

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000896-MR

LOUIS ROBERTSON

APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE LARRY D. RAIKES, JUDGE
ACTION NO. 96-CR-00004

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** *

BEFORE: BARBER, GUIDUGLI AND PAISLEY, JUDGES.

GUIDUGLI, JUDGE. Louis Robertson ("Robertson") appeals from a motion of the Nelson Circuit Court denying his motion for RCr 11.42 relief as untimely filed. We affirm.

In 1997, Robertson was convicted of five counts of first-degree sexual abuse and five counts of first-degree sodomy. He was sentenced to 100 years in prison, and on

February 11, 1999, his conviction was affirmed on direct appeal to the Kentucky Supreme Court.

Robertson is serving his sentence at the Eastern Kentucky Correctional Complex ("EKCC"). On February 25, 2002, he filed a motion with the Nelson Circuit Court seeking RCr 11.42 relief. On March 3, 2002, the circuit court rendered an order denying the motion. As a basis for the order, the court found that Robertson's motion was not timely filed. It noted that the Kentucky Supreme Court opinion affirming Robertson's conviction became final on February 11, 1999, and his motion was not filed within the three year period ending on February 11, 2002. This appeal followed.

Robertson now argues that the circuit court erred in denying his motion for RCr 11.42 relief. He notes that he gave the motion to correctional officials for the purpose of mailing it to the clerk of court prior to February 11, 2002, and argues that this act should satisfy the RCr 11.42 filing requirement. That is to say, Robertson argues that he should be entitled to avail himself of a "mailbox rule", wherein handing the motion to correctional officials would satisfy the filing requirement, as his circumstances barred him from hand-delivering the RCr 11.42 motion to the clerk. He directs our attention to case law from the United States Supreme Court and the 9th Circuit Court of Appeals which he claims forms a basis for Kentucky's adoption of

such a rule, and seeks an order remanding the matter for further proceedings on this issue.

We have closely studied Robertson's argument, and find no basis for tampering with the order on appeal. RCr 11.42(10) provides in clear and unambiguous language that, "[A]ny motion under this rule shall be filed within three years after the judgment becomes final" This language is subject to but one interpretation, to wit, that a filing is required.

Robertson concedes that there is no Kentucky case law providing a mailbox rule for inmates seeking RCr 11.42 relief, and we are not persuaded that cases he cites require such a change. See generally, Houston v. Lack, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988). In Houston, for example, the court in a 5-4 decision concluded that a federal inmate could avail himself of a mailbox rule in order to comply with a statutory 30-day notice of appeal filing requirement. The instant facts are, we believe, distinguishable in that Robertson was not constrained to a mere 30-day period for filing, but had three years to assure that the clerk received his motion. Furthermore, the court in Houston recognized that it was promulgating a limited exception, and the general rule still mandated actual filing with the clerk.

The civil rules should be amended, if at all, by the Kentucky Supreme Court. Both Robertson and the appellate courts

are bound by the civil rules, Electric Plant Bd. of City of Hopkinsville v. Stephens, Ky., 273 S.W.2d 817 (1964), and proper application of the rules should be left largely to the supervision by the trial judge. Naïve v. Jones, Ky., 353 S.W.2d 365 (1961). The appellate courts must respect his or her exercise of sound judicial discretion in their enforcement. Id.

Given the clear and unambiguous nature of RCr 11.42, coupled with our reliance on the trial court's exercise of sound judicial discretion in its enforcement, we find no basis on this issue for reversing the order on appeal.

Robertson argues in the alternative that the motion should be deemed timely filed because there should be a presumption that the clerk received the motion prior to February 11, 2002, or because the delay in filing was a result of excusable neglect, or because he is entitled to equitable tolling. He also argues that the civil rules are not jurisdictional, and should not be interpreted to deny him the right to appellate adjudication.

On the first of these arguments, Robertson maintains that one should reasonably presume that EKCC officials held the motion for no more than three days before mailing it, and that as such we should conclude that the clerk actually received the motion prior to February 11, 2002 even if it was marked "filed" sometime thereafter. This argument relies solely on

speculation, and does not overcome the strong presumption that the trial court's order on this issue was correct. City of Louisville v. Allen, 385 S.W.2d 179 (1964).

On the issues of excusable neglect and equitable tolling, we find nothing in the record excusing Robertson's failure to insure that his motion was received and filed by the clerk in a timely manner. Similarly, the theory of equitable tolling (i.e., waiver of the limitation period for equitable reasons), requires a showing of extraordinary circumstances which are avoidable even with diligence. See generally, Sandvik v. United States, 177 F.3d 1269 (11th Cir. 1999) cited by Robertson to support his argument on this issue. In Sandvik, the movant was denied equitable tolling, and the court cited a litany of cases evidencing the extreme nature of the circumstances required for such tolling. The circuit court below did not err in rejecting Robertson's argument on this issue.

Lastly, Robertson argues that the civil rules, particularly the filing requirement set forth in RCr 11.42, is not jurisdictional in nature and should not operate to bar him from prosecuting his claim for relief in an appellate court. If taken to its natural conclusion, Robertson's argument would render the RCr 11.42 filing requirement meaningless. In promulgating the rules, the Kentucky Supreme Court intended for

them to have meaning and effect, i.e., to govern the practice and procedure of all actions in Kentucky courts. Accordingly, we do not find Robertson's argument on this issue persuasive.

For the foregoing reasons, we affirm the findings of fact, conclusions of law, and order of the Nelson Circuit Court.

ALL CONCUR.

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