

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001039-MR

EDWARD HUTCHINS

APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELEER, JR., JUDGE
ACTION NO. 90-CR-00012

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: McANULTY, MINTON, AND SCHRODER, JUDGES.

McANULTY, JUDGE. Appellant seeks relief from an order of the Hopkins Circuit Court which denied his "Motion to File Belated RCr 11.42 Motion." The order disposing of the matter, which forms the basis of this appeal, fails to address the motion as one to file a belated RCr 11.42 motion, but rather as one disposing upon the merits. Appellant claims that summary consideration of the motion as an RCr 11.42 motion was an abuse

of discretion and that the matter should be remanded for appointment of counsel and an evidentiary hearing.

We have reviewed the record in this matter and conclude that Appellant's claim regardless of its characterization must fail as time barred. RCr 11.42(10). Therefore, we affirm the trial court's order dismissing Appellant's motion for relief pursuant to RCr 11.42.

As the crux of this matter relates to the proper application of law a detailed factual background is unnecessary. While Appellant and the Commonwealth have a slightly different view of the procedural aspects of the motion there is a clear order from the trial court adequately setting out the steps taken.

The threshold issue is whether Appellant could have avoided the requirements of RCr 11.42(1) by filing a motion to file a belated RCr 11.42. Resort to the rule reveals no reference to such a vehicle. Therefore, one cannot reasonably assume that the Supreme Court intended to allow circumvention of the provisions of RCr 11.42 by permitting a "belated" motion to accomplish that which would not otherwise be permitted.

Appellant filed his motion on April 8, 2002. The final judgment was entered February 25, 1992. RCr 11.42(10) provides:

If the judgment becomes final before the effective date of this rule, the time for filing the motion shall commence upon the effective date of this rule.

As the trial court noted, this rule was effective October 1, 1994. The law relating to RCr 11.42 strongly suggests that Appellant's motion must fail. Palmer v. Commonwealth, Ky. App., 3 S.W.3d 763 (1999).

For the foregoing reasons the order dismissing Appellant's motion pursuant to RCr 11.42 is affirmed.

ALL CONCUR.

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