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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001274-MR

BENNY FRANCIS — APPELLANT

v.

APPEAL FROM MONROE CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 98-CR-00064

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BAKER, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Benny Francis appeals from a January 17, 2002, order of the Monroe Circuit Court denying his RCr 11.42 and CR 60.02 motion without a hearing. We affirm.

On October 28, 1998, the Monroe County Grand Jury returned an indictment charging Francis with murder in violation of KRS 507.020, for allegedly causing the death of Cortez Copass by shooting him with a firearm. Honorable John Alexander of the

Department of Public Advocacy (PD) was appointed to represent him. Francis's sister, Donna Carol Rayburn, was charged with complicity to commit murder involving the death of Copass and was also appointed a PD. Each defendant entered a not guilty plea and the matter was set for trial on April 19, 1999. Prior to the scheduled trial date, attorney Alexander withdrew from representing Francis and Honorable Teresa Whitaker, the supervising director of the regional PD office, appeared with Francis at the April 19, 1999, hearing. At that time, Francis withdrew his not guilty plea and entered a guilty plea to the charge of murder. Originally facing the possibility of a death sentence, the plea agreement permitted a sentence range from 20 years to life imprisonment. The Commonwealth agreed to recommend a twenty-two year sentence and stated its opposition to probation.

Prior to accepting Francis's guilty plea, a detailed colloquy between Francis and the trial court took place, a copy of the nine page questions and answers being made part of the trial record. Also included in the record are a signed motion to enter his guilty plea, the Commonwealth's plea officer signed by Francis, a request for sentencing prior to completion of pre-sentence investigation report and judgment and sentence on plea of guilty. Each document contains information which includes Francis's assurances to the trial court that he had entered his

guilty plea freely, voluntarily and knowingly and that his appointed counsel was present and had fully discussed all relevant matters with Francis and believed Francis's plea to be made freely, knowingly, intelligently and voluntarily. The court accepted the guilty plea and followed the plea agreement sentencing Francis to 22 years imprisonment. On the same day, Donna Carol Rayburn pled guilty to complicity to commit murder and had her sentencing continued until May 26, 1999. The record indicates she was sentenced to five years in prison.

On August 31, 1999, Francis filed his first RCr 11.42 motion to vacate sentence and conviction. In said motion, Francis alleges that his rights to effective assistance of counsel under the Sixth and Fourteenth Amendments of the United States Constitution and Section Eleven of the Kentucky Constitution, were violated and he was denied due process when the Commonwealth allegedly failed to turn over evidence (a tape) to his counsel prior to the trial date. That motion was denied by order entered by Monroe Circuit Judge Paul Barry Jones on October 8, 1999. In the order, Judge Jones reviewed Francis's allegations, the standard of review applicable to a RCr 11.42 motion and why his motion must fail. In relevant part, the order stated:

> Francis's main allegation is that he was not provided with effective assistance of counsel. The facts upon which he bases

such allegations are set out as follows: Francis states that his counsel Hon. John Alexander withdrew as counsel due to a conflict, and that Francis was not present at a pre-trial conference on February 24, 1999. He further states that he was denied effective assistance of counsel from the public advocate who was thereafter appointed to represent him, claiming that she consulted with him only two days before his trial. He also alleges that counsel "worked against him to obtain a guilty plea for the [C]ommonwealth."

Francis's claims of ineffective assistance of counsel amount to nothing more than innocuous facts and unsupported allegations. The withdrawal of his first attorney due to a conflict of interests was necessary as required by the rules of professional conduct, and Francis fails to state how this action prejudiced him. Further, his statement that the public advocate only spent two hours in consultation with him a few days before trial is insufficient evidence on which to amend his sentence. Francis failed to demonstrate how much more time for consultation he required or why, and whether more time could have changed the outcome of this case. Likewise, Francis's claim that his attorney "worked against him" is merely an allegation unsupported by any specific facts – no mention is made of how his attorney worked against him, and there is no evidence in the record of any wrongdoing by either attorney.

...

In short, none of the above allegations demonstrate that his counsel's performance was deficient in any way, nor do they show that any such deficient performance prejudiced his defense. Therefore, he has failed to prove either prong of the test for ineffective assistance of counsel, Humphrey

> v. Commonwealth, Ky., 962 S.W.2d 870, 873 (1998).
>
> In any case, the record reviewed by this Court refutes all allegations of any efforts sufficient to invalidate Francis's conviction. RCr 11.42 requires the Court to grant a hearing if a movant raises a material issue of fact, however, "[i]f the record refutes the claims of error, there is no need for an evidentiary hearing." Bowling v. Commonwealth, Ky., 981 S.W.2d 545, 549 (1998). In this case, two documents in the record indicate that Benny Francis, who plead guilty, made his plea willingly and voluntarily. The first document, dated April 19, 1999, is a motion by the defense to change Francis's plea from "not guilty" to "guilty." This document, which was signed by Benny Francis, states that Francis believed that his attorney was fully informed about his case, that he and his attorney had fully discussed his charges and possible defenses to them, and that his guilty plea was "freely, knowingly, intelligently and voluntarily made." The second document in the record is the Court's checklist indicating that Francis was personally asked whether his plea was voluntarily and intelligently made, and whether he had any questions or problems with his attorney's representation. The answers recorded on the checklist show that Francis had no problems with his representation. Thus, the record having refuted Francis's allegations, there is no need for an evidentiary hearing.

Following the denial of his RCr 11.42 motion, Francis filed a notice of appeal on October 21, 1999. At that time, he also requested appointment of appellate counsel and in forma pauperis status. At this point, the record becomes somewhat confusing in that the next entry is a "Motion for discretionary

review of a decision of the court of appeals" filed by Francis on March 22, 2000. In the motion, Francis claims that his "case was decided by the Court of Appeals. Neither the Movant nor the Respondent have (sic) a Petition on Motion for reconsideration pending in the Court of Appeals." He further stated that "The Court of Appeals could not say that the record refuted the Movant's allegations. Nevertheless, the Court of Appeals affirmed the trial court's actions in denying the Movant's RCr 11.42 without appointment of counsel or holding an evidentiary hearing." The main problem with these statements is that Francis apparently never perfected his appeal and thus, there was never an appeal before this Court. It further appears that Francis did not file his motion for discretionary review with the Kentucky Supreme Court but rather with the Monroe Circuit Court.

Once this situation was realized, Francis simply re-filed his previous RCr 11.42 (first filed on August 31, 1999 and denied on October 8, 1999). This second RCr 11.42 was filed on December 21, 2000. In January, 2001, the circuit court entered an order permitting Francis to proceed in forma pauperis and appointed the Department of Public Advocacy to represent him. The appointed PD, Honorable Rebecca Stevens, then filed a supplement to Francis's RCr 11.42 motion on May 17, 2001. Curiously in the body of the motion, Ms. Stevens alleges that

Francis's December 21, 2000, motion to vacate, set aside or correct judgment of conviction was filed pursuant to RCr 11.42 and CR 60.02. However, a review of the motion (as previously indicated filed twice) clearly reveals the motion to be specifically a RCr 11.42 motion with no mention of CR 60.02. Thereafter, Francis filed his own supplement to his original motion adding the issue that his attorney had a conflict of interest in that his first appointed attorney, Mr. Alexander, and his co-defendant's attorney (who is unnamed in any of Francis's pleadings) "were partners in the same law firm and each counsel knew that statements were made by the co-defendant against [Francis]." After reviewing the record, including the two supplements to Francis's RCr 11.42, Monroe Circuit Judge James G. Weddle entered an order denying the second RCr 11.42 motion on January 14, 2002. This appeal followed.

First, it must be noted that Francis appeals the denial of his second RCr 11.42 motion. As the Commonwealth points out in its brief to this Court, Francis raised the issue of his attorney's alleged conflict of interest under RCr 8.30 in his first RCr 11.42 motion. That motion was denied, and subsequently became final and binding when he failed to pursue or perfect his appeal. As our Supreme Court held in Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983):

RCr 11.42 provides a procedure for a motion to vacate, set aside or correct sentence for "a prisoner in custody under sentence or a defendant on probation, parole or conditional discharge." It provides a vehicle to attack an erroneous judgment for reasons which are not accessible by direct appeal. In subsection (3) it provides that "the motion shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding." (Emphasis in original).

...

The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete. That structure is set out in the rules related to direct appeals, in RCr 11.42, and thereafter in CR 60.02. (Emphasis in original).

...

We hold that the proper procedure for a defendant aggrieved by a judgment in a criminal case is to directly appeal that judgment, stating every ground of error which it is reasonable to expect that he or his counsel is aware of when the appeal is taken.

Next, we hold that a defendant is required to avail himself of RCr 11.42 while in custody under sentence or on probation, parole or conditional discharge, as to any ground of which he is aware, or should be aware, during the period when this remedy is available to him. Final disposition of that motion, or waiver of the opportunity to make it, shall conclude all issues that reasonably could have been presented in that proceeding. The language of RCr 11.42

> forecloses the defendant from raising any questions under CR 60.02 which are "issues that could reasonably have been presented" by RCr 11.42 proceedings.

Id. at 856, 857. Likewise is Lycans v. Commonwealth, Ky., 511 S.W.2d 232 (1974), a case factually similar to the one before us (a subsequent RCr 11.42 recitating the same grounds and then adding additional grounds), the Court held:

> We have consistently held that issues which could have been presented in an initial motion to vacate judgment cannot thereafter be raised by subsequent motions. (Citations omitted).
>
> ...
>
> Upon further consideration we have decided that when a prisoner fails to appeal from an order overruling his motion to vacate judgment or when his appeal is not perfected or is dismissed, he should not be permitted to file a subsequent motion to vacate as suggested by the dicta in Schroader [v. Thomas, Ky., 387 S.W.2d 312 (1965)]. If such a procedure were allowed there would be no end to the successive applications for post-conviction relief.
>
> The reasons supporting and the need for final disposition of litigation are applicable to petitions for post-conviction relief as to other areas of law. To the extent that Schroader stands as authority for the filing of subsequent motions to vacate judgment when an appeal from an order denying a motion to vacate is not perfected or is dismissed, it is hereby overruled.

Id. at 232, 233. Both of the above-cited cases fully comply with RCr 11.42(3) which provides, as follows:

> (3) The motion shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding.

Having fully considered the record before us in light of the applicable rules and case law, we believe Francis's appeal in this matter to be procedurally flawed. His second motion, which is the basis of this appeal, is prohibited by RCr 11.42, Gross, Lycans, and a multitude of similar cases which provide that a defendant must state all grounds on which the defendant's collateral attack is based in the initial motion. Francis is prohibited from attempting to re-litigate his alleged claims if he did not include all reasons in his original RCr 11.42 motion or if he failed to properly appeal the original denial. In this case, Francis did both and his subsequent RCr 11.42 is hence prohibited.

While we do believe Francis's appeal to be procedurally flawed, had he properly appealed the original (or had he filed a motion for a belated appeal as advised by the PD's office), the denial of his RCr 11.42 motion would still have been affirmed. In arguing that is attorney had a conflict of interest based on RCr 8.30, he relied on the cases of Peyton v. Commonwealth, Ky., 931 S.W.2d 451 (1996), and Trulock v. Commonwealth, Ky.App., 620 S.W.2d 329 (1981). However, each

case was overruled by Kirkland v. Commonwealth, Ky., 53 S.W.3d 71 (2001). In addressing RCr 8.30, the Kirkland Court held:

> The bright line rule established in Peyton, supra, "replaces the proper and thoughtful exercise by the trial court of discretion based on contemporaneous or on-the-spot supervision of the legal situation with a kind of automatic robotic system handed down from on high." Id. at 456. (Wintersheimer, J., dissenting). This case illustrates the importance of analyzing individual situations on a case-by-case basis. A violation of RCr 8.30, or as in this case, a questionable violation, which does not result in any prejudice to the defendant, should not mandate automatic reversal. Such a result defies logic and ignores the principles of judicial economy.
>
> Consequently, under circumstances where each defendant was represented not by a single firm or single attorney, but by two individually assigned public defenders, and where no conflict or prejudice is claimed, a nonprejudicial or harmless error analysis can be applied. Thus, the failure of the circuit judge to comply with RCr 8.30(1) was harmless or nonprejudicial error. Such failure is not presumptively prejudicial and does not warrant automatic reversal. A defendant must show a real conflict of interest in order to obtain reversal. Peyton v. Commonwealth, Ky., 931 S.W.2d 451 (1996), is overruled. Trulock v. Commonwealth, Ky.App., 620 S.W.2d 329 (1981) is also overruled.

Kirkland, Id. at 75.

For the foregoing reasons, the order of the Monroe Circuit Court denying Francis's RCr 11.42 motion is affirmed.

ALL CONCUR.

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