

RENDERED: MAY 19, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002654-MR

GEORGE RUSSELL ABNEY

APPELLANT

v. APPEAL FROM EDMONSON CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 98-CR-00037

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: KNOPF AND TACKETT, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

TACKETT, JUDGE: George Abney, Sr., appeals from a decision of the Edmonson Circuit Court denying his successive motion for post-conviction relief, pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42 without an evidentiary hearing. Abney, *pro se*, argues that the Commonwealth breached the plea agreement and that he was improperly convicted of conspiracy despite the

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

acquittal of all co-defendants. We find that he is not entitled to relief and affirm the trial court.

Abney pled guilty, but mentally ill, to second-degree arson in October 1999. The allegation against him was that he had hired his son, George Abney, Jr., and a friend of his son's, Scotty Karnes, to burn down the house where his ex-wife was currently residing. He was sentenced to ten years' imprisonment and ordered to pay \$25,000.00 restitution. Abney's son was tried and acquitted in October 2002, and Karnes received immunity from prosecution in exchange for his testimony.

After his sentencing, Abney filed numerous *pro se* motions for post-conviction relief. In October 2000, he filed his first RCr 11.42 motion wherein he claimed ineffective assistance of counsel. The trial court's order denying the motion was upheld on appeal in an unpublished opinion, 2001-CA-000135. This court subsequently denied his petition for rehearing, and the Kentucky Supreme Court denied his motion for discretionary review in January 2003. Abney next requested a writ of *habeas corpus* from the Federal District Court, claiming that state courts had failed to adequately address his claim of ineffective assistance. Again, he was unsuccessful. The Sixth Circuit Court of Appeals denied him a certificate of appealability on April 23, 2004.

While his first RCr 11.42 was winding its way through the court system, Abney filed additional motions under Kentucky Civil Rule (CR) 60.02 (2002), RCr 10.26 (2003), and CR 60.03 and 61.02 (2003). All of these motions were denied by the trial court. Abney opted to appeal from some of the trial court's orders, which were upheld by this court. On September 4, 2004, Abney filed a second RCr 11.42 motion containing two claims. He alleged that the Commonwealth had breached its plea agreement with him continuing to prosecute his son for arson. Further, he claimed that his conviction was invalidated by Kentucky Revised Statute 506.070(3) which bars conviction of a defendant on a charge of conspiracy if all of his co-conspirators are acquitted. The trial court denied his motion without an evidentiary hearing, and this appeal followed.

The claims which Abney asserted in his 2004 RCr 11.42 motion have both been raised in previous claims for post-conviction relief. Abney's claim that his conviction was invalidated by the jury's decision to acquit his son was reviewed in proceedings on his CR 60.02 motion, filed November 1, 2002, and his contention that the Commonwealth breached the plea agreement was originally raised in his CR 60.03 and 61.02 motion, filed December 11, 2003. Further, his current RCr 11.42 motion is untimely. Subsection (10) of the rule requires claims for relief to be filed within three years of the date on which

the judgment becomes final. Abney was sentenced on his guilty plea on October 18, 1999, and he did not file a direct appeal.

His present RCr 11.42 motion was filed September 4, 2004.

Exceptions to the three-year limit exist for situations where facts were unknown to the movant within the time limit or where new rights are created and held to apply retroactively.

Although Abney's son was not tried for his alleged participation in the arson until October 2002, we find that an additional time lapse of two years before Abney filed his current motion for relief was not warranted. Thus, Abney's motion fits within neither exception to the three-year limit in RCr 11.42(10).

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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