

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000434-MR

SANDY TUNGATE

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE STEPHEN M. SHEWMAKER, JUDGE
ACTION NOS. 85-CR-00066 & 86-CR-00029

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; MCANULTY, JUDGE; MILLER, SENIOR JUDGE.¹

COMBS, CHIEF JUDGE: Sandy Leo Tungate, *pro se*, appeals from an order entered by the Boyle Circuit Court on February 10, 2004, which denied his post-conviction motion for relief filed pursuant to RCr² 11.42. We conclude that the trial court correctly denied the motion as having been untimely filed; thus, we affirm.

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² Kentucky Rules of Criminal Procedure.

On March 17, 1986, Sandy Tungate was convicted of attempted rape in the first degree and sentenced to serve ten-years' imprisonment. His sentence was enhanced to twenty years because of his conviction as a persistent felony offender in the first degree. The Kentucky Supreme Court affirmed his convictions on December 16, 1987.

On October 19, 1999, Tungate filed a *pro se* motion pursuant to the provisions of CR³ 60.02 to amend his sentence. The motion was denied a few days later by the Boyle Circuit Court. In December 2000, Tungate wrote to the Boyle Circuit Clerk to request information regarding trial transcripts. The clerk promptly responded to his request. In November 2002, Tungate again corresponded with the circuit clerk. He requested specific information about the twelve jurors who had served at his trial. The clerk again promptly responded to this request. In July 2003, Tungate corresponded with the circuit clerk to request information about the judge who presided over the criminal proceedings, the attorney who prosecuted him, and his court-appointed defense attorneys. The clerk forwarded to Tungate a copy of the judgment of conviction.

On November 7, 2003, Tungate filed a motion to vacate the conviction and his twenty-year sentence pursuant to the provisions of RCr 11.42. Alleging that he had been denied

³ Kentucky Rules of Civil Procedure.

effective assistance of counsel, he asked the trial court to conduct an evidentiary hearing and to appoint counsel for him. In a supporting memorandum, Tungate charged that his trial attorneys had failed to subpoena four witnesses who would have provided evidence favorable to his defense. He also claimed that his attorneys had failed to perfect an appeal to the Supreme Court of Kentucky following his conviction. (We noted earlier that an appeal to the Supreme Court had in fact been taken and that it resulted in affirming his convictions.) On February 10, 2004, the Boyle Circuit Court denied Tungate's motion for relief on the basis that the motion was filed outside the three-year statute of limitations prescribed by RCr 11.42(10). This appeal followed.

RCr 11.42 (10) provides as follows:

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.

The rule also dictates that "if the judgment becomes final before the effective date of this rule, the time for filing the

motion shall commence upon the effective date [October 1, 1994] of this rule." RCr 11.42(10).

Tungate's conviction was final in 1987. Therefore, the three-year statute of limitations of RCr 11.42(10) began to run on October 1, 1994; his time within which to file a motion pursuant to RCr 11.42 expired on October 1, 1997 -- three years after the effective date of the provision. Tungate did not file his RCr 11.42 motion until November 2003 -- more than six years after the statute of limitations against his claims had run. Tungate has not presented sufficient grounds to justify his delay in filing the motion. Thus, the trial court did not err by concluding that Tungate's motion for relief was procedurally barred as untimely. In addition, neither a hearing nor the appointment of counsel was necessary because his motion was clearly refuted by the face of the record.

For the foregoing reasons, we affirm the order denying Tungate's post-conviction motion for relief.

ALL CONCUR.

BRIEF FOR APPELLANT *PRO SE*:

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BRIEF FOR APPELLEE:

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