

Commonwealth Of Kentucky

Court Of Appeals

No. 1996-CA-002335-MR

DAVID E. WILLIAMSON

APPELLANT

V. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS J. KNOFF, JUDGE
ACTION NO. 86-CR-1722

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * * *

BEFORE: GUDGEL, Chief Judge; ABRAMSON and COMBS, Judges.

COMBS, JUDGE: David Eugene Williamson (Williamson) appeals *pro se* from the opinion and order of the Jefferson Circuit Court, entered August 1, 1996, which denied his motion to set aside judgment pursuant to RCr 11.42. Williamson argues that: he was subjected to double jeopardy, received ineffective assistance of counsel, and was improperly denied an evidentiary hearing. Finding no merit in the appellant's contentions, we affirm the judgment of the Jefferson Circuit Court.

Williamson was convicted by a jury of complicity to commit murder; he was sentenced to seventy-five years in prison on February 26, 1988. On March 7, 1988, Williamson filed a motion for a new trial and a Judgment Not Withstanding the Verdict, which was subsequently denied by the court. The Final Judgment and Sentence of Imprisonment was entered on April 1, 1988. On April 5, 1988, Williamson filed a notice of appeal. On October 3, 1989, the Kentucky Supreme Court affirmed the judgment of the Jefferson Circuit Court.

On December 18, 1995, Williamson filed a motion to proceed *in forma pauperis*, a motion to vacate judgment pursuant to RCr 11.42, a motion for appointment of counsel, and a motion for an evidentiary hearing. On August 1, 1996, the Jefferson Circuit Court issued an order denying Williamson's motion to set aside judgment pursuant to RCr 11.42. On August 21, 1996, the court issued an order sustaining Williamson's motion to proceed *in forma pauperis*, but overruling his motion for appointment of counsel on appeal. This appeal followed.

Williamson first argues that the trial court subjected him to double jeopardy by trying him for murder and for complicity to commit murder arising from a single course of conduct. A double jeopardy claim should be raised on direct appeal and is not appropriate for RCr 11.42 relief. Brewster v. Commonwealth, Ky.App., 723 S.W.2d 865 (1986). In order for a defendant to invoke RCr 11.42 relief, there must exist: (1) a violation of a constitutional right; (2) a lack of jurisdiction;

or (3) such violation of a statute as to make the judgment void and, therefore, subject to collateral attack. Tipton v. Commonwealth, Ky.App., 376 S.W.2d 290 (1964). While a RCr 11.42 motion provides the appellant with the opportunity to attack an erroneous judgment on grounds not available by direct appeal (Gross v. Commonwealth, Ky., 648 S.W.2d 856 (1983)), it is not intended to give defendant a vehicle for pursuing what is in essence an alternate appeal or for indirectly seeking review of trial errors that should have been raised upon direct appeal. Williamson's argument as to the issue of double jeopardy fails as he has failed to demonstrate any of the three pertinent grounds available pursuant to RCr 11.42.

Williamson also argues that he was denied his constitutional right to effective assistance of counsel. Williamson alleges that his counsel: failed to raise appropriate defenses, did not adequately investigate, and did not adequately represent him.

The two-pronged test adopted by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), governs this case.

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, supra at 687.

Williamson has failed to meet the first prong of the Strickland test by being unable to demonstrate that his counsel's performance was deficient. According to RCr 11.42 (2), the motion "shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies..." (emphasis added). Williamson alleges that his counsel neglected to raise appropriate defenses and that he did not adequately investigate. However, these bare allegations are wholly unsupported by specific facts. Without a factual basis, the motion must be summarily overruled. See Stanford v. Commonwealth, Ky., 854 S.W.2d 742 (1993).

The second prong of the Strickland test -- whether the appellant's counsel was so deficient as to prejudice the defense -- is a moot point. Williamson has failed to show any deficiency at all -- much less that of the egregious degree amounting to deprivation of a fair trial and the probability that, but for counsel's alleged deficiency, the final outcome of his case would have been different. Therefore, Williamson's claim of insufficiency of counsel must fail.

Williamson next argues that the trial court erred in overruling his motion for an evidentiary hearing pursuant to RCr 11.42 (5). When the trial court denies a motion for an evidentiary hearing on an RCr 11.42 motion, our review is limited 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, Ky.App., 411 S.W.2d 321, 322 (1967). A review of the record before us substantiates that Williamson's allegations are meritless. Since his allegations are refuted by the record as a whole, we hold that the trial court was not required to conduct an evidentiary hearing. Hopewell v. Commonwealth, Ky.App., 687 S.W.2d 153 (1985).

Finally, Williamson contends that the trial court erred in overruling his motion for appointment of counsel. In Commonwealth v. Ivey, Ky., 599 S.W.2d 456 (1980), the Supreme Court interpreted KRS 31.110 and RCr 11.42 as providing for the appointment of counsel on all RCr 11.42 motions where the movant so requests. However, in Commonwealth v. Stamps, Ky., 672 S.W.2d 336 (1984), the Court held that the failure of the trial court to grant a movant's request for counsel in a RCr 11.42 proceeding constituted harmless error as the record revealed that application for relief under the rule amounted to no more than an exercise in futility. Having examined the record, we find that the circumstances of this case dictate that such an "exercise in futility" exists and that, therefore, the court's failure to appoint counsel was harmless error.

In summary, we find that Williamson's claims are unfounded. A double jeopardy claim can not be properly raised before this court pursuant to a RCr 11.42 motion. Williamson failed to state a meritorious claim of ineffective assistance of counsel, and the court was correct in overruling Williamson's

motion to set aside judgment without either appointing an attorney or conducting an evidentiary hearing. Therefore, we affirm the order of the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT *PRO SE*:

David Eugene Williamson
Burgin, KY

BRIEF FOR APPELLEE:

A.B. Chandler III
Attorney General

Gregory C. Fuchs
Assistant Attorney General
Frankfort, KY