

RENDERED: MAY 12, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001185-MR

MICHAEL DEWAYNE GRIMES

APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 99-CR-00556

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: HENRY AND SCHRODER, JUDGES; EMBERTON, SENIOR JUDGE.¹
EMBERTON, SENIOR JUDGE: On January 31, 2000, Michael Dewayne Grimes pleaded guilty to first-degree rape and the amended charge of second-degree sexual abuse. On March 2, 2000, the circuit court entered the final judgment and sentence. In accordance with the plea agreement, Grimes was sentenced to twenty years' imprisonment on the rape charge and twelve months' imprisonment on the sexual abuse charge. He filed a motion to set aside or vacate the judgment and sentence pursuant to RCr

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

11.42 and CR 60.02 on August 24, 2004, alleging that he received ineffective assistance of counsel and that his conviction was a "miscarriage of justice."

Grimes was babysitting the victim, K.S., a three year old child, at the time of the sexual contact. Grimes recites in his brief the facts as he gave them to the police officer investigating the crime as follows:

Michael in effect advised him, that he (Michael) and [K.S.] had been watching T.V. and playing in his bedroom. At some point Michael indicated that [K.S.'s] pants and underwear slipped down and as he got up from the bed his own pants and underwear slipped down. As he bent over to kiss [K.S.] on the forehead his penis accidentally slid into the child's vagina at all rather it "slid into" for only a couple of seconds and was quickly removed withou (sic) any penetration occurring. Although Michael indicated that he did not ejaculate he later indicated that there was seminal fluid present and some of this got on the child.

Confronted with this bizarre account of his client's sexual contact with a young child, Grimes's attorney recommended that he accept the Commonwealth's plea offer.

The circuit court held that the RCr 11.42 motion, filed over four years after the entry of the final judgment and sentence, was time barred. RCr 11.42(10) provides that a motion must be brought within three years after the judgment becomes final unless the movant alleges and proves the facts on which he

relies were not, or could not have been, known to him within the three year period; or there is a fundamental constitutional right asserted that was not established within the time period and that has been held to apply retroactively. Neither exception to the three year time limitation has been asserted and proven by Grimes; the circuit court, therefore, properly found his motion to be untimely.²

Grimes complains on appeal that although his motion alleged ineffective assistance of counsel and was brought pursuant to RCr 11.42, he also brought the motion pursuant to CR 60.02. The basis of his motion was his allegation that his counsel was ineffective, and, therefore, his plea was not knowingly, willingly and voluntarily entered. Although CR 60.02 is referenced in the motion, the proper avenue for relief is a motion brought pursuant to RCr 11.42. Claims of ineffective assistance of counsel and the validity of a guilty plea are not properly raised in a CR 60.02 motion.³ The circuit court correctly considered the motion pursuant to RCr 11.42 and its decision that the motion was untimely is affirmed.

ALL CONCUR.

² Palmer v. Commonwealth, 3 S.W.3d 763 (Ky.App. 1999).

³ Gross v. Commonwealth, 648 S.W.2d 853 (Ky. 1983); McQueen v. Commonwealth, 948 S.W.2d 415 (Ky. 1997).

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