

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001746-MR

THOMAS R. JOHNS, JR.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 05-CR-00101

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT, MOORE, AND VANMETER, JUDGES.

VANMETER, JUDGE: Thomas R. Johns, Jr. appeals from the Fayette Circuit Court order which denied his motion for post-conviction relief pursuant to RCr¹ 11.42 and CR² 60.02. For the following reasons, we affirm.

¹ Kentucky Rules of Criminal Procedure.

² Kentucky Rules of Civil Procedure.

In 2006, following a jury trial, Johns was convicted of one count of reckless homicide and received a five-year sentence of imprisonment. On direct appeal, this court affirmed his conviction and sentence. *Johns v. Commonwealth*, No. 2006-CA-000606-MR (Ky. App., Sept. 21, 2007). Subsequently, the Kentucky Supreme Court denied his motion for discretionary review. *Johns v. Commonwealth*, 2007-SC-000761-D (Ky., Nov. 19, 2008).

On October 31, 2011, Johns filed a motion with the Fayette Circuit Court seeking to vacate his conviction and sentence pursuant to RCr 11.42 and CR 60.02. On November 1, 2011, while Johns's motion was pending, the term of his sentence expired and he was released from custody. Thereafter, the trial court found Johns's RCr 11.42 motion to be moot since he was no longer in custody, and found the court lacked jurisdiction to consider his CR 60.02 motion because the motion was untimely filed. Accordingly, the trial court denied his motion. Johns now appeals.

On appeal, Johns first argues the trial court erred by finding his RCr 11.42 motion to be moot. He points out that he was in custody at the time he filed his motion and that collateral consequences stemming from his conviction justify a review of his claims. We disagree.

In *Parrish v. Commonwealth*, 283 S.W.3d 675 (Ky. 2009), the Kentucky Supreme Court addressed the issue of whether a RCr 11.42 motion became moot if the movant completed his sentence while the RCr 11.42 motion was pending. The Court held that it did, reasoning as follows:

The language of [RCr 11.42] is plain and unambiguous that relief is available only to “[a] prisoner in custody ... or on probation[.]” Our predecessor Court expressly rejected an identical argument in *Sipple v. Commonwealth*: “RCr 11.42 does not provide, expressly or by implication, for the review of any judgment other than the one or ones pursuant to which the movant is being held in custody.” 384 S.W.2d 332 (Ky.1964). Likewise, in *Wilson v. Commonwealth*, our predecessor Court again explained: “RCr 11.42 is procedural remedy designed to give a convicted prisoner a direct right to attack the conviction *under which he is being held*. It is supplemental to the right of habeas corpus, and we must accept the plain meaning of the language of the rule.” 403 S.W.2d 710, 712 (Ky.1966) (emphasis added).

Further, we note that Parrish's argument fails to consider the remedy available under RCr 11.42. By its plain language, the rule is a mechanism by which the party “claims a right to be released” from his sentence. It is axiomatic that a person cannot be released from a sentence which has been completed. For these reasons, we conclude the Court of Appeals did not err when it found that Parrish, by virtue of having completed his sentence during the pendency of his appeal, could not seek appellate relief from the denial of his RCr 11.42 motion.

Id. at 677.

In denying Johns’s RCr 11.42 motion, the trial court relied on *Parrish*, and found that since Johns was not in custody, or on probation, parole, or conditional discharge, the remedy he sought (“the right to be released from his sentence”) was no longer available and thus his RCr 11.42 motion was moot. We agree with the trial court’s decision.

Next, Johns asserts the trial court erred by finding his CR 60.02 to be untimely filed and denying it on that basis. We disagree.

Unlike a RCr 11.42 motion, a “CR 60.02 motion survives the completion of [a defendant’s] sentence.” *Id.* In his underlying motion to vacate, Johns asserted his claims under both RCr 11.42 and CR 60.02, but did not specify the section or sections of CR 60.02 under which he sought relief. On appeal, he argues (1) the Commonwealth presented false evidence at trial and (2) the Commonwealth withheld exculpatory evidence at trial. He now seeks relief under CR 60.02(f), which provides for relief from judgment for reasons of an “extraordinary nature.”

A review of Johns’s claim of falsified evidence reveals that it falls squarely within the parameters of CR 60.02(c), which requires that motions be brought within one year of entry of judgment. Here, the trial court’s judgment was entered on March 21, 2006. Johns’s CR 60.02 motion was not filed until October 31, 2011. Even using the date the Kentucky Supreme Court denied discretionary review as the date of finality, November 19, 2008, Johns’s CR 60.02 motion still was not timely filed. Further, Johns cites no authority in support of his contention that relief for “falsified evidence” may be awarded under CR 60.02(f); rather, the language of CR 60.02 clearly sets forth the grounds for relief (a-f) in the disjunctive and places claims for “falsified evidence” under section (c).

Johns further claims the Commonwealth withheld evidence that its witness at trial, a police sergeant, was being investigated by the police department for misconduct at the time he testified. Johns alleges that shortly after trial, the sergeant was terminated from the police department due to his misconduct. Johns asserts the Commonwealth should have apprised him of the investigation during

trial, and its failure to do so prevented him from challenging the sergeant's bias and credibility on the stand. Johns also argues the trial court did not expressly rule on this claim in its order and thus we are precluded from doing so on appeal.

Again, Johns made all of his claims below pursuant to both RCr 11.42 and CR 60.02. Only in his motion to reconsider did he explicitly argue for CR 60.02(f) relief pertaining to the exculpatory evidence allegation. Thus, the fact that the trial court did not expressly rule on this claim in its original order does not necessarily mean that the court did not reject it under RCr 11.42, especially since Johns's motion to vacate combined his claims under both RCr 11.42 and CR 60.02. In fact, in its order discussing RCr 11.42 relief, the trial court did not refer to any specific claim of error. Instead, the court ruled that *any* claims made pursuant to RCr 11.42 were dismissed as moot. This ruling very well could have included the exculpatory evidence claim.

Moreover, we note that Johns moved for the court to reconsider its order, arguing, in part, that the court failed to consider his exculpatory evidence claim. The trial court denied his motion to reconsider, stating that the court reviewed the record and believed that the original order adequately sets forth the facts and the law as Johns has provided the court, with no additional law sufficient to cause the court to modify or change its previous ruling. We believe the foregoing is sufficient to permit us to review this claim of error.

In regard to the substantive merit of this claim, we reiterate that Johns did not specify in his underlying motion to vacate the section of CR 60.02 under which

he requested relief. And though Johns has not stated precisely when he learned of the alleged investigation and termination of the sergeant, he claims that it was “shortly after trial.” As pointed out by the Commonwealth, if Johns is arguing that this is newly discovered evidence to be addressed pursuant to CR 60.02(b), the motion is untimely for the same reason as the falsified evidence allegation – the motion was not brought within one year of the date of judgment. CR 60.02(b) also requires due diligence on the part of the defendant to discover such evidence and move for a new trial. If Johns’s assertion that the sergeant was terminated “shortly after trial” is correct, then that newly discovered evidence should have been raised in a motion for a new trial under CR 59.02, or raised within one year in a CR 60.02 motion.

On the other hand, if Johns was requesting relief pursuant to CR 60.02(f), which provides for relief for reasons of an “extraordinary nature,” his claim likewise fails. Even if the alleged investigation occurred, and the Commonwealth knew of it and failed to disclose it, Johns presents no proof of this knowledge, nor directs us to any authority requiring the Commonwealth to disclose such an investigation, or requiring the court to admit it into evidence. In short, we fail to find the existence of an “extraordinary” reason for granting relief. Accordingly, the trial court properly denied his motion.

The order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Michael L. Goodwin
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

David W. Barr
Assistant Attorney General
Frankfort, Kentucky