

RENDERED: JUNE 3, 2005; 2:00 p.m.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-001666-MR

TERRY W. TYLER

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT  
HONORABLE STEPHEN A. HAYDEN, JUDGE  
ACTION NO. 87-CR-00021

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DYCHE, HENRY, AND TACKETT, JUDGES.

HENRY, JUDGE: Appellant Terry W. Tyler (Tyler), pro se, brings this appeal from an order of the Henderson Circuit Court, entered July 15, 2004, summarily overruling his successive pro se motion made pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Having concluded that the trial court correctly denied the motion as untimely, we affirm.

On April 27, 1987, in accord with the jury's recommendation, Tyler was sentenced to concurrent ten-year and

life terms of imprisonment upon convictions for one count of burglary in the third degree<sup>1</sup> and one count of robbery in the first degree,<sup>2</sup> as enhanced by second-degree persistent felony offender<sup>3</sup> status.

The history of Tyler's direct and collateral attacks on the conviction is chronicled in the unpublished opinion rendered by this court in Tyler v. Commonwealth (2000-CA-001872-MR and 2000-CA-002019-MR):

In 1987, Tyler appealed his conviction directly. On March 3, 1988, the Kentucky Supreme Court affirmed Tyler's conviction in an unpublished opinion. In August 1988, Tyler filed a pro se motion pursuant to RCr 11.42 to vacate the circuit court's April 27, 1987 judgment. The Henderson Circuit Court denied his RCr 11.42 motion. In an attempt to appeal this denial, Tyler filed a motion for belated appeal with the circuit court, who lacked jurisdiction, and filed a similar motion with this court. On March 3, 1989, Tyler filed pro se a motion pursuant to CR 60.02 seeking a new trial on the alleged grounds of newly discovered evidence and perjured testimony. On April 17, 1989, he filed another pro se motion pursuant to CR 60.02 seeking relief from the circuit court's denial of his RCr 11.42 motion.

On June 22, 1989, the Henderson Circuit Court denied Tyler's two CR 60.02 motions, and Tyler failed to appeal this denial. Then on September 5, 1989, this Court denied Tyler's motion for belated appeal regarding the denial of his RCr 11.42 motion.

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<sup>1</sup> Kentucky Revised Statutes 511.040.

<sup>2</sup> Kentucky Revised Statutes 515.020.

<sup>3</sup> Kentucky Revised Statutes 532.080.

On April 26, 1990, Tyler filed his third motion pursuant to CR 60.02 claiming ineffective assistance of counsel. The circuit court denied this third CR 60.02 motion on May 29, 1990, and Tyler appealed to this court which affirmed the Henderson Circuit Court on February 8, 1991.

Next, on September 13, 1993, Tyler filed a pro se motion pursuant to KRS 532.070 to modify his sentence, which motion the circuit court denied on October 21, 1993. Tyler appealed the denial of his KRS 532.070 motion, and on October 11, 1995, this Court affirmed the Henderson Circuit Court holding that Tyler's motion was untimely and his claims lacked merit.

On July 17, 1998, Tyler filed yet another motion pursuant to CR 60.02, claiming that an improper jury instruction was presented to the jury during the penalty phase. After the Commonwealth failed to respond, Tyler filed a motion for default judgment regarding his fourth CR 60.02 motion. On September 17, 1998, the Henderson Circuit Court denied both motions and concluded that Tyler's fourth CR 60.02 motion was untimely, and the relief sought was not available pursuant to CR 60.02. Tyler appealed this denial. This Court again affirmed the circuit court and held that Tyler's motion was untimely. The issues should have been presented on direct appeal or in an RCr 11.42 motion and did not warrant relief pursuant to CR 60.02.

Finally, Tyler filed yet another motion pursuant to KRS 532.070 to modify his sentence. He claimed that an improper jury instruction had been presented to the jury during the penalty phase and that the Henderson Circuit Court still had jurisdiction to modify his sentence, although more than ten days had passed since the judgment against Tyler was entered. As stated above, on July 19, 2000, the circuit court denied Tyler's second motion to modify his sentence. On July 28, 2000, Tyler filed a motion with the Henderson Circuit Court

requesting the circuit court issue findings of facts and conclusions of law regarding its denial. Also, as stated above, on August 3, 2000, the circuit court denied Tyler's motion for findings of facts and conclusions of law. Subsequently, Tyler appealed both denials to this court.

Both denials were consolidated on appeal to this court, which affirmed the circuit court in the above-referenced opinion rendered January 25, 2002.

On May 17, 2004, Tyler, pro se, filed the RCr 11.42 motion which is the subject of this appeal. In so doing, he admitted that this motion was a successive RCr 11.42 motion, and also admitted that the motion was untimely under RCr 11.42(10), as it was filed more than three years after the judgment became final. He contended, however, that his arguments pertaining to impropriety in the penalty phase jury instructions, causing the instructions to compel the jury to recommend a life sentence, were properly before the trial court pursuant to RCr 11.42(10)(a) and (b), which allow the filing of an RCr 11.42 motion outside the three year time limit providing (a) the movant claims and proves that the facts upon which the claim is based were unknown to the movant and could not have been ascertained by due diligence, or (b) that the fundamental constitutional right asserted was not established within that three year period and has been held to apply retroactively. In summarily denying the motion, the trial court found that this

was a successive RCr 11.42 motion, and that that neither of the RCr 11.42(10)(a) or (b) exceptions applied.

Before us, Tyler raises three arguments, all alleging violations of state and federal constitutional rights. The first claims trial court error in denial of his RCr 11.42 motion as untimely; and the second two arguments attempt to reach the merits of his argument on an improper penalty phase jury instruction. We find no error in the trial court's denial of Tyler's motion as untimely. First, Tyler admits that his motion was filed outside of the three-year time limit. Second, neither of the exceptions to the untimeliness rule apply. RCr 11.42 (10)(a) is not applicable as the facts upon which Tyler based his motion were known or should have been known to Tyler at the time that he directly appealed his case to the Kentucky Supreme Court, and RCr 11.42 (10)(b) is likewise inapplicable as his claimed constitutional violations were available to him at the time of his direct appeal. Additionally, as a successive motion, he is precluded under RCr 11.42(3) from bringing issues that could have been brought in his first RCr 11.42 motion. Gross v. Commonwealth, 648 S.W.2d 853, 857 (Ky. 1983). As illustrated above, Tyler has had numerous opportunities to have meaningful review of his issues.

For the foregoing reasons, the order of the Henderson Circuit Court is affirmed.

ALL CONCUR.

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