

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002715-MR
AND
NO. 1997-CA-002592-MR

RICHARD HENRY MORGAN

APPELLANT

v. APPEALS FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 92-CR-000268

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

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

COMBS, JUDGE: Richard Henry Morgan appeals from a September 29, 1997 order of the Fayette Circuit Court denying relief sought pursuant to RCr 11.42. We affirm.

In 1992, Morgan was indicted for the offenses of capital murder and three counts of robbery in the first degree. He was also charged with the status offense of persistent felony offender in the first degree. A jury trial was conducted.

The Commonwealth's evidence indicated that on the evening of January 26, 1992, Morgan entered the home of an acquaintance. Displaying a handgun, he demanded money from three

men visiting the residence. Following a struggle with Morgan, one of the men was shot. At the conclusion of the guilt phase of the trial, the jury was instructed as to the elements of intentional murder. The jury found Morgan guilty of murder and two counts of robbery. On direct appeal, the Kentucky Supreme Court affirmed Morgan's convictions.

On October 27, 1994, Morgan filed a motion for relief pursuant to CR 60.02 of the Rules of Civil Procedure. The motion was denied by the Fayette Circuit Court. The trial court's order was affirmed on appeal by a panel of this court.

On August 8, 1997, Morgan filed a Rules of Criminal Procedure (RCr) 11.42 motion to set aside judgment along with motions requesting the appointment of counsel and a full evidentiary hearing. Morgan's request for counsel was granted. On September 29, 1997, the Fayette Circuit Court denied appellant's RCr 11.42 motion without an evidentiary hearing. This appeal followed.

The appellant argues that the trial court erred by denying his RCr 11.42 claim without a hearing. He contends that he received ineffective assistance of counsel at trial. In order to prove that he received ineffective assistance, Morgan must show that his trial counsel's performance was deficient to the extent that serious errors were committed that undermined his rights as guaranteed by the Sixth Amendment to the United States Constitution. Additionally, Morgan must prove that these errors so prejudiced the defense that he was deprived of a fair trial. See Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985).

Counsel's representation is presumed to competent. Wilson v. Commonwealth, Ky., 836 S.W.2d 872 (1992). Review is limited to determining whether the motion states grounds which are not refuted by the record and which would require a new trial. Robbins v. Commonwealth, Ky.App., 719 S.W.2d 742 (1986). Where the record on its face refutes the movant's factual allegations in his RCr 11.42 motion, no evidentiary hearing is required. Skaggs v. Commonwealth, Ky., 803 S.W.2d 573 (1990), cert. denied, 502 U.S. 844, 112 S.Ct. 140, 116 L.Ed.2d 106 (1991).

Morgan specifically contends that trial counsel was ineffective by arguing for an instruction on intentional murder alone. He contends that the evidence supported an instruction on lesser-included offenses or on self-defense.

As the trial court noted, a review of the record indicates that Morgan's counsel withdrew a request for instructions on lesser-included offenses at Morgan's behest. At trial, counsel indicated that he had discussed the instructions with Morgan and that it was Morgan's request that the jury be instructed with respect to intentional murder only. When questioned directly, Morgan admitted this course of conduct.

The decision to have the jury instructed only with respect to intentional murder reflected a well-developed, deliberate trial strategy. Significantly, the approach employed by counsel at trial is *per se* matter of professional discretion. Consequently, the Kentucky Supreme Court has specifically recognized that a "reasonable trial tactic" cannot satisfy the

first requirement of the analysis; i.e., a serious error in counsel's performance. Gall, supra. Although in retrospect a particular strategy may prove to have been flawed, it does not qualify as "unreasonable" for purposes of the test. Since the evidence of record refuted appellant's claim that his counsel failed to provide adequate assistance, the trial court did not err in denying the RCr 11.42 motion without a hearing.

Appellant's remaining contentions are merely general allegations and are insufficient to entitle Morgan to relief. Adkins v Commonwealth, Ky.App., 471 S.W.2d 721 (1971).

The judgment of the Fayette Circuit Court denying appellant's motion for relief is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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