

RENDERED: MAY 3, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001908-MR

ERIC GILL

APPELLANT

v. APPEAL FROM GARRARD CIRCUIT COURT
HONORABLE HUNTER DAUGHERTY, JUDGE
ACTION NO. 95-CR-00037

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: JONES, MAZE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Eric Gill brings this appeal from a November 15, 2016, order of the Garrard Circuit Court. We vacate and remand.

At the age of sixteen, Gill was indicted by the Garrard County Grand Jury upon the offenses of capital murder and first-degree robbery. A jury found

him guilty of both offenses, and the circuit court sentenced him to life imprisonment without parole for twenty-five years.

On September 21, 2001, Gill filed a Kentucky Rules of Criminal Procedure (RCr) 11.42 motion alleging ineffective assistance of trial counsel. Thereafter, Gill was apparently diagnosed with a brain tumor, underwent surgery, and subsequent radiation treatments. By order entered November 19, 2001, the circuit court passed the RCr 11.42 motion until Gill finished the radiation treatments.

Some four years later, on February 17, 2006, Gill filed a supplemental motion for a new sentencing hearing pursuant to RCr 11.42 and Kentucky Rules of Civil Procedure (CR) 60.02. The circuit court denied the motion by order entered March 2, 2006. Gill then filed a motion for clarification and reconsideration. By order entered March 17, 2006, the circuit court denied the motion for clarification and reconsideration.

Thereafter, the record is silent for some nine years. Then, on October 13, 2016, Gill filed a *pro se* motion seeking the recusal of Judge Hunter Daugherty and motion for the court to rule on the RCr 11.42 motion filed on September 21, 2001. By order entered November 15, 2016, the circuit court denied the motion to recuse and the motion to rule on the September 21, 2001, RCr 11.42 motion. The circuit court stated:

This court ruled on the RCr 11.42 motion and CR 60.02 motion by Order entered March 2, 2006, denying both without a hearing. A motion for clarification and reconsideration was denied by docket order of March 17, 2006[,] and was never appealed. That decision is, therefore, final.

This appeal follows.

Gill contends that the circuit court erroneously concluded that it had denied the September 21, 2001, RCr 11.42 motion by order entered March 2, 2006. For the following reasons, we agree.

In the September 21, 2001, RCr 11.42 motion, Gill raised issues concerning trial counsel's alleged ineffective performance; however, the circuit court "passed" the September 21, 2001, RCr 11.42 motion until Gill finished radiation treatment. Gill subsequently filed a supplemental motion for resentencing under CR 60.02 and RCr 11.42. In this supplemental motion, Gill only argued that he was entitled to a new sentencing hearing in light of the recent United States Supreme Court Opinion of *Roper v. Simmons*, 543 U.S. 551 (2005). No arguments were advanced concerning trial counsel's alleged ineffective assistance, and no reference was made to the RCr 11.42 motion filed September 21, 2001. The circuit court denied the supplemental motion for a new sentencing hearing under CR 60.02 and RCr 11.42 in a March 2, 2006, order. This order is silent as to the September 21, 2001, RCr 11.42 motion and did not address any issues concerning trial counsel's alleged ineffective assistance. After entry of the

March 2, 2006, order, Gill filed a motion for clarification and reconsideration. In particular, Gill stated that it was unclear “whether this court intended that order to extend to the Motions filed pursuant to CR [sic] 11.42 in general.” By order entered March 17, 2006, the circuit court explained that it was “[d]enied as to this supplemental motion.”

A review of the March 2, 2006, order reveals that the circuit court did not address any issues raised in the September 21, 2001, RCr 11.42 motion and did not specifically refer to the September 21, 2001, RCr 11.42 motion. Instead, the circuit court only ruled upon the issue of resentencing as raised in the February 17, 2006, supplemental motion. Additionally, in the March 2, 2006, order, the circuit court plainly stated that it was only denying “this supplemental motion.” As the issues raised in the September 21, 2001, RCr 11.42 motion have never been ruled upon by the circuit court and the motion is still technically “passed” or stayed, we vacate the court’s November 15, 2016, order and remand for the court to issue a ruling upon the September 21, 2001, RCr 11.42 motion.¹

For the foregoing reasons, the Order of the Garrard Circuit Court is vacated and remanded for proceedings consistent with this Opinion.

¹ This Opinion should not be misconstrued as passing upon the merits of Eric Gill’s Kentucky Rules of Criminal Procedure 11.42 motion filed on September 21, 2001. We express no opinion thereupon.

JONES, JUDGE, CONCURS.

MAZE, JUDGE, CONCURS WITH SEPARATE OPINION.

MAZE, JUDGE, CONCURRING: I fully agree with the majority's opinion vacating the trial court's denial of Gill's RCr 11.42 motion and remanding this matter for consideration of the issues raised in his 2001 motion. As the majority correctly notes, the record clearly shows that the trial court's 2006 ruling only addressed the issue raised in Gill's supplemental motion. However, the trial court's misunderstanding as to what issues remained was caused by Gill's nine-year delay in bringing the matter to the court's attention. The doctrine of laches may apply to an RCr 11.42 proceeding to bar enforcement of a claim where the defendant failed to assert his rights for an unreasonable amount of time. *See Brumley v. Seabold*, 885 S.W.2d 954, 956-57 (Ky. App. 1994); *Hayes v. Commonwealth*, 837 S.W.2d 902, 905 (Ky. App. 1992). Although it would be preferable for the trial court to rule on the merits of Gill's RCr 11.42 motion, I would suggest that the remaining claims may be barred by laches if the delay has prejudiced the Commonwealth's ability to respond. But since laches involves a question of fact, the trial court has the sole discretion to consider the application of the doctrine upon remand.

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