

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001801-MR

ROBERT L. FIELDS

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
ACTION NO. 05-CR-00075

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, J. LAMBERT, AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Robert L. Fields appeals from an order of the Letcher Circuit Court dismissing his motions pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 and Kentucky Rules of Civil Procedure (CR) 60.02. He argues that the circuit court erred when it dismissed both motions as untimely filed. We affirm.

The facts of Fields's case were provided in his direct appeal to this

Court:

Coy McClain was arrested on December 2, 2004, and was taken to the Letcher County Jail. McClain testified that after arriving at the jail, he informed the jail staff that he had conflicts with inmates Ricky Bates and appellant Robert L. Fields. Still, McClain was placed in a cell with Fields, appellants Michael Fugate and David Lucas, and Frank Campbell. The cell was comprised of a common area and four "lockdown" cells, each containing two bunks.

McClain further testified that on December 5, he stepped into a lockdown cell with Fugate, Lucas, and Campbell to inquire about a possible card game since the men had previously played cards together in the jail. Lucas closed the cell door, locking it, and Fugate and Lucas began hitting McClain. Lucas pulled down McClain's pants and threatened to sodomize him. Further, Campbell sat on his bunk with his penis exposed and talked about McClain fellating him, while Fugate and Lucas pushed McClain's head toward Campbell's penis. At some point, McClain's face touched Campbell's penis. Meanwhile, Fields, who was in the common area, turned up the television's volume and made other noise, and he pointed and laughed at McClain. McClain testified that he screamed "to the top of his lungs" for help but that he was not able to exit the lockdown cell for three to four hours. The men would not permit McClain to alert the guards, threatening to kill him if he did so.

Nevertheless, some time later McClain returned to the lockdown cell to get his dropped cigarettes. Someone again closed the door, and Fields hit McClain, rubbed his penis across McClain's face, and tried to force McClain to fellate him. Some four hours later, McClain exited the lockdown cell and told the guards that he had been beaten.

McClain was taken to the hospital where facial x-rays revealed that nothing was broken; he was then taken

back to jail. After he was released on bail, McClain saw other doctors who informed him that he had a fractured and dislocated condyle, a hinge-like bone structure at the upper end of the jaw near the ear. McClain subsequently underwent surgery in which a titanium plate and screws were used to secure the bone.

Fields, Fugate, and Lucas were eventually indicted for attempted first-degree sodomy and complicity to commit second-degree assault. The matter proceeded to trial where McClain testified as set forth above. Additionally, Lucas, jail personnel, and treating doctors testified. The jury found all three men guilty of complicity to commit second-degree assault, and complicity to commit first-degree sexual abuse. Fields, Fugate, and Lucas were sentenced, respectively, to a total of fifteen, fifteen, and ten years' imprisonment.

Fields v. Commonwealth, 2006-CA-002365-MR, 2008 WL 4683001, 1 (Ky. App. 2008) (footnotes omitted) (unpublished). This Court affirmed Fields's convictions on direct appeal. *Id.* at 6. The Supreme Court of Kentucky denied discretionary review on June 17, 2009.

Fields mailed his *pro se* RCr 11.42 motion on June 20, 2012, and the circuit court clerk received it on June 25, 2012. The Department of Public Advocacy (DPA) filed a supplement to Fields's motion on December 30, 2013. In its supplement, the DPA included claims under CR 60.02 alleging that one juror "lied or omitted relevant information during voir dire and improperly influenced other jurors[,]” and that Malinda Mason, McClain's friend, would testify that McClain told her he fabricated the assault. The Commonwealth filed several motions to dismiss Fields's post-conviction motions as untimely and addressed the claims on the merits. The Commonwealth also raised the defense of laches,

claiming two of its material witnesses had passed away. Following a hearing on the issue of timeliness, the trial court denied both of Fields's motions as untimely.

On appeal, Fields makes the following claims of error: (1) he was entitled to equitable tolling for his RCr 11.42 motion because he erroneously relied upon the DPA's advice regarding the filing deadline; (2) his RCr 11.42 motion was not barred by the doctrine of laches; (3) his supplement to his RCr 11.42 motion was not successive or time-barred; and (4) his CR 60.02 motion was filed within a reasonable time.

We first address the timeliness of Fields's *pro se* RCr 11.42 motion and supplement. CR 76.30(2)(b) provides that if a motion for discretionary review is denied by the Supreme Court, the opinion of this Court becomes final immediately upon denial of the motion. RCr 11.42(10) contains a three-year time limitation providing as follows:

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.

. . . If the motion qualifies under one of the foregoing exceptions to the three year time limit, the motion shall be filed within three years after the event establishing the

exception occurred. Nothing in this section shall preclude the Commonwealth from relying upon the defense of laches to bar a motion upon the ground of unreasonable delay in filing when the delay has prejudiced the Commonwealth's opportunity to present relevant evidence to contradict or impeach the movant's evidence.

Untimeliness under the rule operates as a procedural bar to a motion and, therefore, unless Fields can avoid its application, the trial court properly summarily denied his *pro se* RCr 11.42 motion and its supplement. *Moorman v. Commonwealth*, 484 S.W.3d 751, 757 (Ky. App. 2016). While we agree with Fields that equitable tolling applies to post-conviction motions, we disagree that as alleged by him, the doctrine saves his untimely motion. Consequently, his supplement cannot be considered timely under the equitable tolling doctrine or the relation back doctrine under CR 15.

From 2005-2011, Kentucky law was settled that equitable tolling applied to post-conviction motions. In *Robertson v. Commonwealth*, 177 S.W.3d 789 (Ky. 2005), *overruled on other grounds by Hallum v. Commonwealth.*, 347 S.W.3d 55 (Ky. 2011), the Supreme Court considered whether an inmate's untimely filing of an RCr 11.42 motion due to a delay in mailing by prison officials could be deemed timely through adoption of the prison mailbox rule or equitable tolling. The Court rejected the prison mail box rule in favor of the equitable tolling test. *Robertson*, 177 S.W.3d at 792.

After *Robertson*, RCr 12.04 was amended to adopt the prison mailbox rule. RCr 12.04(5) provides “the notice [of appeal] shall be considered filed if its envelope is officially marked as having been deposited in the institution’s internal mail system on or before the last day for filing with sufficient First Class postage prepaid.”

In *Hallum*, the Court addressed the effect of RCr 12.04(5) in the context of an inmate’s notice of appeal. After determining RCr 12.04(5) should be applied retroactively, the Supreme Court addressed the continued applicability of the equitable tolling test. In doing so, the Court stated that the equitable tolling test in *Robertson* was now “duplicative and superfluous, with its utility marginalized.” *Hallum*, 347 S.W.3d at 59. It continued, stating: “The prison mail box rule was crafted to remedy the procedural deficiency our rules posed to *pro se* inmates seeking to appeal; thus, there is no longer a need for *Robertson’s* equitable tolling provision. Consequently, we overrule *Robertson*.” *Id.*

After *Hallum*, the question arose as to how broadly the Supreme Court’s language should be read and whether it overruled *Robertson* to the extent that it applied to post-conviction motions. In a series of unpublished opinions, this Court reasoned that the Supreme Court did not intend to overrule *Robertson’s* adoption of equitable tolling for inmates filing RCr 11.42 motions but did so only as to notices of appeal. See *Anderson v. Commonwealth*, 2012–CA–001869–MR, 2014 WL 812886 (Ky. App. 2014) (unpublished); *Treat v. Commonwealth*, 2010–CA–002220–MR, 2012 WL 1886512 (Ky. App. 2012) (unpublished); *Kollros v.*

Commonwealth, 2011–CA–002081–MR, 2012 WL 4839557 (Ky. App. 2012) (unpublished). In *Treat*, this Court explained: “*Hallum* . . . did not prohibit the application of the tolling doctrine to RCr 11.42 motions that do not involve the prison mailbox rule. Therefore, we conclude that the equitable tolling doctrine still applies to post-convictions proceedings that meet strict standards of tolling relief.” *Treat*, 2012 WL 1886512 at 2. Subsequently, this Court issued a published opinion on the matter.

Citing the reasoning in *Treat*, this Court held that equitable tolling in the context of post-conviction proceedings was undisturbed by *Hallum*. *Moorman*, 484 S.W.3d at 754. However, the equitable tolling test is stringent requiring that the prisoner establish he or she has pursued his rights diligently, and an extraordinary circumstance stood in his or her way that prevented timely filing. *Id.* at 757. To benefit from equitable tolling, both prongs must be shown. *Id.*

Not only is *Moorman* instructive on the effect of *Hallum* on equitable tolling in the context of an RCr 11.42 motion, it is instructive on the resolution of Fields’s claim that equitable tolling saves his untimely *pro se* RCr 11.42 motion. Unfortunately for Fields, *Moorman* also teaches that mere attorney negligence will not warrant equitable tolling.

Quoting *Holland v. Florida*, 560 U.S. 631, 651-52, 130 S.Ct. 2549, 2564, 177 L.Ed.2d 130 (2010) with approval, this Court held: “A ‘garden variety claim of excusable neglect,’ such as a simple ‘miscalculation’ that leads a lawyer to miss

a filing deadline does not warrant equitable tolling.” *Moorman*, 484 S.W.3d at 757. It is the rule in this jurisdiction that “[a]ttorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the post-conviction context where prisoners have no constitutional right to counsel.” *Id.* (quoting *Lawrence v. Florida*, 549 U.S. 327, 336-37, 127 S.Ct. 1079, 1085, 166 L.Ed.2d 924 (2007)).

Fields’s argument regarding the reason for his delay in filing his *pro se* RCr 11.42 motion is strikingly similar to that given in *Moorman*. He argues appointed counsel gave him erroneous advice as to when his time for filing commenced. Even if factually correct, he has not alleged an extraordinary circumstance sufficient to equitably toll the time limitation in RCr 11.42(10). Because his *pro se* RCr 11.42 motion was untimely, the supplement cannot relate back to that untimely motion.

Fields’s final argument is that the trial court erred when it found that he had not filed his CR 60.02 motion within a reasonable time. Specifically, Fields contends that his claim relating to Malinda Mason’s affidavit was filed within a reasonable time because it was filed approximately two and one-half years after the Kentucky Innocence Project (KIP) first spoke with Mason.¹ Fields’s judgment was entered on October 19, 2006, and KIP first spoke with Mason on July 27, 2011. He did not file a CR 60.02 motion asserting this argument until December 30, 2013.

¹ Fields makes no argument concerning the timeliness of the juror misconduct issue he raised in his CR 60.02 motion, thereby presumably conceding it was untimely.

CR 60.02 specifies that motions brought under subsection (f) “shall be made within a reasonable time[.]” “What constitutes a reasonable time in which to move to vacate a judgment under CR 60.02 is a matter that addresses itself to the discretion of the trial court.” *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

CR 60.02 was enacted as a substitute for the common law writ of coram nobis. The purpose of such a writ was to bring before the court that pronounced judgment errors in matter of fact which (1) had not been put into issue or passed on, (2) were unknown and could not have been known to the party by the exercise of reasonable diligence and in time to have been otherwise presented to the court, or (3) which the party was prevented from so presenting by duress, fear, or other sufficient cause.

Id. at 856.

Fields argues that his attorneys were actively working on his case before he filed his motion and the attorneys wished to present Fields’s RCr 11.42 and CR 60.02 motion together. Importantly, however, Fields has not stated any reason why he could not have spoken to Mason prior to July 2011. Fields has not asserted, for example, that Mason approached KIP only recently or that she had been previously unavailable. In fact, Fields has proffered no reason why KIP could not have investigated this claim before it did. *See Djoric v. Commonwealth*, 487 S.W.3d 908, 910 (Ky. App. 2016) (a movant under CR 60.02(f) did not file his claim within a reasonable time because he could have discovered the immigration consequences of his plea sooner). As such, Fields has failed to provide a sufficient

reason for the more than seven-year delay between the date his judgment was entered and the date he filed his CR 60.02 motion. This Court has previously held such a lengthy delay was unreasonable. *Graves v. Commonwealth*, 283 S.W.3d 252, 257 (Ky. App. 2009). The circuit court did not abuse its discretion when it determined that Fields's CR 60.02 motion was not filed within a reasonable time.

In sum, we hold that Fields's RCr 11.42 motion was untimely filed. We also hold, by extension, that he was not entitled to review of his supplement to that motion. Finally, we hold that the circuit court did not abuse its discretion when it determined that Fields's CR 60.02 motion was not filed within a reasonable time.

Based on the foregoing, the Letcher Circuit Court's order dismissing Fields's RCr 11.42 and CR 60.02 motions is affirmed.

J. LAMBERT, JUDGE, CONCURS.

CLAYTON, JUDGE, CONCURS IN RESULT ONLY.

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