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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000135-MR

GOERGE R. ABNEY, SR. APPELLANT

v. APPEAL FROM EDMONSON CIRCUIT COURT
HONORABLE RONNIE DORTCH, JUDGE
ACTION NO. 98-CR-00037

COMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUIDUGLI, HUDDLESTON AND JOHNSON, JUDGES.

GUIDUGLI, JUDGE. George Abney, Sr. ("Abney") appeals from an order of the Edmonson Circuit Court denying his motion for RCr 11.42 relief. We affirm.

The facts are uncontroverted. On September 28, 1998, Abney was indicted by the Edmonson Grand Jury on the charge of second-degree arson. It was alleged that Abney hired his son and another individual to burn down his ex-wife's residence. On October 6, 1999, Abney entered a plea of guilty, and was sentenced to ten (10) years in prison.

It appears from the record that once imprisoned, Abney undertook a campaign of filing pro se motions. These motions

are contained in the record and need not be addressed herein. On February 27, 2001, Abney's court-appointed public defender sought and received leave of court to withdraw as counsel.

Most lately, Abney moved for RCr 11.42 relief and the recusal of the trial judge. Abney argued therein that his trial counsel was ineffective for failing to investigate and/or call certain witnesses. He further maintained that the indictment improperly showed the crime as occurring on May 7, 1998, rather than May 15, 1998. As part of the motion, he sought the recusal of the trial judge and an evidentiary hearing.

Upon considering the matter, the circuit court denied Abney's request for an evidentiary hearing, recusal, and RCr 11.42 relief. Thereafter, Abney filed a pro se motion for findings of fact and conclusions of law on the denial of his RCr 11.42 motion. This motion was denied as well, and the instant appeal followed.

Abney now argues that the circuit court's denial of his RCr 11.42 motion is constitutionally infirm. As best we can tell, his primary argument is that the court improperly denied his motion for findings of fact and conclusions of law. He also argues that the court erred in failing to appoint counsel. He seeks to have the matter reversed and remanded with instructions to enter the relief sought.

We have closely examined Abney's argument and find no error. The first question is whether a hearing on the motion was required. As the parties are well aware, a hearing is only required where there exists an issue of fact that cannot be

resolved by reference to the record. Stanford v. Commonwealth, Ky., 854 S.W.2d 742 (1993).

In the matter at bar, Abney's broad claims of ineffective assistance of counsel and failure of the court to appoint counsel were properly disposed of by reference to the record. Abney's ineffective assistance claim is premised on the argument that counsel improperly failed to investigate certain witnesses which Abney argues would have supported his claims of innocence had the matter gone to trial. In order to prevail on such a claim, though, Abney must show that trial counsel committed errors so serious that his performance fell outside the wide range of professionally competent assistance, and that but for the errors there is a reasonable likelihood that the outcome of the trial would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That is to say, Abney must show that there is a reasonable likelihood that counsel's alleged failure to investigate certain witnesses would have changed the outcome of the proceeding had the matter gone to trial.

Abney has made no such showing. It appears from the record that trial counsel, after adequate investigation, recommended that Abney enter a plea of guilty. It can hardly be said that Abney has offered any evidence that the outcome of the proceedings would have been different had trial counsel conducted a more thorough investigation or had pursued any witnesses with more vigor. Since this matter was resolved by reference to the

pleadings and the record, no hearing was required. Stanford, supra.

The next question is whether the trial court erred in denying Abney's motion for findings of fact. It did not. Findings are required only if a hearing has been conducted. RCr 11.42(6); see also, Stanford, supra (stating at p. 743, "[I]f there is no hearing, then no findings are required."). Clearly, since no hearing was required or conducted below, the trial court was under no due to render findings of fact.

Lastly, Abney notes that the indictment improperly states that the crime in question occurred on May 7, 1998, rather than May 15, 1998. The Commonwealth concedes that this assertion is correct. They note, however, that had the matter gone to trial the indictment would have been amended to conform to the proof via a proper motion. If it is Abney's assertion that trial counsel acted ineffectively in failing to raise this as an issue, we find this argument unpersuasive. Similarly, the issues of recusal and failure to appoint counsel are given little or no attention in Abney's brief, and do not form a basis for reversal.

For the foregoing reasons, we affirm the order of the Edmonson Circuit Court which denied Abney's motion for RCr 11.42 relief.

HUDDLESTON, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN RESULT ONLY.

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