

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-002036-MR

LAMONT BROWN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 02-CR-01151

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: LAMBERT, K. THOMPSON, AND L. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Lamont Houston Brown appeals from the Fayette Circuit Court's summary denial of his untimely Kentucky Rules of Criminal Procedure (RCr) 11.42 motion in which he raised an ineffective assistance of counsel claim. Brown argues the circuit court erred in determining his motion was untimely because there was no proof he was aware the Kentucky Supreme Court

reversed the Court of Appeals and reinstated his conviction in 2008 until after Brown was released from federal custody in 2017. We affirm because Brown's motion did not satisfy the conditions for equitable tolling because there was proof he had notice that his conviction was finalized.

In 2002, based on an anonymous tip, police were surveilling Brown in his vehicle. Later, when the police confronted Brown, they saw him put something in his mouth. Suspecting that he ingested cocaine, the police called for an ambulance and Brown was taken to the hospital where police read him his *Miranda*¹ rights. Brown made incriminating statements and consented to a search of his residence.²

Brown was indicted on November 5, 2002, for trafficking in a controlled substance, first degree; tampering with physical evidence; and being a persistent felony offender, first degree.

On February 21, 2003, Brown filed a motion to suppress on the basis that the stop was illegal as there was not sufficient corroboration of the anonymous tip. After a hearing, the circuit court denied the motion.

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

² The detailed facts surrounding these events can be found in *Commonwealth v. Brown*, 250 S.W.3d 631, 632-33 (Ky. 2008) (*Brown II*).

Subsequently, Brown, who was on supervised release on federal charges, entered a conditional guilty plea. Brown filed a motion to remain free on the same bond pending appeal and a motion for probation.

On May 15, 2003, a final judgment and sentence was imposed. The circuit court sentenced Brown to five years on the trafficking charge, enhanced to ten years based on being a PFO-1, and one year on the tampering charge, to be served concurrently for a total of ten years. Brown was denied probation but allowed to remain out on the same bond pending appeal. Brown appealed based on the denial of his motion to suppress.

The Court of Appeals reversed Brown's conviction on the basis that the information furnished by the anonymous tipster was insufficiently corroborated to justify a warrantless search and seizure. *Brown v. Commonwealth*, No. 2003-CA-001195-MR, 2004 WL 1367435, at *4 (Ky.App. Jun. 18, 2004) (unpublished) (*Brown I*).

The Kentucky Supreme Court accepted discretionary review on February 15, 2006. While that appeal was pending, on March 13, 2007, Brown was indicted on new charges by the Commonwealth.³

³ Brown was indicted for trafficking in a controlled substance, first degree; possession of a controlled substance, second degree; possession of drug paraphernalia; and being a persistent felony offender, first degree.

On April 24, 2008, the Kentucky Supreme Court reversed the Court of Appeals and reinstated Brown's original judgment, ruling "[i]nsomuch that we find that the stop was not constitutionally deficient, Brown's incriminating statement allegedly made to emergency medical personnel and law enforcement during the course of his medical treatment is neither tainted nor inadmissible." *Brown II*, 250 S.W.3d at 636. Brown's judgment and sentence became final on May 15, 2008.

The circuit court ordered Brown to appear on May 23, 2008, for a status hearing apparently regarding both the 2007 charges and his now finalized 2002 conviction. While counsel for Brown was present, Brown did not appear. The circuit court stated that a warrant would be issued for Brown's arrest unless he turned himself in by midnight. The circuit court dismissed the 2007 charges without prejudice because there was a federal indictment on these charges.

Brown did not turn himself into state custody and, therefore, on May 28, 2008, the circuit court revoked Brown's appeal bond and issued a warrant for his arrest. On June 9, 2008, Brown surrendered to federal authorities on his federal charges.

On July 16, 2008, a bond forfeiture order and notice of hearing were entered. The circuit court noted that Brown failed to appear at the May 23, 2008 hearing. Brown was ordered to appear to show cause why the court should not enter a judgment against him and his surety for the amount of the bail and costs.

On August 1, 2008, the circuit court held the bond forfeiture hearing. Brown was present⁴ along with the attorney who was representing him in his federal case. His federal attorney told the circuit court that Brown did not appear on May 23, 2008, as ordered not because he was wishing to flaunt the circuit court's order but because he was dealing with health problems and other concerns. She explained that Brown tried to call her around that time, but she was not able to return his call. Brown's federal attorney stated Brown surrendered to federal authorities on June 9, 2008.

On August 5, 2008, judgment was entered on the bond forfeiture. The circuit court stated that notice was provided to Brown and his surety, but they failed to appear at the May 23, 2008 hearing and show cause why judgment should not be entered against them. The circuit court awarded the Commonwealth a joint and several judgment against Brown and his surety in the amount of \$63,000.00.

While the Commonwealth should have lodged a detainer against Brown with the federal authorities based on his outstanding warrant, apparently

⁴ Initially, Brown's federal attorney stated that Brown would not be able to appear because he was a federal inmate, but she had spoken with him the previous night and he authorized her to represent him in this matter. However, the bailiff interjected that a Lamont Brown was present; there was discussion as to whether it was the right Lamont Brown, but when he came into the courtroom his counsel stated that this was her client. Brown's attorney seemed surprised, stating that Brown was not supposed to be there because no writ was filed, and she did not know how he appeared without a writ. Brown was present for all substantive discussion.

this was not done as sometime later in 2008, Brown was released on federal bond pending trial because he was cooperating with federal authorities.

On March 9, 2009, Brown began serving his federal sentence, which the federal district court made consecutive to his state sentence. When Brown served out his federal sentence on November 3, 2014, he was served with a bench warrant for the 2002 case and for the contempt charge. Brown was released into the custody of the Kentucky Department of Corrections.

On November 7, 2014, Brown appeared at the contempt hearing with his state counsel. Much of the hearing was devoted to Brown's counsel trying to sort out with the circuit court whether Brown was entitled to any credit on his 2002 case for the time he served on his federal case. While it was agreed that the circuit court issued a warrant for Brown's arrest after he failed to appear at the May 23, 2008 status hearing, Brown's counsel stated that Brown did not have any notice of the May 23, 2008 status hearing.⁵

The circuit court questioned why the warrant was not served on Brown while he was in federal custody and he was permitted to be released on federal bond while awaiting conviction and sentencing; the circuit court also questioned whether someone wanted Brown to complete serving his federal

⁵ This conflicts with the representations made by Brown's federal counsel in front of Brown at the bond forfeiture hearing.

sentence first before serving the warrant on him, stating “I have seen this game before,” and indicated that it sounded like Brown had no idea there was an outstanding warrant on him.⁶

Brown requested that his sentence be made concurrent with his previously completed federal sentence. The hearing was continued to allow counsel to investigate the matter further. As to the contempt charge for failing to appear at the May 23, 2008 status hearing, the Commonwealth and the circuit court agreed it would be appropriate to dismiss that charge.

On December 12, 2014, Brown’s ten-year sentence was imposed after the circuit court determined it had no ability to run the sentence concurrent with a later federal sentence. Brown appealed.

On April 22, 2016, the Court of Appeals affirmed in *Brown v. Commonwealth*, No. 2015-CA-000072-MR (unpublished) (*Brown III*). The Court of Appeals determined that the circuit court had no duty to make Brown’s sentence concurrent with a later imposed federal sentence, Brown did not qualify for relief under any subsection of Kentucky Rules of Civil Procedure (CR) 60.02, and the circuit court could not re-establish jurisdiction under CR 60.02 to amend his judgment. The Court of Appeals noted that in Kentucky there is a statutory

⁶ This was pure speculation on the circuit court’s part and Brown’s personal appearance at the bond forfeiture hearing was not discussed.

presumption that state and federal sentences are to run consecutively if the judgment is silent pursuant to Kentucky Revised Statutes (KRS) 532.115, and because the judgment was silent it must be presumed that the sentences are consecutive, and the circuit court had no jurisdiction to change Brown's sentence.

On September 18, 2017, Brown filed a motion with the circuit court seeking to vacate his judgment pursuant to RCr 11.42 and a motion for an evidentiary hearing.⁷ The circuit court denied the motion on two bases. The circuit court determined it was appropriate to dismiss without a hearing because it was clear that trial counsel's failure to bring other claims in the motion to suppress and to pursue an appeal was appropriate trial strategy. It also determined that Brown's motion was untimely pursuant to RCr 11.42(10) because it was filed more than three years after Brown's judgment was final, and Brown should have known about any ineffective actions at the time he entered his plea.

⁷ Brown's underlying argument regarding ineffective assistance of counsel is as follows: Brown argues that statements he made while in the hospital under the influence of cocaine were not knowing and voluntary and should not have been admitted against him, and while in this state he could not consent to a search of his residence. Brown argues his counsel, who did bring a motion to suppress based upon the use of an anonymous informant, was ineffective by failing to investigate and bring as an additional ground in the motion to suppress that Brown could not knowingly and voluntarily confess or consent to a search of his residence while impaired. Brown argues that based on his statements to counsel, counsel had a duty to interview his family who could have corroborated his condition, review his medical records, and challenge his statements and consent to search his residence. Brown also argues that when he was discussing a plea agreement with his counsel, that Brown was not aware that he could go to trial and maintain his challenge to the stop, and his counsel never discussed the option of negotiating a non-conditional guilty plea for a reduced sentence.

Brown argues his failure to timely file an RCr 11.42 motion earlier should be excused because “[t]here is nothing in the record showing that [Brown] had notice of the decision of the Kentucky Supreme Court or notice of the hearing before the Fayette Court.” Brown states he was in federal custody as of June 9, 2008, was not present at the May 23, 2008 hearing or at the August 1, 2008 bond forfeiture hearing, and was not served with a warrant for failure to appear until November 3, 2014, when he was being released from federal custody on his federal sentence and, therefore, his RCr 11.42 motion was timely when filed within three years of him having notice that his judgment and conviction was reinstated.

RCr 11.42 provides in relevant part as follows:

- (10) 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.

Because Brown’s conviction became final in 2008, he needed to file his RCr 11.42 motion by 2011, but he did not file it until 2017. Neither of the exceptions provided by the rule which could excuse his failure to file his RCr

11.42 motion within the three-year time limit applies. The facts underlying Brown's ineffective assistance of counsel claims were known or knowable by the time Brown was sentenced, and the constitutional right he is now asserting was well-established at that time.

Brown's motion can only be saved if equitable tolling applies. To establish that equitable tolling is warranted, thereby allowing the consideration of an untimely filed RCr 11.42 motion, the defendant must show both diligence in pursuing his claims and that an extraordinary occurrence stood in his way.

Moorman v. Commonwealth, 484 S.W.3d 751, 757 (Ky.App. 2016). In contrast, a "garden variety claim of excusable neglect" such as a miscalculation that leads to missing a filing deadline "does not warrant equitable tolling." *Id.* (quoting *Holland v. Florida*, 560 U.S. 631, 651-52, 130 S.Ct. 2549, 2564, 177 L.Ed.2d 130 (2010)).

Brown's argument that there was no proof he was aware that the Supreme Court reversed the Court of Appeals in *Brown II* and he would now have to serve his ten-year sentence on the 2002 case is refuted by the record.⁸ Based on the representations made by Brown's federal counsel on August 1, 2008, at the

⁸ Brown did not argue that he failed to receive notice that his conviction was finalized; instead, he argues that there is no proof that he received notice. By wording his argument in this way, Brown seeks to place the burden on the Commonwealth to establish that he received notice of *Brown II*. However, it was Brown's burden to establish that equitable tolling was appropriate, rather than the Commonwealth's duty to establish that Brown received notice of the outcome of the appeal.

bond forfeiture hearing which Brown attended, he knew he was supposed to appear at the May 23, 2008 show cause hearing and he knew that the appellate bond was forfeit for failing to appear after the 2002 conviction was finalized.

It appears that Brown may have been operating under the faulty conclusion that he would receive credit for time served on his federal sentence, or that he would be able to get these two sentences to be served concurrently and, therefore, chose to wait to see if that would happen before pursuing an ineffective assistance of counsel claim. Such a strategic approach cannot excuse an untimely filing.

Additionally, Brown was on notice that his case was pending before the Kentucky Supreme Court and would be decided at some point. If Brown did not receive notice at the time his case was decided, it appears that this was because he was in hiding trying to prevent himself from being taken into custody on his new charges (both state and federal). We will not reward Brown's willful failure to avoid prosecution. Brown had some duty to apprise himself as to the status of the Commonwealth's appeal and had a variety of avenues available to him for doing so. Being incarcerated on federal charges is not an extraordinary occurrence which would excuse Brown from making any inquiries as to the status of his state case.

Accordingly, we affirm the Fayette Circuit Court's summary denial of Brown's untimely RCr 11.42 motion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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