

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-003193-MR

STEPHEN ROSS COLLINS

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE MARY C. NOBLE, JUDGE  
ACTION NO. 91-CR-000713

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
\*\* \*\*

BEFORE: BUCKINGHAM, COMBS, AND McANULTY, JUDGES.

McANULTY, JUDGE: Stephen Ross Collins (hereinafter, appellant) appeals the Fayette Circuit Court's denial of his RCr 11.42 motion alleging numerous errors in his trial, in particular with the performance of his counsel. Finding no error, we affirm.

A Fayette County Grand Jury charged appellant with murder on September 13, 1991, for the shooting death of Brian White. Appellant was tried by a jury and found guilty of first degree manslaughter. The Kentucky Supreme Court affirmed his conviction in a unanimous opinion.

On May 1, 1997, appellant filed a motion to vacate his conviction pursuant to RCr 11.42. The circuit court appointed

counsel to represent appellant. Appellant thereafter filed a motion to amend the order in which he asserted that he did not wish to be represented by counsel, and stated that he wanted to secure an attorney for assistance with witnesses for an evidentiary hearing only. The Fayette Circuit Court entered an order allowing appellant to proceed pro se. The Commonwealth filed a response to appellant's RCr 11.42 motion. On November 11, 1997, the Fayette Circuit Court denied appellant's RCr 11.42 motion to vacate. This appeal followed.

Appellant's first claim of error is that KRS 503.050, governing the use of physical force in self-protection, is void for vagueness because it does not encompass the "right to defend against multiple assailants." We find that appellant raised this issue on direct appeal in his argument that he should have been permitted an instruction which included language regarding others acting in concert with the victim. The Supreme Court declined to address it because it was unpreserved for review. We find that this issue was a matter for direct appeal, not collateral attack. RCr 11.42 is not for the purpose of permitting a criminal defendant to retry issues which could have and should have been raised in the original proceedings. Brown v. Commonwealth, Ky., 788 S.W.2d 500, 501 (1990). Although appellant frames the issue as one of vagueness, the issue is the same as appellant's demand for a multiple aggressor instruction and we will not review it.

Second, appellant alleges that the statutory definition of "serious physical injury" in KRS 500.080(15) is void for vagueness for not explaining precisely what is meant by

"prolonged" injury or disfigurement. Again, this is an issue which would have been properly raised at the trial and on direct appeal; it is not proper for a RCr 11.42 motion. Brown, supra.

Next, appellant alleges numerous instances of ineffective assistance of counsel at his trial, as well as instances of prosecutorial misconduct which he contends his counsel was ineffective for failing to challenge. As the issues of prosecutorial misconduct could have and should have been raised on direct appeal, Brown, supra, we review these solely for a determination of counsel's effectiveness.

In order to establish a claim of constitutionally ineffective assistance of counsel, appellant must show that his counsel's performance was deficient to such an extent that the integrity of the proceedings was impaired. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). To meet the burden of proof, appellant must first show that his counsel's performance was deficient, and second that the deficient performance prejudiced his defense. Id. at 687, 104 S. Ct. at 2064, 80 L. Ed.2d at 693; Gall v. Commonwealth, Ky., 702 S.W.2d 37, 39 (1986).

Appellant's first claim of ineffectiveness is that his counsel erred in failing to challenge the definitions of "wantonly and recklessly" given with the "erroneous belief" qualification to the self-protection instruction. We find that although defense counsel did not raise this precise issue on

appeal,<sup>1</sup> the Supreme Court examined the instructions and held as follows:

After reviewing the self-protection instruction that was submitted to the jury, we concur with the trial court's ruling that it properly instructed the jury as to the law pursuant to KRS Chapter 503.

Because the Supreme Court reviewed the self-protection instruction for error and found none, we conclude that defense counsel did not err in failing to challenge the instruction on the grounds appellant now raises. The instruction given was the accepted instruction on the erroneous belief qualification at the time of appellant's trial. As a result, we do not believe that appellant has shown any prejudice, and he has failed to establish ineffectiveness of counsel.

Next, appellant challenges his counsel's cross-examination of an eyewitness to the shooting, arguing in essence that the examination could have been done more effectively. Appellant does not identify any essential evidence bearing on the witness's testimony or credibility which was not before the jury. This is a mere attempt to second-guess counsel's trial strategy and retry the case collaterally. Dorton v. Commonwealth, Ky., 433 S.W.2d 117, 118 (1968). This is insufficient to establish attorney ineffectiveness. Strickland, 466 U.S. at 681, 104 S. Ct. at 2061, 80 L. Ed.2d at 694. As a result we cannot find that

---

<sup>1</sup> According to the Supreme Court's Opinion, appellant challenged the self-protection issue on the grounds that the self-protection instruction should have stated that he was under no duty to retreat or flee, and should have included language regarding others acting in concert with the victim.

the result of trial would have been any different if the cross-examination had been done as appellant now argues.

Appellant raises additional arguments about various witnesses his attorney could have called to the stand, or the manner in which he questioned a doctor who testified. Again, this is merely second-guessing of defense counsel's strategy, without any showing that the strategy employed by his attorney was deficient. The trial court correctly found that this did not suffice to establish ineffective assistance of counsel. Dorton, supra; Strickland, supra.

Next, appellant argues that his attorney should have moved to suppress the photographic lineup identification evidence. Appellant has not shown any legitimate reason for his counsel to have challenged the photo identification process and thus has not shown deficient performance or prejudice.

Appellant designates his subsequent series of arguments as both prosecutorial misconduct and ineffective assistance of counsel. We have reviewed these complaints, which concern the prosecutor's closing argument and his questioning of appellant at trial, and find no error. Even considering the comments cumulatively, as appellant urges us to do, we do not find there would have been a different result in this case had counsel objected to the prosecutor's comments. The statements appellant cites were all reasonable inferences drawn from the evidence in the case, and thus were fair comments on the evidence. Bush v. Commonwealth, Ky., 839 S.W.2d 550, 557 (1992). We find no ineffective assistance of trial counsel.

Finally, appellant argues that the circuit court erred in not appointing counsel to assist him in "investigating" his claims in this RCr 11.42 proceeding. This was proper since appellant asserted in the trial court his resolve to represent himself, and only wanted an attorney to assist in investigation and at a hearing. See Allen v. Commonwealth, Ky.App., 668 S.W.2d 556, 557 (1984). Moreover, an RCr 11.42 proceeding is not for the purpose of conducting a "fishing expedition" to develop issues. Jones v. Commonwealth, Ky., 388 S.W.2d 601, 603 (1965). There was no error.

For all the foregoing reasons, we affirm the order of the Fayette Circuit Court which overruled appellant's RCr 11.42 motion to vacate.

ALL CONCUR.

BRIEF FOR APPELLANT:

Stephen Ross Collins, pro se  
West Liberty, KY

BRIEF FOR APPELLEE:

Albert B. Chandler III  
Attorney General of Kentucky

Samuel J. Floyd, Jr.  
Assistant Attorney General  
Frankfort, KY