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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000840-MR

BILLY RAY COLLINS

APPELLANT

v.

APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL WRIGHT, JUDGE
INDICTMENT NO. 96-CR-00159

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** *

BEFORE: DIXON, VANMETER, AND WINE, JUDGES.

DIXON, JUDGE: Appellant, Billy Ray Collins, appeals from the Letcher Circuit Court's denial of his motion for post-conviction relief pursuant to RCr 11.42. We conclude that Appellant's motion was untimely, as it was filed outside the three-year requirement set forth in RCr 11.42(10). Thus, we affirm the lower court.

This matter has a lengthy and complex procedural history. In March 1997, a Letcher County jury convicted Appellant of two counts of incest, and recommended a

sentence of seven and one half years on each count to be served consecutively. However, although the written judgment and sentence entered by the trial court on August 1, 1997, provided that Appellant was to serve a term of imprisonment of seven years and six months for each of the two offenses, it did not specify whether the sentences were to be served concurrently or consecutively.

Trial counsel thereafter filed a direct appeal to this Court on August 8, 1997. However, the appeal was subsequently dismissed in February 1998, for failure to file a brief or respond to a show cause order. In December 1998, Appellant filed a *pro se* RCr 11.42 motion alleging ineffective assistance of counsel based, in part, on the dismissal of his direct appeal. Although it does not appear from the record that the motion was ever ruled on, this Court reinstated Appellant's direct appeal in March 1999, noting that Appellant was not aware that his trial counsel had been suspended from the practice of law in January 1998.

After his appeal was reinstated, Appellant retained new counsel. In September 1999, counsel filed a motion to dismiss the direct appeal on the grounds that a review of the file indicated there were no appealable issues. Counsel noted, however, his intent to seek a clarification of Appellant's sentence in the trial court and his belief that this Court did not have jurisdiction to address the issue. By order of this Court dated November 10, 1999, Appellant's direct appeal was dismissed.

In the interim, counsel made an inquiry concerning Appellant's sentence to the Kentucky Department of Corrections (KDOC). In a letter dated October 25, 1999, KDOC wrote:

You received a sentence of seven years and six months on each of two counts of incest. The sentencing judgment indicates the jury recommended these sentences run consecutively, for fifteen years. However, the sentencing judgment did not specify how the sentences were to run. Your sentence was calculated as a fifteen year sentence.

Our Office of General Counsel has reviewed your case, and determined that since the sentencing judgment did not specify how the sentences were to run, the sentences must run concurrently, under the provisions of KRS 532.110(2). Therefore, your sentences have been re-calculated for a total sentence of seven years and six months.

On April 18, 2001, almost eighteen months after the first letter, Appellant received a second letter from KDOC indicating that his sentence had again been recalculated to fifteen years imprisonment. Specifically, KDOC stated,

The Commonwealth's Attorney has provided further information concerning the sentences you received on indictment number 96CR00159. The prosecuting attorney and judge that imposed sentence on July 23, 1997 both agree that it was the intent of the court to follow the jury's recommendation for seven years and six months on Count 1 and seven years and six months on Count 2 with the sentences running consecutively for a fifteen-year sentence.

After discussion with our Office of General Counsel, the decision was made to again recalculate your sentence as a total sentence of fifteen years based on the new information received.

The “further information” referred to in the second KDOC letter was the result of a March 2001 correspondence from the Commonwealth's Attorney's office to KDOC, wherein the Assistant Commonwealth's Attorney explained that he had spoken with the prosecutor assigned to Appellant's case, as well as the trial judge, and both had stated that the sentence imposed was to be fifteen years.

Appellant thereafter filed a motion in the Letcher Circuit Court to clarify his sentence, attaching all three letters. On July 3, 2001, he also filed a Petition for a Writ of Habeas Corpus in the Morgan Circuit Court, the location of his confinement. The Morgan Circuit Court dismissed the petition on July 27, 2001, and this Court subsequently affirmed the dismissal.¹

On August 2, 2001, the Letcher Circuit Court entered an order denying Appellant's motion to clarify his sentence, noting that it was without jurisdiction to hear the matter. Appellant neither filed a motion to alter, amend or vacate nor appealed the circuit court's order. Instead, Appellant filed a Petition for a Writ of Habeas Corpus in Federal Court for Eastern District of Kentucky. Lengthy litigation followed, resulting in an opinion from the Sixth Circuit Court of Appeals on January 5, 2005, wherein the majority held that Appellant had failed to exhaust his state remedies. *Collins v. Million*, 121 Fed.Appx. 628 (6th Cir. 2005) (not recommended for full-text publication).

On April 7, 2005, Appellant filed the instant RCr 11.42 motion in the Letcher Circuit Court claiming that KRS 532.110(2) was controlling and that his sentence should have only been seven years and six months. The trial court denied the motion on April 11, 2006, ruling that it was not filed within the three-year limit required by RCr 11.42(10). This appeal ensued.

Appellant argues herein that the trial court erred in denying RCr 11.42 relief on the grounds that his motion was untimely. Appellant relies on the language of RCr 11.42(10), which provides:

¹ Neither the Morgan Circuit Court order denying the petition, nor this Court's order affirming on appeal specify any reason for denial. *Collins v. Million*, Docket No. 2001-CA-002414-MR (Ky.App., Dec. 11, 2001).

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.

Appellant contends that his case clearly falls within subsection (10)(a), because the facts upon which his claim is predicated were unknown to him within the three-year statute of limitations.

Appellant's final judgment was entered on August 1, 1997. Accordingly, the three-year limitations period expired in 2000. Within that time period, Appellant received the first letter from KDOC applying KRS 532.110(2) and calculating his sentence at seven years and six months. Certainly, at that point it was not in Appellant's best interest to challenge his sentence. Appellant did not receive the second letter from KDOC recalculating his sentence at fifteen years imprisonment until April 2001. Thus, we agree with Appellant that it was not until he received the second letter that the facts upon which his instant claim is predicated became known to him. *See* RCr 11.42(10)(a).

The flaw in Appellant's argument, however, is that RCr 11.42(10)(b) clearly states that, “[i]f the motion qualifies under one of the foregoing exceptions to the three year time limit, the motion shall be filed within three years after the event establishing the exception occurred.” The event establishing the exception to the three-year statutory requirement was the KDOC's April 18, 2001 letter. Thus, Appellant was under a statutory obligation to file his RCr 11.42 motion within three years of receiving the April

2001 letter. RCr 11.42(10)(b). As such, Appellant's motion was clearly untimely as it was not filed until April 7, 2005, a year after the three-year limitations period expired.

Nor do we find persuasive Appellant's claim that his motion falls within the guise of RCr 11.42(10)(b) because his fundamental constitutional right to habeas relief was not known within the statute of limitations period. Appellant clearly has not identified a constitutional right that was established after the limitations period and was given retroactive effect. RCr 11.42(10)(b). Nevertheless, citing to *Commonwealth v. Marcum*, 873 S.W.2d 207 (Ky. 1994), Appellant claims that it was not until the expedited procedure of seeking state habeas corpus relief was exhausted did it become appropriate to file an RCr 11.42. However, the crux of this argument hinges on the merits of Appellant's state habeas corpus petition, which is not before this Court. And *Marcum*, while discussing the remedies provided by both state habeas corpus and RCr 11.42, does not hold that a state habeas petition tolls the time for filing an RCr 11.42 motion.

Instead of appealing from the trial court's August 2001 order denying his motion to clarify sentence, or filing an RCr 11.42 motion, Appellant chose to pursue state and federal habeas corpus relief. The Federal Anti-Terrorism and Effective Death Penalty Act (A.E.D.P.A.) provides a one-year statute of limitations for federal habeas proceedings that is tolled while a motion for state post-conviction relief is pending. 28 U.S.C. § 2244(d)(2). *Bowling v. Commonwealth*, 964 S.W.2d 803, 804 (Ky. 1998). However, Kentucky law contains no analogous provision. Thus, Appellant's election to seek habeas corpus relief must be deemed a waiver of his right to seek state post-conviction relief pursuant to RCr 11.42.

Although we agree with the trial court's decision that Appellant's RCr 11.42

motion was untimely, we remain troubled by the procedural nature of this case. First, KRS 532.110(2) provides that, “[i]f the court does not specify the manner in which a sentence imposed by it is to run, the sentence shall run concurrently with any other sentence which the defendant must serve[.]” Here, contrary to the Commonwealth's assertion, the sentencing judge did not specify - in the sentencing hearing or in the judgment - the manner in which Appellant's sentences were to be served. The KDOC, in its first letter, correctly applied KRS 532.110 in calculating Appellant's sentence at seven years and six months imprisonment. It was not until the Commonwealth's Attorney contacted KDOC in April 2001 that KDOC decided it could, in effect, ignore KRS 532.110, and recalculate Appellant's sentences to run consecutively. We agree with Judge Stafford's² dissenting comment that, “through *ex parte* communication with the prosecutor and the KDOC, [the trial judge] did, in effect, what he had no jurisdiction to do in fact: namely, amend the judgment to correct an omission that, by operation of state law, worked in Collin's favor.” *Collins v. Million, supra*.

Notwithstanding the procedural irregularities of this case, and while Appellant may have other avenues of relief such as an action for declaration of rights, *see Polsgrove v. Ky. Bureau of Corrections*, 559 S.W.2d 736 (Ky. 1977), we must conclude that Appellant's petition for post-conviction relief pursuant to RCr 11.42 was properly denied as being outside the limitations period required by RCr 11.42(10).

The order of the Letcher Circuit Court is affirmed.

ALL CONCUR.

² The Honorable William H. Stafford, Jr., District Judge for the Northern District of Florida, sitting by designation.

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