

RENDERED: December 3, 2004; 2:00 p.m.

ORDERED NOT PUBLISHED BY THE KENTUCKY SUPREME COURT:
JUNE 8, 2005 (2005-SC-0136-D)

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001184-MR

JEFFREY DEWAYNE CLARK

APPELLANT

v. APPEAL FROM MEADE CIRCUIT COURT
HONORABLE SAM H. MONARCH, JUDGE
ACTION NO. 92-CR-00043

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: BARBER, KNOPF, AND TACKETT, JUDGES.

TACKETT, JUDGE: Jeffrey Dewayne Clark appeals from the decision of the Meade Circuit Court finding that his action under Kentucky Rules of Criminal Procedure (RCr) 11.42 was time-barred under RCr 11.42(10). Clark argues that his action was not time-barred because the statute was tolled while he sought habeas corpus relief in the federal courts. We hold that seeking federal habeas corpus relief does not toll the statute of

limitations in RCr 11.42, and affirm the circuit court's decision.

Clark was convicted of murder in March, 1995 for the 1992 murder of co-defendant Garr Hardin's girlfriend. He appealed that judgment to the Kentucky Supreme Court, which affirmed his conviction in October of 1997 and denied a petition for rehearing in December of that year. Clark sought certiorari in the United States Supreme Court, which was denied in 1998. Then, rather than seek state post-conviction relief, Clark sought federal habeas corpus relief in the Western District of Kentucky in December 1998, which that court denied in November, 1999. Clark appealed to the United States Court of Appeals, which affirmed the district court's decision in an opinion which became final in August, 2001 after rehearing en banc was denied. Finally, on January 29, 2003, Clark filed a motion to vacate sentence under RCr 11.42 in the Meade Circuit Court, which the circuit court denied as untimely. This appeal followed.

Clark argues that the judgment should not be considered final until the federal habeas corpus proceedings concluded with the Sixth Circuit's decision in August 2001, or in the alternative that the doctrine of equitable tolling should apply to allow him to proceed with his 11.42 motion. The Commonwealth responds by stating that under Kentucky Civil Rule 76.30(2)(c), the judgment became final when the Kentucky Supreme

Court denied rehearing in 1997. The circuit court stated that at the very latest, the matter became final when the U.S. Supreme Court denied certiorari. The Commonwealth also notes that while federal law tolls the statute of limitations on habeas corpus proceedings while a prisoner seeks state post-conviction relief, Kentucky law contains no analogous provision. Therefore, the Commonwealth states, Clark elected to proceed with the federal habeas corpus petition and not to pursue state post-conviction relief. The Commonwealth also notes that there are no Kentucky cases that support Clark's position that he is entitled to equitable tolling under these circumstances.

We agree that Clark's election to precede with federal habeas corpus relief amounts to an election not to proceed with state post-conviction relief. We also agree that he is not entitled to equitable tolling under these circumstances. Equitable tolling, as Clark himself states, requires that the untimely filing be due to extraordinary circumstances that are both beyond his control and unavoidable even with diligence and when strict application of the limitations period would be inequitable. Andrews v. Orr, 851 F.2d 146, 151 (6th Cir. 1988). We do not agree that Clark's misunderstanding of the way in which the statute of limitations is applied is sufficient reason to apply that doctrine in this case, as it is neither beyond his control nor unavoidable even with diligence.

For the foregoing reasons, the judgment of the Meade
Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joseph Ray Myers
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky