

RENDERED: JULY 25, 2014; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2013-CA-001094-MR

WAYNE ALLEN EPLION

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT  
HONORABLE C. DAVID HAGERMAN, JUDGE  
ACTION NOS. 01-CR-0136 AND 02-CR-00069

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: COMBS, THOMPSON AND STUMBO, JUDGES.

STUMBO, JUDGE: Wayne Allen Eplion appeals from an Order of the Boyd Circuit Court denying his Motion for Kentucky Rules of Criminal Procedure (RCr) 11.42 relief from Judgment. Eplion argues that the trial court erred in sentencing him without providing him with the contents of a presentencing evaluation. He also maintains that his trial counsel's failure to conduct a psychiatric evaluation

constitutes ineffective assistance of counsel. We find no error, and Affirm the Order on appeal.

The facts are not in controversy. In 2001, Eplion was indicted by the Boyd County Grand Jury on one count of first-degree sodomy involving his five-year-old stepdaughter. A second indictment followed in 2002, in which Eplion was charged with two counts of second-degree sodomy involving the same victim. The indictments were consolidated, and Eplion subsequently accepted the Commonwealth's plea offer of ten years' imprisonment on each count to be served consecutively for a total term of thirty years in prison. On April 15, 2002, the Boyd Circuit Court rendered a Judgment consistent with the plea.

Eplion's subsequent appeal appears to have been dismissed for lack of prosecution. The following year, Eplion filed a *pro se* Motion for Relief under RCr 11.42, which also appears to have been dismissed for lack of prosecution.

Some ten years later on February 4, 2013, Eplion, through counsel, filed the instant Motion for RCr 11.42 relief. As a basis for the Motion, Eplion argued that his trial counsel improperly failed to provide him a copy of his comprehensive sex offender presentence evaluation at the time of sentencing in 2002. Eplion also maintained that his trial counsel was ineffective in failing to seek a psychiatric evaluation for the purpose of determining if Eplion had any characteristics of a sexual predator.

The matter proceeded in Boyd Circuit Court, whereupon the Court rendered an Order on May 10, 2013, denying the RCr 11.42 Motion. In support of

the Order, the Court determined that the Sex Offender Registration Act ("SORA") report is never filed in the public record, and that there was no basis for concluding that the report was not made available to Eplion and his counsel at the time of sentencing. The Court found that Eplion presented no authority indicating that the failure to be provided with a SORA report at the time of sentencing would support vacating the Judgment. Additionally, the Court determined that the basis for a claim of ineffective assistance of counsel would have been known to Eplion many years ago, and that Eplion failed to comply with RCr 11.42(10) which requires a claim of ineffective assistance to be brought within three years of the Judgment. Eplion's Motion was denied, and this appeal followed.

Eplion first argues that the Boyd Circuit Court erred in failing to conclude that he was improperly denied the receipt of the comprehensive sex offender presentence evaluation at the time of sentencing as required by statute. He directs our attention to Kentucky Revised Statutes 532.045(8), which states that "[b]efore imposing sentence, the Court shall advise the defendant or his counsel of the contents and conclusions of any comprehensive sex offender presentence evaluation performed pursuant to this section and afford a fair opportunity and a reasonable period of time, if the defendant so requests, to controvert them." Eplion maintains that there is no evidence of record that he was provided with this evaluation, and contends that this forms a proper basis for reversing the Judgment.

We cannot determine from the record that Eplion and his counsel did not receive a presentence evaluation at the time of sentencing in 2002. *Arguendo*,

even if it is the case that Eplion and his counsel were not provided with the evaluation, Eplion does not cite to any support for his contention that the failure to receive a presentence evaluation forms a proper basis for reversing the Judgment of conviction, nor that trial counsel was ineffective in failing to raise this issue. Additionally, this matter was known, or should have been known, in or around 2002 and should have been raised, if at all, via direct appeal. *Parrish v. Commonwealth*, 272 S.W.3d 161 (Ky. 2008). We find no error on this issue.

Eplion also argues that he did not receive the effective assistance of counsel to which he was entitled because his trial counsel failed to cause Eplion to be evaluated by a competent psychologist or psychiatrist to determine if he had any characteristics of a sexual predator. Eplion maintains that his trial counsel never discussed trial strategy with him, nor any issues concerning jury selection, mitigating circumstances or any other factors which may have been used to support his defense. He concludes that RCr 11.42 is implicated, and that he should be given the opportunity to withdraw his guilty plea.

RCr 11.42(10) provides that:

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.

Eplion's instant Motion was filed some ten years after the Judgment, and neither exception to the three-year rule applies. For this reason alone, we conclude that the Boyd Circuit Court's denial of Eplion's RCr 11.42 Motion was proper. Even if the Motion had been brought in a timely manner, Eplion failed to demonstrate that counsel's performance was deficient, that the deficient performance prejudiced the defense, and that that outcome of the proceeding would have been different but for the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). We find no error.

For the foregoing reasons, we Affirm the Order of the Boyd Circuit Court denying Eplion's Motion for RCr 11.42 relief from Judgment.

ALL CONCUR.

BRIEF FOR APPELLANT:

Benjamin J. Lookofsky  
Lexington, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

David W. Barr  
Assistant Attorney General  
Frankfort, Kentucky