

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002366-MR

JACTA EST ALEA

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE KEVIN WILLIAM DELAHANTY, JUDGE
ACTION NO. 83-CR-001313

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 2001-CA-001688-MR

JACTA EST ALEA

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON
ACTION NOS. 83-CR-001313 & 83-CR-001141

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: COMBS and McANULTY, Judges; and JOHN D. MILLER,¹ Special Judge.

COMBS, JUDGE: Jacta Est Alea appeals from two orders of the Jefferson Circuit Court. The first order, entered July 27, 2000,

¹ Senior Status John D. Miller Sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

denied Alea's motion filed pursuant to KRS² 17.142 requesting the segregation of his criminal records. The second order, entered July 20, 2001, denied his motion filed pursuant to RCr³ 11.42 to vacate his 1984 sentence. We affirm.

In 1983, Alea, then known as Kenneth Ross, was indicted on numerous counts of first-degree robbery, one count of first-degree burglary, and being a second-degree persistent felony offender (PFO). In a separate indictment, Alea was charged with intimidating a witness and being a first-degree PFO. After a jury trial, Alea was found guilty under the first indictment on 15 counts of robbery, one count of burglary, and of being a second-degree PFO. He was acquitted of the charges contained in the second indictment. In the final judgment entered on March 8, 1984, Alea was sentenced to serve ninety (90) years in prison. With the exception of the reversal of one count of robbery, Alea's convictions and sentence were affirmed on direct appeal to the Kentucky Supreme Court. See, Ross v. Commonwealth, Ky., 710 S.W.2d 229 (1986).

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²Kentucky Revised Statutes.

³Kentucky Rules of Criminal Procedure.

The sole issue raised in this appeal is whether the trial court erred in denying Alea's motion to segregate his court records pertaining to his convictions from the records that involved his acquittal on the charge of intimidating a witness. Because Alea was not acquitted of all the charges on which he was tried, the trial court ruled that he was not entitled to any relief predicated on KRS 17.142, the statute requiring the segregation ~~A~~ upon request of ~~A~~ all records relating to the arrestee in the possession of law enforcement and other public agencies. Alea argues that the trial court erred since he was found innocent of the charges contained in one of the two indictments consolidated for trial in 1984.

The Commonwealth offers several grounds for upholding the order, the most significant of which is that the provisions of KRS 17.142 allowing for segregation of records have no application to court records. York v. Commonwealth, Ky.App., 815 S.W.2d 415 (1991); see also, Ex Parte Farley, Ky., 570 S.W.2d 617 (1978).

We find no error in the ruling of the trial court on this issue. We affirm as to Appeal No. 2000-CA-002366-MR.

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Subsequent to his direct appeal, Alea filed various motions for post-conviction relief in both state and federal

courts. In November 2000, he filed a motion pursuant to RCr 11.42, the denial of which is the subject of this appeal.

Alea alleged that his trial counsel had rendered ineffective assistance by failing to object to the Commonwealth's use of a May 18, 1981, conviction from Indiana for armed robbery and theft in order to convict him of being a PFO. He contended that if trial counsel had investigated the Indiana judgment, he would have discovered that Alea pled guilty only to the crime of robbery -- a Class C felony, the punishment for which is imprisonment for two to eight years and a maximum fine of \$10,000. The other charges pending against him, including the theft charge, had been dismissed. On February 26, 2001, while his RCr 11.42 motion was pending, the Floyd Superior Court in Indiana entered an order correcting the twenty-year-old judgment to reflect that Alea was convicted of robbery and that the theft charge had been dismissed. Alea argued that this corrected judgment comprised newly discovered evidence sufficient to establish that his 1984 PFO conviction in the Jefferson Circuit Court was based on erroneous information in violation of his constitutional rights.

In its order denying Alea's RCr 11.42 motion, the trial court stated as follows:

The basis for Mr. Alea's 11.42 Motion is that there is newly discovered evidence regarding his earlier conviction in Indiana. Mr. Alea argues that because the Indiana Court incorrectly recorded his convictions, that the PFO II status was

improperly considered by the jury. On February 26, 2001, the Indiana Courts [sic] did correct their records to reflect Mr. Alea's convictions in May of 1981. The corrected record reflects that Mr. Alea was found guilty under two (2) separate indictments for a Class C Felony in each indictment and the theft charge against him in one of the indictments was dismissed.

Pursuant to the Persistent Felony Offenders Statute, the corrected Indiana conviction does not change Mr. Alea's status as a PFO II at the time of the 1984 Judgment and sentence of the Court. Additionally, this is not newly discovered evidence in that this is evidence that could have easily been obtained at an earlier date. However, even if it could not have been discovered, Mr. Alea's PFO II status would have been the same and would not have affected the Judgment of the Court. Further, the Court agrees with the Commonwealth that Mr. Alea's 11.42 Motion is not timely in that it was not filed within three (3) years after the Judgment became final. The last Amended Judgment in this case was on December 20, 1996.

In his appeal, Alea has abandoned any argument of ineffective assistance of trial counsel. Instead, he maintains that his PFO conviction and sentence should be vacated as a matter of law and the matter remanded for re-sentencing. He argues that due process requires a reversal of his PFO conviction because the 1981 felony conviction relied upon by the Commonwealth in imposing the enhanced sentence was ultimately vacated. He also argues that the three-year statute of limitations for seeking post-conviction relief contained at RCr 11.42(10) should not act as a barrier to his claim because he used due diligence in getting the 1981 judgment set aside,

thereby becoming entitled to invoke the exception to the limitations period contained at RCr 11.42(10) (a).

Alea interprets Webb v. Commonwealth, Ky., 904 S.W.2d 226 (1995), as allowing a collateral attack on his 1984 PFO conviction after having successfully attacked a portion of the 1981 Indiana conviction used to convict him. Although Webb does appear to permit such an attack, the Kentucky Supreme Court has more recently reaffirmed its holding in Howard v. Commonwealth, Ky., 777 S.W.2d 888, 889 (1989), that a defendant's failure to challenge the validity of a prior conviction at the time he was charged with being a persistent felony offender precludes later review of the prior conviction.

When a defendant is charged with PFO, it is incumbent upon the defendant to challenge the validity of the prior conviction within the PFO proceeding. If a defendant fails to do so, the validity of the conviction is final and cannot be challenged in a subsequent RCr 11.42 proceeding.

Graham v. Commonwealth, Ky., 952 S.W.2d 206, 208 (1997).

Regardless of the degree of diligence that Alea exercised in obtaining a correction of the Indiana judgment, he failed to raise any issue with respect to the validity of the 1981 Indiana guilty plea when he was tried in 1984. That failure resulted in a waiver of his right to contest its validity in this subsequent RCr 11.42 proceeding. Therefore, we affirm the trial court's denial of his RCr 11.42 motion.

We affirm the orders of the Jefferson Circuit Court as
to Appeal No. 2001-CA-001688-MR.

ALL CONCUR.

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