

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002522-MR

BILLY WALL

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JAMES M. SHAKE, JUDGE
ACTION NOS. 99-CR-002793 & 00-CR-000469

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, DYCHE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: This case arises from four post-conviction motions filed by Billy Eugene Wall, Jr. (Wall) seeking relief from his conviction on eleven firearm possession charges and a persistent felony offender charge (PFO). These motions were stayed by the trial court pending a direct appeal of Wall's conviction to this Court. The case has subsequently evolved into a procedural nightmare as Wall alleges to have brought these motions under Ky. R. Crim. P. (RCr) 10.02, while the court

presumably treated the motions in its opinion and order as RCr 11.42 motions, notwithstanding that the court initially treated the motions as having been filed under RCr 10.02. For the reasons set forth herein, we affirm.

Wall filed the notice of appeal of his conviction and his pro se motions which are the subject of this appeal on August 25, 2000. In Wall's direct appeal, this Court affirmed his conviction by an unpublished opinion (2000-CA-002036-MR) rendered on March 8, 2002. The Kentucky Supreme Court subsequently denied discretionary review of that opinion. This Court, in its opinion on Wall's direct appeal, thoroughly reviewed the factual background relevant to understanding the issues now before this Court and is restated in part as follows:

On October 1, 1999, the Jefferson County Police Department obtained a warrant to search 4801 Fury Way, Louisville, Kentucky. The search warrant was obtained based upon evidence that Wall, who was a fugitive wanted on a criminal warrant in Michigan, was staying in the apartment. The police also had evidence that Wall, a convicted felon, kept firearms at the apartment. The search warrant was executed with the aid of a SWAT team. As a result of the search, the police discovered three handguns and eight rifles, including an assault rifle. Various ammunition, gun parts, a small quantity of marijuana, and a fake social security card were also found. Further, when police attempted to arrest Wall, he resisted arrest.

On November 16, 1999, in Case 99-CR-2793, Wall was indicted for two counts of

second-degree possession of a forged instrument (KRS 516.060); possession of a firearm (handgun) by a convicted felon (KRS 527.040); possession of marijuana (KRS 218A.1422); and resisting arrest (KRS 520.090). On February 28, 2000, in Case 00-CR-0469, Wall was indicted for second-degree persistent felony offender (PFO II) (KRS 532.080(2)). On March 28, 2000, in Case 00-CR-00703, Wall was indicted for two counts of possession of a firearm (handgun) by a convicted felon; eight counts of possession of a firearm by a convicted felon; and second-degree persistent felony offender. (footnote omitted).

The eleven firearm possession charges and the PFO charge were severed from the remaining charges and were tried before a jury commencing on May 31, 2000. Following the presentation of the evidence, on June 5, 2000, the jury returned a verdict finding Wall guilty on each of the eleven charged firearm possession offenses and of PFO II. Wall then waived jury sentencing in favor of a plea agreement under which the Commonwealth recommended a total enhanced sentence of fourteen years for the firearm offenses. In conjunction with the plea agreement, Wall pled guilty to the possession of a forged instrument charge, the possession of marijuana charge, and the resisting arrest charge, with the sentences received in those cases to run concurrently with the sentence received in the firearm cases. In conjunction with the plea, Wall reserved his right to appeal his firearm possession and PFO convictions.

On July 12, 2000, Wall filed a motion for a new trial, which was subsequently denied. A sentencing hearing was held on July 18, 2000, and final judgment was entered on July 26, 2000. . . .

At the time of the sentencing hearing in July of 2000, Wall requested a continuance on the grounds that the police had used false information to obtain a search warrant and that several of the Commonwealth's witnesses had given false testimony at trial. The trial court refused to continue the sentencing hearing, but advised Wall that the court would consider his allegations when placed in written motions.

On August 25, 2000, the same day that Wall filed the notice of appeal from his conviction, Wall filed four pro se motions. The caption on each of these motions reads as follows:

- i. Motion for Jefferson District Court Public Defender[,] Michael L. Goodwin to Give the Defendant[,] Billy Wall[,] Jr[.] a Copy of Everything Pertaining to the Defendant Case . . . ;
- ii. Motion for a New Trial or Vacate Judgment for Inefective [sic] Assistance of Counsel;
- iii. Motion for Criminal Charges against Officer C. Marthet . . . , Anthony Allen . . . , [and] Assistant Commonwealth Attorney Monica Bryan Brashear . . . ;
And
- iv. Motion to Vacate or Set Aside Judgment for Fraud upon the Court.

The trial court initially treated these motions as having been filed under RCr 10.02. By opinion and order entered November 8, 2001, the trial court stayed consideration of the motions pending the outcome of Wall's direct appeal. The trial court noted in the November 8 opinion and order that Wall's motions were untimely, having been filed after the five-day time limit

set forth in RCr 10.06. The court further noted that neither party had moved the Court of Appeals to stay Wall's direct appeal for the court to obtain jurisdiction pursuant to RCr 10.06(2).¹

Immediately after Wall's conviction was affirmed by this Court in March of 2002, Wall filed a motion on March 26, 2002, to reinstate his pro se motions. By order entered April 26, 2002, the trial court permitted Wall to proceed in forma pauperis and appointed counsel to represent Wall. Wall's appointed counsel subsequently filed at least two motions for extension of time to file a supplemental memorandum, which referenced in each that the memorandum would be filed "in support of RCr 11.42." Wall's supplemental memorandum was filed on September 25, 2002, and again referenced therein that it was filed "in support of RCr 11.42." There is no reference in the memorandum to RCr 10.02 and Wall's primary argument to the trial court in his supplemental memorandum looked to a search based upon a search warrant that had been obtained illegally.

On November 4, 2002, the trial court entered its opinion and order denying Wall's motion for relief pursuant to RCr 11.42. The trial court held that an illegal search and

¹ Our Court noted in its Opinion affirming Wall's conviction on direct appeal that the trial court properly construed the motion as a motion pursuant to Ky. R. Crim. P. (RCr) 10.02. Additionally, the trial court could properly consider a motion to vacate judgment while the appeal was pending under RCr 11.42. Wilson v. Commonwealth, 761 S.W.2d 182 (Ky.App. 1988).

seizure does not form an appropriate basis for relief pursuant to RCr 11.42. This appeal followed.

Wall argues that the trial court erred by classifying his motion as an RCr 11.42 motion and that he has not been afforded a hearing based upon his allegations of fraud and perjured testimony at trial. Additionally, Wall argues that he has "perceived injustices" because the search warrant in his case was obtained through an affidavit prepared by police officer Mark Watson. Officer Watson was indicted and convicted in Jefferson County more than two years after Wall's trial, apparently for giving false affidavits to obtain illegal search warrants in other criminal cases.

This Court has thoroughly examined the record on appeal, including Wall's pro se motions and the supplemental memorandum of law submitted to the trial court. This Court can locate no evidence therein, nor does Wall direct this Court to any new evidence that links Officer Watson's alleged improprieties to Wall or this case. This case was not cited as a basis for Watson's indictment. The fact that Officer Watson may have been involved in obtaining a search warrant in Wall's case or was otherwise involved in Wall's arrest does not alone require an evidentiary hearing or a new trial for Wall. Speculation or conjecture about Officer Watson does not constitute new evidence sufficient to warrant a new trial under

RCr 10.02. "Newly discovered evidence 'must be of such decisive value or force that it would with reasonable certainty, change the verdict or that it would probably change the result if a new trial should be granted.'" Collins v. Commonwealth, 951 S.W.2d 569, 576 (Ky. 1997)(citation omitted). Additionally, any motion for a new trial based upon newly discovered evidence must be accompanied by an affidavit showing the appellant exercised sufficient diligence to obtain the evidence prior to his trial. Id. The record before this Court reflects no such affidavit nor does it identify any new evidence that would pertain to the alleged actions of Officer Watson sufficient to warrant a new trial for Wall.

Accordingly, our review on this appeal is limited to the arguments raised pertaining to RCr 10.02 and RCr 11.42. We will address each of these issues separately.

Wall argues that his four pro se motions should be treated as RCr 10.02 motions which the trial court did initially.² We agree that Wall's "Motion to Vacate or Set Aside Judgment for Fraud Upon the Court" sets forth grounds that could be raised under a RCr 10.02 motion. However, we believe the trial court was correct in its interlocutory order of November 8, 2001, that this motion was untimely. The time restraints for

² We would note that only two of Walls four motions have any substance or relevancy to this appeal. The motion requesting counsel to turn over his files to Wall and the motion for criminal charges against individuals named therein are not properly before this Court on appeal.

filing a motion under RCr 10.02 are found in RCr 10.06(1) which mandates that a motion for new trial shall be served not later than five days after return of the verdict. The verdict in this case was entered on June 5, 2000. Wall's motion pursuant to RCr 10.02 was filed on August 25, 2000, eighty-one days after the verdict was rendered. The Kentucky Supreme Court, in Shadowen v. Commonwealth, 82 S.W.3d 896 (Ky. 2002), held that a motion for a new trial under RCr 10.06 must be served not later than five days after the return of the verdict, exclusive of Saturday, Sundays and legal holidays. Where the requirements of this rule are not met, appellate courts are not obligated to address the merits of any allegations asserting error on a trial court's ruling on a new trial motion. Pate v. Commonwealth, 134 S.W.3d 593 (Ky. 2004). Accordingly, any arguments raised on appeal that the trial court erred in not ruling on the RCr 10.02 motions are not properly before the Court and otherwise without merit.

As concerns RCr 11.42, there is no dispute that Wall filed a "Motion for a New Trial or Vacate Judgment for Inefective[sic] Assistance of Counsel," as one of his four pro se motions on August 25, 2000. When this Court's opinion was rendered on Wall's direct appeal, Wall immediately filed motions with the trial court to re-docket his pro se motions, including his motion for ineffective assistance of counsel. Wall's

appointed counsel filed two motions for extensions of time to file a supplemental memorandum regarding his post-conviction relief under RCr 11.42 and then, in his supplemental memorandum argued the merits of Wall's pro se motion under RCr 11.42. It is without question that the supplemental memorandum submitted by Wall's counsel primarily addressed issues pertaining to the legality of the search warrant issued to search the premises where Wall had been living. The gist of the motion for ineffective assistance of counsel filed by Wall also looked to issues pertaining to the search warrant, the fabrication of evidence, and counsel's failure to timely seek suppression. However, neither in Wall's motion nor supplemental memorandum, does he identify any evidence or make any substantive argument as to how his counsel was ineffective at trial. Whether this was strategy or oversight is not relevant to our review. The trial court, citing Brown v. Wingo, 396 S.W.2d 785 (Ky. 1965), correctly held in its opinion that allegations regarding an illegal search and seizure alone do not form an appropriate basis for relief under RCr 11.42. Accordingly, there was no error in the trial court's denial of Wall's motion for relief pursuant to RCr 11.42.

For the reasons and grounds set forth herein, the opinion and order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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