

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002940-MR

JAMES WHITEHEAD

APPELLANT

v. APPEAL FROM GREEN CIRCUIT COURT
HONORABLE WILLIAM M. HALL, JUDGE
ACTION NO. 88-CR-008

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: DYCHE, GUIDUGLI, AND JOHNSON, JUDGES.

JOHNSON, JUDGE: James Robert Whitehead (Whitehead) appeals from an order of the Green Circuit Court entered on October 24, 1997, that denied his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to vacate his sentence. Having concluded that Whitehead's RCr 11.42 motion is successive and that the circuit court's findings were not clearly erroneous, we affirm.

On July 28, 1989, Whitehead was convicted of rape in the first degree (Kentucky Revised Statutes (KRS) 510.040), rape in the second degree (KRS 510.050), and sexual abuse in the first degree (KRS 510.110), and was sentenced to serve 26 years in the state penitentiary. The convictions and sentences were affirmed by the Supreme Court of Kentucky on September 6, 1990.

The procedural history of this case is difficult to understand due to the confusing record that we have before us. However, it appears that on June 3, 1992, Whitehead filed an RCr 11.42 motion alleging ineffective assistance of counsel on the grounds that counsel failed to investigate possible perjured testimony. On March 9, 1994, the trial court held an evidentiary hearing in order to determine if there had been perjured testimony and the effect such testimony might have had on the trial. The trial court determined that the evidence was "totally insufficient to grant the RCr 11.42 motion." This Court affirmed the denial of RCr 11.42 relief on March 7, 1997. On June 11, 1997, the Supreme Court denied discretionary review.

On September 15, 1997, Whitehead filed a second RCr 11.42 motion alleging ineffective assistance of counsel and prosecutorial misconduct. Whitehead's second RCr 11.42 motion alleged ineffective assistance of counsel on three grounds: (1) that counsel failed to properly investigate the case to discover information favorable to Whitehead's defense and to present favorable evidence that had been discovered; (2) that counsel failed to file a post-trial motion to seek a new trial based on newly discovered evidence; and (3) that counsel failed to object to the prosecutor's closing argument. The trial court held another evidentiary hearing and allowed both parties to submit legal memorandums. On October 24, 1997, the trial court denied Whitehead's second RCr 11.42 motion stating initially that it had "previously [o]verruled Defendant's motion as it pertained to ineffective assistance of counsel", and further stating that it

"finds no evidence that any comments of the prosecutor denied the Defendant his constitutional right of due process of law." This appeal followed.

Whitehead's claim that counsel failed to properly investigate his case and failed to present favorable evidence refers to the allegedly perjured testimony of one of the witnesses. The trial court in denying the first RCr 11.42 motion found that Whitehead had failed to prove the alleged perjury. When Whitehead made this same claim in his second RCr 11.42 motion, the trial court correctly denied that claim as being successive. Successive RCr 11.42 motions are clearly barred by section 3 of this rule. RCr 11.42(3); Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983).

Whitehead's second claim of ineffective assistance of counsel concerns his allegation that counsel failed to file a post-trial motion based upon the discovery of new evidence. Here again, Whitehead's alleged 'new' evidence is the alleged perjury. Accordingly, Whitehead's second claim is also barred as a successive RCr 11.42 motion.

Whitehead's third claim of ineffective assistance of counsel is that his counsel failed to object to the prosecutor's closing argument. Whitehead alleges that the closing argument of the prosecutor: (1) went beyond the evidence at trial; (2) led the jury to believe that the Commonwealth possessed more evidence than it actually had; (3) characterized defense witnesses as liars; (4) improperly shifted the burden of proof to the defendant; and (5) alleged uncharged crimes. The trial court denied Whitehead relief on this issue when it denied his second

RCr 11.42 motion by finding that there was no misconduct by the prosecutor in his closing argument to which counsel should have objected.

We affirm the trial court's denial of relief on this issue because it was not even required to address the prosecutorial misconduct claim in the second RCr 11.42 motion since it was a successive RCR 11.42 motion. Furthermore, the issue of alleged prosecutorial misconduct could and should have been raised on direct appeal. Bronston v. Commonwealth, Ky., 481 S.W.2d 666, 667 (1972).

For the foregoing reasons, we affirm the order of the Green Circuit Court denying Whitehead's RCr 11.42 motion for relief.

ALL CONCUR.

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