

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2017-CA-001127-MR

MICHAEL UNSELD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE BRIAN C. EDWARDS, JUDGE  
ACTION NO. 11-CR-001592

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, COMBS AND MAZE, JUDGES.

COMBS, JUDGE: Appellant, Michael T. Unseld (Unseld), appeals from an order of the Jefferson Circuit Court which denied his motion to vacate pursuant to RCr<sup>1</sup> 11.42 without conducting an evidentiary hearing. After our review, we affirm.

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<sup>1</sup> Kentucky Rules of Criminal Procedure.

On May 11, 2011, Unseld was indicted by a Jefferson County Grand Jury for possession of a handgun by a convicted felon and being a persistent felony offender (PFO) in the first degree. On January 4, 2012, Unseld entered a plea of guilty to both offenses. The trial court's order entered on January 6, 2012, reflects that the Commonwealth recommended a five-year sentence for possession of a handgun, also providing that if Unseld "appears for PSI [Presentencing Investigation] and sentencing and commits no new offenses, at sentencing the Commonwealth will dismiss the PFO charge. Otherwise, the Commonwealth will recommend ten years." Sentencing hearing was scheduled for February 29, 2012, but on July 26, 2012, Unseld entered a new guilty plea, entered by the court on July 27, 2012.<sup>2</sup>

On August 2, 2012, the trial court entered an "AMENDED JUDGMENT OF CONVICTION AND SENTENCE (AFTER PLEA AND WAIVER OF PRESENTENCE INVESTIGATION) ORDER OF PROBATION" (uppercase original), providing in relevant part, as follows:

By agreement and order of the Court the previous plea of guilty [of] January 4, 2012 is set aside.

On *July 26, 2012*, by agreement with the attorney for the Commonwealth, the Defendant withdrew his plea of not guilty and entered a plea of guilty to:

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<sup>2</sup> The judgment of conviction and sentence entered on July 27, 2012, reflects that Unseld was sentenced to "**FIVE (5) YEARS** to serve withheld for FIVE (5) YEARS." (Emphasis original.) That discrepancy appears to have been a clerical error.

- **POSSESSION OF A HANDGUN BY CONVICTED FELON**
- **PFO I**

The Court found the Defendant's plea to be knowingly and voluntarily entered and accepted it.

...

**IT IS HEREBY ORDERED AND ADJUDGED** the Defendant is guilty of the following crime and the Court fixes the sentence as follows:

- **POSSESSION OF A HANDGUN BY CONVICTED FELON**      **FIVE (5) YEARS**
- **PFO I**      **ENHANCEMENT**

The Defendant is sentenced to **TEN (10) YEARS** to serve withheld for FIVE (5) years. All counts shall run concurrent. Restitution shall be paid as ordered.

(Emphasis original.) The trial court ordered Unseld placed on probation for five years subject to the conditions set forth therein and:

**FURTHER ORDERED AND ADJUDGED** that upon completion of the aforesaid *five (5) year* period, the Defendant shall finally be discharged provided the Defendant has fully Complied with the above conditions and that there is no warrant by any Court pending against the Defendant and that probation has not been revoked prior thereto.

(Emphasis original.)

Unseld repeatedly failed to comply with the terms of his release. By order entered on April 11, 2013, Unseld was admitted into Drug Court. However, he absconded from the program. By order entered on July 11, 2014, the Jefferson Circuit Court, Division Five, Drug Court revoked probation and ordered Unseld

delivered to the Bureau of Corrections to “remain in its custody until released in accordance with the law, for a period of: **TEN (10) YEARS** see attached judgment.”<sup>3</sup> (Emphasis original.) The case was transferred back “to its original division, Division 11, for any further proceedings since the Defendant is no longer a participant in Drug Court.”

By order entered on June 22, 2015, Unseld was again admitted to Drug Court. On August 31, 2015, Drug Court entered a judgment on motion to revoke finding that Unseld had violated the terms of his probation and directing that he be delivered to and remain in the custody of Corrections “until released in accordance with the law for a period of: **TEN (10) YEARS** (see attached judgment).”<sup>4</sup> (Emphasis original.) The case was transferred back to Division 11 again.

On September 23, 2015, the trial court granted Unseld’s motion for shock probation. By order entered on February 19, 2016, the trial court revoked his probation, finding that Unseld had violated its terms by picking up new felony charges and failing to comply with supervision. The order remanded Unseld to the sheriff’s custody to be transported to Corrections “to begin service of the sentence imposed by this Court.”

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<sup>3</sup> Nothing is attached to that order in the record before us.

<sup>4</sup> Nothing is attached to that order in the record before us.

On September 21, 2016, Unseld filed a motion to vacate judgment pursuant to RCr 11.42, requesting that the court “vacate his final judgment and sentence of imprisonment as entered in relation to the above reflected action on 7/11/2014.”<sup>5</sup> Unseld also filed a memorandum of law, a motion for an evidentiary hearing and a motion to proceed *in forma pauperis* and for appointment of counsel.

By order entered on February 17, 2017, the trial court denied Unseld’s motion to vacate, reciting as follows:

Movant is currently serving a 10 year sentence imposed by this Court pursuant to a plea agreement. Movant’s motion alleges that his attorney at the District Court stage of this case failed to properly convey to the District Court that movant wished to accept a plea offer that would have subjected him to a three year sentence.

The court discussed the test for ineffective assistance of counsel in *Strickland v. Washington*, 446 U.S. 668, 100 S. Ct. 1932, 64 L.Ed.2d 593 (1984), adopted in *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985), and explained that:

Unseld is currently serving a sentence imposed upon him after the Court determined that he intelligently, knowingly and voluntarily waived his right to a jury trial . . . . In addition, Mr. Unseld acknowledged upon entering his plea of guilty to those charges that he was satisfied by the services provided to him by his counsel.

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<sup>5</sup> As discussed below, the order entered on July 11, 2014, is *not* the final judgment. It is a Drug Court order revoking probation.

The court determined that Unseld had failed to articulate any substantive reasons to support a finding of ineffective assistance of counsel or to warrant an evidentiary hearing.

On appeal, Unseld argues that the trial court erred in denying his request for an evidentiary hearing. He contends that his counsel at the district court stage was ineffective for failing to convey his desire to accept a plea offer of a three-year sentence. He also contends that his second counsel was ineffective in not investigating what Unseld was telling him about his first counsel. However, we do not address the merits because we conclude that Unseld's 11.42 motion was untimely filed.

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.

If the judgment becomes final before the effective date of this rule,<sup>[6]</sup> the time for filing the motion shall commence upon the effective date of this rule. If the motion qualifies under one of the foregoing exceptions to the three year time limit, the motion shall be filed within three years

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<sup>6</sup>“In 1994, RCr 11.42 was amended to include a time limitation. RCr 11.42(10). . . .” *Palmer v. Commonwealth*, 3 S.W.3d 763, 764 (Ky. App. 1999).

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.

(Emphasis added.)

In *Clark v. Commonwealth*, 476 S.W.3d 895 (Ky. App. 2015), the defendant was charged with theft and forgery under three different indictments, which were later consolidated. On February 20, 2009, the court entered final judgment and sentence on plea of guilty in each of the cases, probating the sentences and transferring the cases to Drug Court. A restitution order was entered in the second and third cases. On August 1, 2013, the circuit court entered an order revoking probation. On August 5, 2013, the court amended the judgment in the second case to show that the defendant had been convicted of theft by deception over \$300.00.

On August 8, 2014, the defendant, *pro se*, filed a motion to vacate his sentence pursuant to RCr 11.42 based upon ineffectiveness of counsel. The circuit court found that the motion was not timely filed **within three years after sentencing** pursuant to RCr 11.42(10), citing *Commonwealth v. Carneal*, 274 S.W.3d 420 (Ky. 2008), which held that for purposes of post-conviction relief, a

youthful offender's original sentencing order is the final judgment. This Court affirmed and explained as follows:

Clark was sentenced to a probated twenty-year sentence on February 20, 2009, at which time all of the issues relating to his guilt and sentence were decided. Pursuant to the Supreme Court's holding in *Carneal*, Clark had three years from that date to seek RCr 11.42 relief. Clark did not seek such relief until August 8, 2014, more than three years after he had been sentenced . . . . We reject Clark's argument that the August 2013 order amending the judgment in one of Clark's cases had any effect on the running of the three-year period in which he could have sought relief. This did not constitute a resentencing, as Clark argues. Therefore, we must hold that Clark's RCr 11.42 motion was not timely filed and that the trial court properly denied his motion on that basis.

*Clark*, 476 S.W.3d at 899-900.

In the case before us, Unseld was sentenced to a probated ten-year sentence on August 2, 2012, at which time all issues relating to his guilt and sentence were also decided.<sup>7</sup> He had three years from that date to seek relief pursuant to RCr 11.42, but he did not file his motion until September 21, 2016. Therefore, we must conclude that it was untimely.

Accordingly, we affirm. See *Kentucky Spirit Health Plan, Inc. v. Commonwealth Fin. & Admin. Cabinet*, 462 S.W.3d 723 (Ky. App. 2015) (well-

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<sup>7</sup> And there is no indication in Unseld's motion that either RCr 11.42(10)(a) or (b) would apply.



settled that appellate court may affirm lower court for any reason supported by record).

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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