

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-003010-MR

LARRY NICHOLS

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE STEVEN R. JAEGER, JUDGE
ACTION NO. 93-CR-0273

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: GUDGEL, CHIEF JUDGE; COMBS AND GARDNER, JUDGES.

GARDNER, JUDGE: Larry S. Nichols appeals from an order of the Kenton Circuit Court denying his motion for relief under Kentucky Rule of Criminal Procedure (RCr 11.42). We affirm.

Larry Nichols (Nichols), Kevin Morris and Jeff Morris were in a van stopped by a police officer in Kenton County, Kentucky at approximately 4:36 a.m. on May 24, 1992.¹ Nichols was lying in the back of the van next to a woman who appeared not to be breathing. When the police officer went to check on the

¹We have incorporated a portion of the recitation of facts and procedural history rendered in Nichols's prior appeal, No. 1997-CA-000318-MR.

woman, the van sped away. A few minutes later, the officer received a message that the van had been involved in an accident in Boone County. The woman was found dead at the scene of the accident.

Nichols was indicted for murder by the Boone County Grand Jury on July 31, 1992. Nichols moved to transfer the case to Kenton County pursuant to RCr 8.26. The Boone Circuit Court granted the motion after making a determination that the evidence indicated that the offense had occurred in Kenton County. After the transfer, Nichols moved the Kenton Circuit Court to dismiss the indictment for defectively naming Boone County as the place of the offense. On November 28, 1994, the Kenton Circuit Court denied the motion to dismiss and granted appellant's motion to amend the indictment to reflect that the offense had occurred in Kenton County. Nichols proceeded to trial and was convicted of murder by a jury. On March 30, 1996, the Kenton Circuit Court issued a final judgment and imposed a sentence of thirty-five years.

On February 22, 1996, the Supreme Court of Kentucky affirmed Nichols's conviction in an unpublished opinion. Nichols argued in part that his case had been improperly transferred to the Kenton Circuit Court. The argument concluded that RCr 8.26 unconstitutionally permitted changes of venue in violation of Section 11 of the Kentucky Constitution. The Supreme Court held that since the newly advanced theory had not been presented to the trial court, appellate review was precluded (citing Gross v. Commonwealth, ex rel. Cowan, Ky. App., 795 S.W.2d 65 (1990)).

After the denial of his direct appeal, Nichols filed a series of pro se motions. The trial court, in turn, denied all the motions presented by Nichols except for a motion to proceed in forma pauperis. Of all these denials, Nichols only appealed from his "motion for writ of error." On March 6, 1998, a panel of this Court affirmed the trial court's denial of this motion.

During the pendency of this latest appeal, Nichols filed a motion for relief pursuant to RCr 11.42. The trial court overruled this motion on November 4, 1997, and this appeal followed.

Nichols now argues that "[h]ad the trial counsel properly investigated the case before this Court, objected to false testimony, and planed [sic] a sounder defense he would not have been found guilty by a jury of his peers." In an attempt to support this contention, Nichols offers a litany of arguments, including assertions that: 1) he was denied a speedy trial; 2) he was denied a bill of particulars; 3) his conviction was obtained by use of perjured testimony; 4) the Commonwealth withheld exculpatory evidence; 5) the grand jury was unconstitutionally selected and impaneled; 6) the jury was subjected to improper voir dire; 7) witnesses were coached; 8) the indictment was improperly amended to reflect that the crime was committed in Kenton County; 9) exculpatory evidence was destroyed; 10) co-defendants were improperly allowed to confer; 11) the jury was improperly instructed; 12) jurors improperly discussed the case; and, 13) the co-defendants' credibility should have been impeached. We have closely studied the facts, the law, and the

arguments of Nichols and of the Commonwealth, and find no basis for tampering with the order denying Nichols's motion for relief.

For a defendant to seek relief pursuant to an RCr 11.42 motion, he must demonstrate: (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., 376 S.W.2d 290 (1963). Nichols has alleged no grounds that would entitle him to relief pursuant to RCr 11.42. The numerous issues that he raises here either were previously raised or should have been raised on direct appeal to the Kentucky Supreme Court and are not appropriate for RCr 11.42 relief. An appellant is not permitted to raise issues in RCr 11.42 proceedings that could have or should have been raised in the original proceedings or on direct appeal. Williamson v. Commonwealth, Ky., 767 S.W.2d 323 (1989). We find that the issues raised by Nichols do not properly come within the purview of an RCr 11.42 motion, and on this basis alone must affirm the order on appeal.

Arguendo, even were we to construe Nichols's arguments as properly brought in conjunction with an RCr 11.42 motion, they simply form no rational basis for supporting his assertion that he did not receive the effective assistance of counsel to which he is entitled. See generally Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), requiring the movant to show that his counsel's performance was deficient and that the deficiency was prejudicial.

For the foregoing reasons, this Courts affirms the judgment of the Kenton Circuit Court.

ALL CONCUR.

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