

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000224-MR

FRANCIS GERALD THOMAS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOHN WOODS POTTER, JUDGE
INDICTMENT NO. 95-CR-000358

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; HENRY AND SCHRODER, JUDGES.

HENRY, JUDGE: Francis Gerald Thomas appeals from the Jefferson Circuit Court's denial of his RCr¹ 11.42 motion. On review, we affirm.

The Circuit Court denied Thomas's motion because it was not filed within the time limit provided in the rule. Thomas contends that the limit should be extended because he *could have* filed a petition for certiorari to the United States Supreme Court within ninety days after the decision of the

¹ Kentucky Rules of Criminal Procedure.

Kentucky Supreme Court became final. Although he admits he did not file a petition for certiorari, he urges us to rule that the Kentucky Supreme Court's decision was not "final" for purposes of RCr 11.42, until the time period for filing such a petition expired.

All the substantive arguments contained in Thomas's RCr 11.42 motion pertain to the jury instructions. Some of these arguments also involve the exception to the time limitation provided for in RCr 11.42(10)(b). The Circuit Court had to examine these arguments in order to determine whether they should be considered even though the motion was untimely, but the court ultimately found that none of them had merit.

Thomas was convicted of various crimes, including wanton murder and trafficking in a controlled substance in the first degree, for his involvement in a tragic incident that occurred in Louisville on February 8, 1995. Thomas wanted to buy a kilogram of cocaine. After making various contacts, he made an agreement with Roy Lee Woods to purchase the cocaine for \$27,000.00. The transaction was to take place in the parking lot of Trixie's Lounge on Preston Highway. Woods arrived with Aaron McDuffie and Avery Graves. Thomas was accompanied by Kenneth Furman. The parties met inside the bar and then proceeded to the parking lot. Their vehicles were parked some distance apart. Woods and Thomas went to Thomas's vehicle.

Thomas gave the cash to Woods, who took it to his car and put it in the trunk. Furman was at Woods's vehicle when Woods approached with the money, and received \$500.00 as part payment for his role in arranging the transaction. Furman asked Woods, "Where's the dope?" and Woods replied that he had given it to Thomas. As Furman walked to Thomas's car, the Woods vehicle left the scene, driven by Avery Graves. When Furman got into the car with Thomas, they discovered that neither of them had received the cocaine. Thomas pursued the Woods vehicle. The parties exchanged gunfire and reached speeds estimated at up to 100 miles per hour through residential and business streets. The Woods vehicle, with Graves driving, ran a red light at the intersection of Shelby Street and Eastern Parkway and collided with a vehicle driven by Clara McDonald. Clara was killed instantly. The other occupant of the McDonald vehicle, Clara's eighteen-year-old son Robert, died later as a result of head injuries suffered in the collision. Thomas, still in pursuit, also ran the red light and collided with a different vehicle, causing property damage but no serious injuries. Thomas, Graves, and Woods were all tried, convicted and sentenced to life in prison for wanton murder and received concurrent sentences for other convictions. Their sentences were affirmed on direct appeal to the Kentucky Supreme Court. See Graves v. Commonwealth, 17 S.W.3d 858 (Ky. 2000).

We agree with the trial court that Thomas's motion was untimely. The conviction was affirmed by the Kentucky Supreme Court on January 20, 2000. Thomas filed a petition for rehearing, which was denied on June 15, 2000. The conviction became final on that date. CR² 76.30(c); see also Palmer v. Commonwealth, 3 S.W.3d 763 (Ky.App. 1999). Therefore, Thomas had until June 14, 2003, to file a motion under RCr 11.42(10). His motion was not filed until August 21, 2003. Finality of Kentucky judgments is determined by Kentucky law. Thomas cites to no authority in support of his contention that the limitation period for filing a motion under RCr 11.42 is tolled by the period within which a petition for certiorari to the United States Supreme Court could have been filed had he chosen to file one.

RCr 11.42(10) provides two narrow exceptions to the three-year limitation period. The rule states in relevant part:

(10) 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

²Kentucky Rules of Civil Procedure.

right asserted was not established within the period provided for herein and has been held to apply retroactively.

We find it difficult to improve upon the wording of the Opinion and Order of the trial court in ruling on the remaining issues, and we therefore adopt that wording as our own, as follows:

Thomas argues that the statute of limitations should be tolled because Robertson v. Commonwealth, 82 S.W.3d 832 (Ky. 2002) and Patterson v. Haskins, 316 F.3d 596 (6th Cir. 2003), cases decided after his appeal became final, established a constitutional right to have a jury instruction on proximate cause. Thomas also contends that the rights created by these cases should be applied retroactively to Thomas.

The Court finds that neither Robertson nor Patterson addressed a fundamental constitutional right "not established" within the time following the date of Thomas's final judgment from the Supreme Court of Kentucky. In Robertson, the Supreme Court of Kentucky held that the second degree manslaughter and reckless homicide instructions given to the jury did not "sufficiently frame" the issue of causation because they omitted the "substantially more probable" element of KRS 501.060(3)(b). Robertson, supra, at 838. However, the court did not provide that a fundamental right to a different causation instruction had been established. In fact, the court affirmed the defendant's conviction, noting that the instructions for second degree manslaughter and reckless homicide were not prejudicial to the defendant. Robertson, supra, at 839.

In Patterson, the Sixth Circuit Court of Appeals held that since a jury instruction for involuntary manslaughter,

based on child endangering, omitted the proximate cause element, the defendant must be granted a writ of habeas corpus. Patterson, supra, at 607, 610. The court reasoned that the omission of the proximate cause instruction violated the defendant's fundamental constitutional right to have a jury determine that the defendant was guilty of every element of a crime. Patterson, supra, at 608, citing to United States v. Gaudin, 515 U.S. 506, 522-23, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995)(holding that a criminal defendant has the constitutional right to have the jury determine a defendant's guilt of every element of his offense). Therefore, Patterson did not establish a fundamental constitutional right as required by RCr 11.42(10)(b). Instead, Patterson relied on an already well-established constitutional right to have every element of an offense proved.

Since Robertson and Patterson, which Thomas relies on, did not fall within the exception in RCr 11.42(10)(b) of creating a fundamental constitutional right not established, Thomas's RCr 11.42 motion is not timely. Therefore, Thomas's RCr 11.42 motion is denied. Although the Court is not ruling on the retroactivity of Robertson and Patterson, it notes that new rules of criminal procedure only apply to cases pending on appeal at the time the new rule is announced. Justice v. Commonwealth, 987 S.W.2d 306, 311 (Ky. 1998) citing to Griffith v. Kentucky, 479 U.S. 314 (1987). Therefore, even if Robertson and Patterson had established new rules establishing a fundamental constitutional right, they would not have applied to Thomas because his appeal was already final when they were issued. In addition, the Court notes that the instruction issue raised by Thomas in his RCr 11.42 motion was already raised on appeal and decided against Thomas by the Supreme Court of Kentucky. Graves, supra, at 864-65.

The Opinion and Order of the Jefferson Circuit Court
denying Thomas's RCr 11.42 motion is affirmed.

ALL CONCUR.

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