

RENDERED: OCTOBER 27, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002506-MR

FRED ERNEST JONES

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE FARMER H. HELTON, JUDGE
ACTION NO. 99-CR-00072

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: DIXON AND TAYLOR, JUDGES; KNOPF,¹ SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Appellant, Fred Jones, was convicted of two counts of sodomy in the second degree following a jury trial in Bell Circuit Court. He received a total of twenty years' imprisonment. Our Supreme Court affirmed the conviction on direct appeal. 2005-SC-0785-MR. The opinion was final on September 13, 2001. Jones, *pro se*, filed a motion to vacate the judgment pursuant to RCr 11.42 on June 21, 2005. The trial court summarily denied the motion as untimely. This appeal follows.

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

Jones argues that equitable tolling should be applied to excuse his delay because a prison riot on September 14, 2004, made the law library inaccessible until January 2005.

RCr 11.42(10) provides:

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.

In Robertson v. Commonwealth, 177 S.W.3d 789, 792 (Ky. 2005), our Supreme Court adopted the five factor Dunlap test for determining whether equitable tolling applies to an otherwise time-barred RCr 11.42 motion: (1) the petitioner's lack of notice of the filing requirement; (2) the petitioner's lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the respondent; (5) the petitioner's reasonableness in remaining ignorant of the legal requirement for filing his claim. (Citing Dunlap v. United States, 250 F.3d 1001 (6th Cir.1988)). As factors one, two, and five are essentially incorporated into RCr

11.42(10)(a), the primary factors to be considered are factors three (diligence) and four (prejudice). Id.

We find that Jones is not entitled to equitable tolling based upon the application of the Dunlap test to the facts of this case. We cannot conclude that Jones has satisfied the diligence requirement. Jones acknowledged the original filing deadline and that his motion was untimely. Additionally, the alleged prison riot that prevented him from accessing the law library did not occur until September 14, 2004, the date of the filing deadline for his motion. He does not even allege that his motion was ready to be mailed that day, only that it was "well underway." Additionally, the motion was filed on June 21, 2005, six months after Jones stated that the library had reopened. The trial court correctly denied the motion as untimely.

Accordingly, the order of the Bell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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