

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002366-MR

CLIFFORD RALPH DARNELL

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LARRY D. RAIKES, JUDGE
ACTION NO. 87-CR-00015

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, BUCKINGHAM, AND HENRY, JUDGES.

BUCKINGHAM, JUDGE: Clifford Ralph Darnell appeals from an order of the Greenup Circuit Court denying his RCr¹ 11.42 motion to vacate his conviction and sentence for criminal offenses.

Because we believe the circuit court correctly denied Darnell's motion due to his having completed his sentence and having been released from custody when the court ruled, we affirm.

In 1988 Darnell was convicted of two counts of incest and was sentenced to seven and one-half years in prison. The

¹ Kentucky Rules of Criminal Procedure.

judgment was affirmed on his direct appeal. Darnell filed a second RCr 11.42 motion on January 18, 2001. The circuit court denied the motion in an order entered on October 11, 2002, and this appeal by Darnell followed.² The circuit court denied Darnell's motion because he was no longer in custody when the court ruled.³

The rule states that:

(1) A prisoner in custody under sentence or a defendant on probation, parole or conditional discharge who claims a right to be released on the ground that the sentence is subject to collateral attack may at any time proceed directly by motion in the court that imposed the sentence to vacate, set aside or correct it.

RCr 11.42(1). The rule has been interpreted to mean that relief is only available to movants who are being held in custody. See Sipple v. Commonwealth, 384 S.W.2d 332 (Ky. 1964); Wilson v. Commonwealth, 403 S.W.2d 710, 712 (Ky. 1966).⁴ Although Darnell was in custody under the judgment when he filed his motion, he had been released by the time the court addressed his motion. Therefore, RCr 11.42 relief was not available to him.

² Although it has been two years since Darnell filed his notice of appeal, this case was not submitted for ruling until July 30, 2004.

³ Darnell had been released from prison on June 16, 2001.

⁴ Since the decisions in Sipple and Wilson, RCr 11.42(1) has been amended to allow persons on parole, probation, or conditional discharge to file RCr 11.42 motions. However, the Commonwealth stated that Darnell had completely served his sentence, and Darnell did not contest that fact. Thus, we assume that Darnell had completely served his sentence when he was released from custody and was not on parole, probation, or conditional discharge.

The order of the Greenup Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael J. Curtis
Ashland, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky