

RENDERED: JANUARY 18, 2008; 2:00 P.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-001469-MR

RICHARD MOORE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JAMES M. SHAKE, JUDGE  
ACTION NOS. 01-CR-001398, 01-CR-001701 AND 01-CR-002357

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION AFFIRMING

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BEFORE: DIXON, STUMBO AND WINE, JUDGES.

WINE, JUDGE: Richard Moore appeals *pro se* from the Jefferson Circuit Court's denial of his motion for post-conviction relief pursuant to RCr 11.42. We agree with the trial court that Moore was not entitled to relief as his motion was submitted beyond the three-year statute of limitations following his conviction.

The procedural history of this case is rather lengthy. We adopt the Commonwealth's rendition as it is analogous with the record.

In June of 2001, appellant was indicted by a Jefferson County Grand Jury on three counts of theft by unlawful taking over \$300.00, three counts of receiving stolen property over \$300.00, and one count of operation of a motor vehicle by a person whose operator's license has been revoked, suspended, cancelled or denied. The next month, appellant was indicted on two more counts of theft by unlawful taking over \$300.00 and one count of being a persistent felony offender in the first degree. In October of that same year, appellant was indicted again. This time, appellant was indicted on 25 counts of theft by unlawful taking over \$300.00, three counts of burglary in the third degree, one count of receiving stolen property over \$300.00, three counts of burglary in the third degree, one count of receiving stolen property over \$300.00, and one count of being a persistent felony offender [(“PFO”)] in the first degree.

On November 21, 2001, appellant appeared before the trial court to enter guilty pleas to all of the charges contained in the three indictments. For Indictment 01-CR-1398, the Commonwealth recommended a five year sentence on the TBUT convictions, five years for the receiving stolen property convictions, and 90 days for operating a motor vehicle on a suspended or revoked license. All sentences were to run concurrently with each other. Appellant was also ordered to pay restitution.

For Indictment No. 01-CR-1701, the Commonwealth recommended a five year sentence for each of appellant's two TBUT convictions, which was enhanced to 10 years by virtue of appellant's status as a [PFO]. The Commonwealth agreed to recommend probation on the condition that appellant serve six months in jail, enter and successfully complete an inpatient treatment program, and pay restitution. The sentence in this case was ordered to run consecutively with appellant's sentence in 01-CR-2357.

For Indictment No. 01-CR-2357, the Commonwealth recommended a sentence of five years for each of appellant's 25 TBUT convictions (enhanced to 10 years by virtue of appellant's PFO status), five years for each of appellant's three burglary in the third degree convictions (enhanced to 10 years by virtue of his PFO status), and five years for appellant's receiving stolen property conviction (enhanced to 10 years by virtue of his PFO status). All counts in that case were ordered to run concurrently with each other, but consecutively with the sentence in 01-CR-1701. The Commonwealth agreed to recommend probation on the condition that appellant pay restitution, serve six months in jail and enter into "an inpatient program immediately after his release from jail."

Thereafter, on December 6, 2001, the trial court entered a final judgment in each of Moore's cases and sentenced Moore in accordance with the Commonwealth's recommendations in each judgment. Apparently, Moore failed to comply with the trial court's conditions, as his probation was revoked in 2004.

More than four years after his conviction, Moore filed a *pro se* motion for relief pursuant to RCr 11.42. The motion was never stamped by the clerk's office, but Moore states that the RCr 11.42 motion was filed on or about June 14, 2006. However, the certificate of service on the motion states that it was mailed on June 5, 2006. In addition, Moore mailed a "Motion for Leave to Proceed in Forma Pauperis" along with his RCr 11.42 motion that was filed in the clerk's office on June 6, 2006.

The trial court entered an order on June 14, 2006, denying Moore's RCr 11.42 motion as it was untimely filed. This appeal followed.

Moore relies heavily on RCr 11.42 (10)(a) in his argument that his motion should not have been dismissed as untimely. Specifically, Moore argues that his lack of mental capacity has been ongoing such that he did not realize until after the expiration of the limitations period that he was not competent to enter a guilty plea. In support of his argument, Moore asserts he is a “severely addicted individual.” He asserts that he did not receive the treatment indicated in the plea agreement until after he had entered his plea of guilty when he was committed to the Department of Corrections. After treatment, Moore contends that his mental capacity improved.

RCr 11.42(10) requires that any motion to vacate, set aside, or correct a sentence 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.

This Court noted that a judgment becomes final with “the conclusive judgment in the case, whether it be the final judgment of the appellate court on direct appeal or the judgment of the trial court in the event no direct appeal was taken.” *Palmer v. Commonwealth*, 3 S.W.3d 763, 765 (Ky.App. 1999). There is no question that the judgment became final on December 6, 2001. Thus, Moore’s June 2006, motion was clearly untimely unless he proved the grounds set out in RCr 11.42(10)(a).

We agree with the trial court that Moore failed to prove such grounds.

Moore's argument on appeal is directly contradictory to his statements before the trial court. Moore specifically indicated to the court during his guilty plea that he was not impaired by drugs and that he understood the proceedings against him. Moore freely signed the "Motion to Enter Guilty Plea" forms which stated that he was not impaired by drugs, that he was fully informed about the charges against him, and that he knowingly, intelligently and voluntarily declared his plea of guilty. While such pronouncements in open court do not preclude a claim of incompetence, they raise a strong presumption that Moore made a knowing, intelligent and voluntary guilty plea.

Moreover, Moore presents no evidence substantiating his claim that he was not competent to enter a guilty plea. He fails to indicate for our review what substance he was addicted to and how that substance diminished his mental capacity. Further, Moore fails to indicate exactly when his mental capacity returned, and he has failed to offer any evidence to support his claim that he suffered from diminished mental incapacity either at the time he entered his guilty plea or at anytime thereafter. Indeed, the record refutes his general allegations of diminished capacity. Moore went to the Department of Corrections in March 2004, nearly one year prior to the end of the three-year statute of limitations. But the record indicates that Moore filed a number of *pro se* motions and correspondence with the trial court between the time final judgment was entered and the time he filed his RCr 11.42. Those motions included a *pro se* motion for shock probation, a *pro se* motion for "Alternative Sentencing Plan," and another motion for shock probation.

Furthermore, Moore is required to offer some proof that the facts predicated his claim were either unknown to him or undiscoverable by the exercise of due diligence. *Commonwealth v. Stacey*, 177 S.W.3d 813 (Ky. 2005). However, Moore submits that he had knowledge of his addiction prior to the plea proceedings. Therefore, the elements under RCr 11.42(10) required to toll the statute simply have not been met.

Finally, Moore argues he was entitled to an evidentiary hearing and further claims that his defense counsel was ineffective. But since Moore's motion was untimely filed, we need not address the merits of these claims.

Accordingly, the Jefferson Circuit Court's order denying Moore's RCr 11.42 motion as untimely is affirmed.

ALL CONCUR.

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