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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-000353-MR

JERRY COLLINS

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
INDICTMENT NO. 93-CR-00035

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT AND STUMBO, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

LAMBERT, JUDGE: On September 15, 1997, the Supreme Court of Kentucky's opinion affirming Jerry Collins's life sentence for rape, sodomy, incest, and wanton endangerment involving his minor daughter became final. *See Collins v. Commonwealth*, 95 S.W.3d 569 (Ky. 1997). Collins had three years from that date to file any motion to vacate, set

¹ Senior Judge David C. Buckingham, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and KRS 21.580.

aside, or correct the sentence absent a showing of either (1) newly discovered facts that were previously unobtainable but are material; or (2) a new, material, retroactive case-law precedent. *See* RCr 11.42(10); *Palmer v. Commonwealth*, 3 S.W.3d 763 (Ky. 1998). Therefore, when Collins did not seek relief from his conviction under RCr 11.42 until December 27, 2002, some five years after finality, the circuit court denied his petition as untimely. We now affirm the decision of the circuit court because Collins has failed to establish either of the two aforementioned exceptions to the three-year limitations period.

RCr 11.42 (10)(a) authorizes the filing of an otherwise belated petition to vacate a conviction if and only if the petitioner pleads new, previously unobtainable material facts. Here, Collins relies on the affidavit of one Arnold Con containing double hearsay and indicating that an unidentified juror impeached his own verdict sometime after trial by indicating that he thought Collins was innocent but nevertheless voted to convict. We agree with the circuit court that this affidavit lacks sufficient factual specificity or materiality to meet the requirement of subsection (10)(a). *See* RCr 11.42 (10)(a) (factual allegations must be specific); RCr 10.04 (a juror may not be examined to impeach a verdict except to show that the verdict was made by lot).

RCr 11.42(10)(b) authorizes the filing of an otherwise belated petition to vacate a conviction if and only if a new, material, case-law precedent has been held to apply retroactively. Here, Collins contends that *Estep v. Commonwealth*, 64 S.W.3d 805 (Ky. 2002), *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575 (Ky. 2000), *Jordan v. Commonwealth*, 74 S.W.3d 263 (Ky. 2002), and *Miller v. Commonwealth*, 77 S.W.3d 566 (Ky. 2002), should all retroactively apply to his case. We disagree with

Collins's contention and affirm the circuit court's holding that the Supreme Court of Kentucky has never held that any of these cases are to be applied retroactively. Consequently, Collins has not established the applicability of subsection 10(b)'s exception either.

In sum, Collins's petition for relief from his conviction under RCr 11.42 was filed outside the three-year limitations period. Collins has also failed to establish that either exception to the three-years limitations period applies to his conviction. Accordingly, we hold that Collins's Motion for Relief from Sentence was not timely filed and, therefore, that the circuit court's decision to deny post-conviction relief is correct as a matter of law.

ALL CONCUR.

BRIEF FOR APPELLANT:

James W. Craft, II
Whitesburg, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Michael L. Nickles
Assistant Attorney General
Frankfort, Kentucky