied his motion on the merits. Counsel did not file a timely direct appeal as Sanders-El asserts he instructed him to do.

According to Sanders-El, he believed that his counsel had filed the appeal. After

¹ We recounted the facts underlying Sanders-El's conviction in our opinion on direct appeal. In the interests of brevity, we incorporate the factual background by reference, but do not quote it verbatim because the underlying facts do not assist us in resolving this appeal. *See Sanders v. Commonwealth*, 2006-CA-0002282-MR, 2008 WL 2219789 (Ky. App. May 30, 2008).

he discovered this was not the case, he filed an untimely appeal on January 4, 2010, along with a motion for a belated appeal. We granted Sanders-El a belated appeal on February 8, 2010. We affirmed the trial court in an opinion entered on December 29, 2010. *Sanders v. Commonwealth*, 2009-CA-002354-MR, 2010 WL 5345907 (Ky. App. Dec. 29, 2010). Sanders-El sought discretionary review from the Supreme Court of Kentucky, which was denied on October 19, 2011.

On February 13, 2012, Sanders-El filed a *pro se* motion for post conviction relief pursuant to RCr 11.42 challenging his conviction on the basis of ineffective assistance of counsel. The Commonwealth did not respond. The trial court denied the motion on the merits after concluding that Sanders-El had not demonstrated his counsel was ineffective such that it denied him a fair trial as required by *Strickland*. *Strickland v. Washington*, 466 U.S. 668 (1994), and *Gall v. Commonwealth*, 702 S. W.3d 37 (Ky. 1985). This appeal followed.

II. Analysis

As a threshold matter, we must first determine whether Sanders-El's RCr 11.42 motion was timely. Any motion filed pursuant to RCr 11.42(10) must be filed “within three years after the judgment becomes final,” within three years after the facts upon which a previously undiscovered claim is predicated became known, or within three years after the “fundamental constitutional right asserted” was created and held to apply retroactively.

In Kentucky, a judgment becomes final with “the conclusive judgment in the case, whether it be the final judgment of the appellate court on direct appeal or the

judgment of the trial court in the event no direct appeal was taken.” *Palmer v. Commonwealth*, 3 S.W.3d 763, 765 (Ky. App. 1999).

Here, Sanders-El’s conviction became final on November 6, 2008, the date the Kentucky Supreme Court denied discretionary review of his direct appeal. Therefore, pursuant to RCr 11.42(10) Sanders-El had three years from November 6, 2008, in which to file his RCr 11.42 motion. Sanders-El did not file his motion until February 3, 2012, more than two months beyond the three year timeliness requirements outlined in RCr 11.42 (10).

Moreover, we find the exceptions to the timeliness requirements of RCr 11.42 (10) do not apply. Sanders-El does not allege that the facts upon which his RCr 11.42 motion is predicated were unknown to him and could not have been ascertained by the exercise of due diligence, nor does he allege the establishment of any fundamental constitutional right during the three-year time period following the date in which his judgment became final. RCr 11.42 (10) (a) and (b).

We also note that Sanders-El's subsequent CR 60.02 motion does not serve to reopen or extend the period at issue. By its own terms, CR 60.02 provides: “[a] motion under this rule does not affect the finality of a judgment or suspend its operation.” Thus, even though Sanders-El's CR 60.02 was pending, his underlying conviction became final when the Kentucky Supreme Court denied discretionary review in his direct appeal.

We also do not believe that the Commonwealth's failure to file a response at the trial court level constitutes a waiver of the timeliness issue or an admission that

Sanders-El's motion was timely. "RCr 11.42 provides that an answer may be filed to the motion to vacate judgment but it does not require it. A motion is not a pleading and no written response is required to entitle a party to oppose it."

Ramsey v. Commonwealth, 399 S.W.2d 473, 475 (Ky. 1966).

When an RCr 11.42 motion is filed after the three-year period for filing such motions has expired, the trial court does not have jurisdiction to adjudicate the motion, and "this Court is similarly without jurisdiction to hear any appeal therefrom." *Bush v. Commonwealth*, 236 S.W.3d 621, 623 (Ky. App. 2007). Consequently, we lack jurisdiction to consider Sanders-El's appeal.

III. Conclusion

Accordingly, Sanders-El's appeal from the Jefferson Circuit Court denying his motion for RCr 11.42 relief is hereby DISMISSED.

ALL CONCUR.

BRIEF FOR APPELLANT:

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