

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-000163-MR

BENNIE P. BERRY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE DENISE CLAYTON, JUDGE  
ACTION NOS. 94-CR-000220; 94-CR-000722;  
94-CR-002685; AND 95-CR-000434

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

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BEFORE: BUCKINGHAM, GUIDUGLI, AND McANULTY, JUDGES.

McANULTY, JUDGE: Bennie P. Berry (Berry) appeals the Jefferson Circuit Court's denial of his RCr 11.42 motion alleging ineffective assistance of counsel. Finding no error, we affirm.

In April of 1995, Berry entered a guilty plea to multiple charges from indictment numbers: 94-CR-000220 (possession of controlled substance cocaine); 94-CR-000722 (criminal trespass, first degree); 94-CR-002685 (assault under

extreme emotional disturbance; resisting arrest and attempting to elude) and 95-CR-000434 (reckless driving; attempting to elude; resisting arrest; receiving stolen property under \$300; two counts of wanton endangerment, second degree and operating a motor vehicle without operator's license). Berry was sentenced to a total of seven years, probated for five years. Ultimately, after finding that Berry violated the terms and conditions of his probation, the trial court revoked Berry's probation by Order entered January 8, 1997.

Over six years after originally being sentenced, on November 28, 2001, Berry mailed his motion for relief under RCr 11.42. On December 4, 2001, the trial court denied the motion without an evidentiary hearing on the grounds that Berry did not file the motion within three years after the judgment became final as required by RCr 11.42(10). Further, Berry did not prove either of the exceptions to the three year time limit in RCr 11.42(10), which are:

(a) . . . 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) . . . the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

On appeal, Berry argues that the trial court erred in denying his motion as untimely. We disagree. Because there was

no direct appeal of the 1995 convictions, the judgment became "final," and the limitations period started to run on June 7, 1995, when the amended Judgment of Sentence and Probation was entered. See Palmer v. Commonwealth, Ky. App., 3 S.W.3d 763, 765 (1999). Berry filed his RCr 11.42 motion over six years after the judgment became final. Moreover, the facts upon which Berry based his motion were known to Berry at the time that he chose to enter a guilty plea, therefore, the first exception to RCr 11.42(10) is not applicable. Specifically, Berry alleges that his attorney failed to interview two key witnesses. The second exception is also inapplicable because Berry's motion is based on a violation of his right to have the assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution.

For the foregoing reasons, the circuit court's denial of Berry's motion for RCr 11.42 relief is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Bennie P. Berry, Pro Se  
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BRIEF FOR APPELLEE:

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