

RENDERED: SEPTEMBER 17, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001980-MR

JARON SHAWN TEAGUE

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 98-CR-002453

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: COMBS, CHIEF JUDGE; MINTON, AND VANMETER, JUDGES.

VANMETER, JUDGE: This is a pro se appeal from the Jefferson Circuit Court's order denying appellant Jaron Shawn Teague's RCr 11.42 motion to vacate the trial court's judgment, which was entered after appellant pled guilty to escape in the second degree and to being a persistent felony offender (PFO) in the first degree. Appellant claims that he was afforded ineffective assistance of counsel. For the reasons stated hereafter, we affirm.

On September 19, 1997, appellant was ordered to serve a 365-day sentence after he pled guilty to a misdemeanor shoplifting offense. On July 9, 1998, appellant escaped while on work release. He subsequently was indicted for escape in the second degree and for being a PFO in the first degree. Appellant pled guilty to both charges, and on August 23, 1999, the court entered a judgment sentencing him to an enhanced term of ten years. However, the court withheld imposition of the sentence and instead placed appellant on intensive probation for five years, subject to his strict compliance with substance abuse treatment and other conditions. Due to multiple probation violations, the court entered an order on January 21, 2000, revoking appellant's probation and ordering him to begin service of his ten-year sentence.

On August 21, 2000, appellant filed a habeas corpus action in the Lyon Circuit Court. The court's dismissal of the action was affirmed by this court on January 10, 2001, in Appeal No. 2000-CA-002530-MR.

On January 12, 2001, appellant filed a motion seeking custody time credit pursuant to KRS 532.120. The trial court denied both that motion and appellant's motion to reconsider. Appeal No. 2001-CA-000462-MR followed. Appellant then filed a motion for a declaration of his rights. The court denied the motion on February 8, 2001, and it subsequently denied

appellant's motion to reconsider. Appeal No. 2001-CA-000688-MR followed. The two appeals were consolidated, and this court rendered an unpublished opinion affirming the court's orders on May 23, 2003.

On November 1, 2001, while the consolidated appeal was pending, appellant filed a second habeas corpus action in the Boyle Circuit Court. This court affirmed the dismissal of the action on April 9, 2002, in Appeal No. 2002-CA-000226-MR. Appellant's motion for discretionary review was denied by the Kentucky Supreme Court on January 14, 2004.

The matter now before us on appeal stems from appellant's July 28, 2003, RCr 11.42 motion seeking to vacate the August 1999 judgment on grounds of ineffective assistance of counsel. The Jefferson Circuit Court denied appellant's motion on September 4, 2003. This appeal followed.

RCr 11.42(10) states in relevant part:

Any motion under this rule shall be filed within three years after the judgment becomes final, unless the motion alleges and the movant proves either:

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

(Emphasis added.) RCr 11.42(8) provides that a trial court's final order on a motion for RCr 11.42 relief shall not be effective until the expiration of time for filing a notice of appeal, and the final disposition of any appeal taken. Thus, as stated in *Palmer v. Commonwealth*, Ky. App., 3 S.W.3d 763, 765 (1999), "the judgment becomes final" with "the conclusive judgment in the case, whether it be the final judgment of the appellate court on direct appeal or the judgment of the trial court in the event no direct appeal was taken."

Here, the record shows that the trial court entered the judgment in question in August 1999, pursuant to appellant's guilty plea. Because appellant did not file timely postjudgment motions or a timely appeal, the judgment became final as of its August 1999 date of entry. See *Palmer*, 3 S.W.3d at 765. Thus, the RCr 11.42 motion which appellant filed in July 2003 was not timely, as it did not satisfy the RCr 11.42(10) requirement that it be filed within three years after the judgment became final.

There is no merit to appellant's contention that the running of time for filing his motion for RCr 11.42 relief was tolled by his motion for custody time credit pursuant to KRS 532.120, or by his motion for a declaration of rights. In the first place, the motions for custody time credit and for a declaration of rights were both filed long after the August 1999 judgment had become final. In any event, as held in *Duncan v.*

Commonwealth, Ky. App., 614 S.W.2d 701 (1980), a KRS 532.120 motion for custody time credit qualifies as a CR 60.02 motion. Since CR 60.02 specifically mandates that any "motion under this rule does not affect the finality of a judgment or suspend its operation," appellant's motion clearly could not toll the running of time for purposes of seeking RCr 11.42 relief. Similarly, appellant's motion for a declaration of rights did not fall into any of the categories of motions which may toll the running of time under RCr 12.04(3) or CR 73.02(e).

Further, although appellant has filed several appeals since 1999, those appeals were taken from orders denying habeas corpus relief (Appeals No. 2000-CA-002530-MR and 2002-CA-000226-MR), and from orders denying appellant's motions seeking custody time credit (Appeal No. 2001-CA-000462-MR) and a declaration of rights (Appeal No. 2001-CA-000688-MR). As those appeals were not taken from the original judgment which appellant now seeks to vacate, but instead were taken either from postjudgment motions or from orders regarding separate matters, they did not toll the running of time for seeking RCr 11.42 relief from the August 1999 judgment.

The court's judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jaron Teague, Pro Se
Central City, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Samuel J. Floyd, Jr.
Assistant Attorney General
Frankfort, Kentucky