

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002370-MR

WILLIAM R. VIRGIL

APPELLANT

V. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD KOPOWSKI, JUDGE
ACTION NO. 87-CR-199

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

* * * * *

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

GUDGEL, CHIEF JUDGE: This is an appeal from an order entered by the Campbell Circuit Court denying an RCr 11.42 motion. On appeal appellant, William R. Virgil, contends that the trial court erred by failing to find that he was denied a fundamentally fair trial and that he received ineffective assistance of counsel. We disagree with both of appellant's contentions. Hence, we affirm.

In September 1988, appellant was convicted of murder and sentenced to seventy years' imprisonment. Shortly after the final judgment was entered, appellant unsuccessfully sought CR 60.02 relief on the ground that the judgment was based upon

fraudulently obtained evidence. In May 1990, the supreme court affirmed both the judgment of conviction and the order denying CR 60.02 relief. In February 1992 appellant filed a pro se RCr 11.42 motion. After counsel was appointed to represent appellant, he was granted leave to serve as co-counsel in the RCr 11.42 proceeding. The court conducted an evidentiary hearing on the motion in August 1992. Thereafter, numerous extensions of time were granted to appellant to file a memorandum in support of his motion and his initial memorandum was filed in April 1995. On September 8, 1997, the trial court entered an order denying appellant's motion. This appeal followed.

First, appellant contends that the court erred by failing to find that the perjured testimony of one witness denied him a fundamentally fair trial. We disagree.

An RCr 11.42 proceeding provides a trial court with the opportunity "to review its judgment and sentence for constitutional invalidity of the proceedings prior to judgment or in the sentence and judgment itself." Commonwealth v. Wine, Ky., 694 S.W.2d 689, 694 (1985). Indeed,

RCr 11.42 does not authorize relief from a judgment of conviction for mere errors of the trial court. In order for the rule to be invoked there must be a violation of a constitutional right, a lack of jurisdiction, or 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 (1964).

Lynch v. Commonwealth, Ky. App., 610 S.W.2d 902, 906 (1980). An allegation regarding perjured testimony at a defendant's trial, however, clearly does not afford a basis for RCr 11.42 relief.

Hendrickson v. Commonwealth, Ky., 450 S.W.2d 234 (1970); Fields v. Commonwealth, Ky., 408 S.W.2d 638 (1966).

Apparently, witness Joe Womack testified at trial that he and appellant shared a prison cell and that appellant admitted to him that he killed the victim. However, appellant was able to conclusively establish at the RCr 11.42 hearing that Womack's testimony regarding their sharing a jail cell was false. He urges, therefore, that Womack's perjured testimony deprived him of a fair trial and warranted granting RCr 11.42 relief.

As noted earlier, perjured testimony does not afford a basis for granting RCr 11.42 relief. See Commonwealth v. Basnight, Ky. App., 770 S.W.2d 231 (1989). Further, the evidence adduced at the RCr 11.42 hearing regarding the issue of whether appellant and Womack shared a prison cell did not necessarily establish that appellant was denied a fair trial because it only demonstrated Womack's lack of credibility. Indeed, as recognized by the supreme court in its opinion affirming the judgment of conviction, appellant's conviction was not based exclusively upon Womack's testimony.

Appellant's reliance upon Williams v. Commonwealth, Ky., 569 S.W.2d 139 (1978), is unavailing. In Williams, the trial court refused to permit the defendant to question a witness during trial as to his possible motives for testifying. The supreme court held that the right of a criminal defendant to cross examine a witness to show motive or prejudice or otherwise impeach the witness's credibility is fundamental to a fair trial. Williams, supra. Further, the court stated that "a defendant has

a right to expose the fact that a witness has criminal charges pending against him and thereby possesses a motive to lie in order to curry favorable treatment from the prosecution."

Williams, 569 S.W.2d at 145. The instant action, in contrast to Williams, does not involve a situation where the accused was prevented from questioning a witness as to his possible motives for testifying. Indeed, Womack was extensively cross-examined by appellant's trial attorney and by appellant regarding alleged inconsistencies in his testimony. Further, evidence was adduced at trial from another witness who testified that appellant could not have shared a prison cell with Womack. Thus, the situation in Williams is simply inapposite to the instant action.

Appellant also contends that he was denied effective assistance of counsel. Again, we disagree.

A claim of ineffective assistance of counsel must be established by demonstrating both that the counsel's performance was deficient and that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Gall v. Commonwealth, Ky., 702 S.W.2d 337 (1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). Moreover, a "defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." McQueen v. Commonwealth, Ky., 949 S.W.2d 70, 71 (1997), cert. denied, ____ U.S. ____, 117 S.Ct. 2536, 138 L.Ed.2d 1035 (1997). Further, "the [trial] court must consider the totality of the evidence before the judge or jury at trial

and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonably professional assistance." Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 911 (1998).

Appellant contends that his trial counsel was ineffective because he failed to make a reasonable pretrial investigation as to the locations of his and Womack's prison cells. However, appellant's trial attorney testified at the RCr 11.42 hearing that before the trial he talked with employees at the prison about the records as to appellant's and Womack's prison cells and that he and appellant decided against subpoenaing those records. Moreover, the attorney testified, and the trial record shows, that he challenged Womack's credibility and the discrepancies in his testimony and that he inquired regarding his motivation for testifying. Further, counsel noted that although he would have utilized the prison's records to attack Womack's credibility, it was nevertheless challenged in other ways. In addition, counsel testified that utilizing the prison records to impeach Womack would not have been effective especially since appellant and Womack occupied adjoining jail cells. Given the foregoing testimony, we perceive no basis for a finding that appellant's counsel was ineffective regarding the pretrial investigation of Womack.

Finally, appellant contends that his trial counsel was ineffective because he allegedly prevented him from testifying on his own behalf. We disagree.

Appellant's allegation in this vein is simply not supported by the record. Appellant's trial counsel testified at the RCr 11.42 hearing that he and appellant discussed whether appellant would testify, and that appellant decided not to do so and risk making a mistake during cross-examination. This testimony is uncontroverted except by appellant's contrary unsupported allegation in this proceeding. Since the testimony at the hearing establishes that appellant decided against testifying on his own behalf, we cannot revisit the decision upon his claim of ineffective assistance. See McQueen v. Commonwealth, Ky., 948 S.W.2d 415 (1997).

The court's order is affirmed.

ALL CONCUR.

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