

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2006-CA-000583-MR

LELAND D. MARTIN

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE STEVE ALAN WILSON, JUDGE  
ACTION NOS. 74-CR-15996 AND 74-CR-15998

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \*\* \* \*\* \*

BEFORE: NICKELL AND TAYLOR, JUDGES; PAISLEY,<sup>1</sup> SENIOR JUDGE.

NICKELL, JUDGE: Leland D. Martin, pro se, has appealed from the March 7, 2006, denial of his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42, Kentucky Rules of Civil Procedure (CR) 60.02, writ of error

---

<sup>1</sup> Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

coram nobis,<sup>2</sup> and Kentucky Revised Statutes (KRS) 419.020 in the Warren Circuit Court. We affirm.

In December 1974 Martin was indicted by a Warren County grand jury in two separate indictments for one count of dwelling house breaking and one count of grand larceny on each indictment. On February 13, 1975, Martin pled guilty to these charges and a final judgment was entered on the same day. Pursuant to a negotiated plea agreement, Martin was sentenced to serve three years on each of the dwelling house breaking charges and two years on each of the grand larceny charges, all to run consecutively for a total sentence of ten years imprisonment. On April 16, 1976, Martin filed an RCr 11.42 motion in the Warren Circuit Court claiming that he had been promised that his sentences would be served concurrently, not consecutively; that he relied upon same when he had entered his plea; and that his plea was therefore not voluntarily given. An evidentiary hearing was subsequently held on Martin's motion, and on June 1, 1976, the Circuit Court entered an order denying Martin's requested relief. No appeal of that order followed.

In November 2002 Martin was indicted by the United States District Court for the Southern District of Indiana for possession of a firearm by a convicted felon. On July 7, 2004, Martin was convicted of these charges and sentenced to 210 months imprisonment. Based upon Martin's prior convictions, including, among others, the 1975

---

<sup>2</sup> Martin argues for relief under a writ of error coram nobis, which the Court notes was a common law remedy which has been replaced by the enactment of CR 60.02. Therefore, no further discussion of coram nobis is required.

Warren County conviction, the federal court enhanced his sentence an additional 110 months.

On February 9, 2006, Martin filed a motion to vacate the 1975 judgment pursuant to RCr 11.42, CR 60.02, writ of error coram nobis, and KRS 419.020. The circuit court denied Martin's motion by order entered on March 7, 2006. This appeal followed.

As there was no evidentiary hearing held by the trial court prior to denying Martin's RCr 11.42 motion, our standard of review is "confined to whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." Lewis v. Commonwealth, 411 S.W.2d 321, 322 (Ky. 1967). We find Martin's claims to be totally refuted by the record.

Martin first claims that the court below erred by dismissing his RCr 11.42 motion as untimely filed. RCr 11.42(10) states in relevant part:

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.

If the judgment becomes final before the effective date of this rule, the time for filing the motion shall commence upon the effective date of this rule. If 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.

In the present case, Martin's judgment became final upon the running of the time limit for filing a direct appeal from the judgment rendered on February 13, 1975.

See Palmer v. Commonwealth, 3 S.W.3d 763 (Ky.App. 1999). However, RCr 11.42(10) did not become effective until October 1, 1994, thus giving Martin until October 1, 1997, to file his motion for relief under RCr 11.42. Martin's motion was not filed until February 9, 2006, well in excess of the three-year limitation granted by RCr 11.42(10).

Martin's argument that equitable tolling should apply to excuse the tardiness of his filing is without merit. While RCr 11.42(10) does allow for the tolling of the filing deadlines, Martin has failed to meet either of the requirements for an exception as set forth in the rule. Martin's conviction was over 30 years old before the motion below was filed. Martin could not have been totally unaware of the facts underlying his claims within such a lengthy time frame. In fact, Martin had previously filed a motion for relief under RCr 11.42 alleging nearly the same facts as alleged herein, further undermining his contention that he was unaware of the facts giving rise to the instant motion for relief. Further, the law is well-settled that successive motions for relief under RCr 11.42 are barred. See Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001); Shepherd v. Commonwealth, 477 S.W.2d 798 (Ky. 1972); Lycans v. Commonwealth, 511 S.W.2d 232 (Ky. 1974); and Case v. Commonwealth, 467 S.W.2d 367 (Ky. 1971) . As such, the trial court did not err by denying Martin's motion without holding an evidentiary hearing.

Additionally, the fundamental constitutional right Martin is asserting was established prior to the time period in which he had to file his motion for relief. See Strickland v. Washington, 466 U.S. 68, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); and Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Therefore, Martin has failed to prove that he is entitled to a tolling of the time limitations set forth in RCr 11.42(10), and we find that the trial court was not clearly erroneous in denying his motion.

Finally, we must address Martin's motion for relief under CR 60.02 and KRS 419.020. Petitions for relief under CR 60.02 must be brought within a reasonable time, and in certain circumstances within one year of the alleged harmful act or omission. In the instant case, Martin waited in excess of 30 years before filing his motion. In a factually similar case, Ray v. Commonwealth, 633 S.W.2d 71 (Ky.App 1982), we denied relief under CR 60.02 where convictions entered 12 years earlier were being attacked, holding that the appellant had not filed for relief within a reasonable time and no extraordinary grounds for relief had been advanced. For the same reasons, we find that the trial court herein did not err in denying Martin's requested relief.

Martin's argument that he is entitled to relief under the habeas corpus provisions of KRS 419.020 has even less merit. "The writ of habeas corpus is a constitutional protection against illegal restraint, its purpose being to regain liberty of a person who is being illegally restrained. When appellant regained his freedom, his habeas corpus proceeding became moot [citations omitted]." Griffith v. Schultz, 609 S.W.2d 125, 126 (Ky. 1980). Martin fully served his time for the underlying conviction

and thereafter regained his freedom with respect to that conviction. Martin's current incarceration on unrelated federal charges is of no consequence to the instant case, in which he now attempts to assert a habeas corpus challenge to his previous incarceration. Therefore, no relief can be had under KRS 419.020.

For the foregoing reasons, the Warren Circuit Court's order denying Martin RCr 11.42, CR 60.02, and KRS 419.020 relief is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Leland D. Martin, Pro Se  
Terre Haute, Indiana

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General

Michael L. Harned  
Assistant Attorney General  
Frankfort, Kentucky