

RENDERED: DECEMBER 16, 2005; 2:00 P.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2004-CA-000065-MR

MICHAEL ELLIOTT

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT  
HONORABLE LEWIS B. HOPPER, JUDGE  
ACTION NO. 91-CR-00167

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: JOHNSON, KNOPF, AND VANMETER, JUDGES.

JOHNSON, JUDGE: Michael Elliott has appealed from an order denying his motion for post-conviction relief pursuant to RCr<sup>1</sup> 11.42. Elliott contends that he received ineffective assistance of counsel in connection with his murder trial because trial counsel failed to investigate statements given by two exculpatory witnesses and/or failed to call the witnesses to

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<sup>1</sup> Kentucky Rules of Criminal Procedure.

testify during the trial. Elliott also contends that the trial court erred by denying his motion without conducting an evidentiary hearing, erred by failing to recuse from presiding over his motion, and erred in "denying the appellant's claim of actual innocence and his wrongful incarceration[.]" Having concluded that the motion was filed outside of the limitations period for filing an RCr 11.42 motion, that Elliott could have raised his ineffective assistance claim in his previous RCr 11.42 proceeding, that Elliott was not entitled to an evidentiary hearing on his motion, that the trial judge did not err in failing to recuse himself from the proceedings, and that his claim of "actual innocence" and "wrongful incarceration" is without merit, we affirm.

On December 10, 1991, a Laurel County grand jury returned indictments against Elliott and his co-defendant, Allen Cushman, for murder,<sup>2</sup> burglary in the first degree,<sup>3</sup> attempted murder,<sup>4</sup> and robbery in the first degree.<sup>5</sup> Elliott was also indicted as a persistent felony offender in the first degree (PFO I).<sup>6</sup> The charges resulted from the August 21, 1991, murder of Earl L. Cowden and the attempted murder of Cowden's son,

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<sup>2</sup> Kentucky Revised Statutes (KRS) 506.010.

<sup>3</sup> KRS 511.020.

<sup>4</sup> KRS 506.010 and KRS 511.020.

<sup>5</sup> KRS 515.020.

<sup>6</sup> KRS 532.080(3).

Leon. Cushman was tried separately in November 1995, and was convicted on all four counts of the indictment and sentenced to death. However, before Cushman perfected his appeal, and prior to Elliott's trial, he died of natural causes.

After nearly three years of delay brought on by an interlocutory appeal taken by Elliott from the trial court's 1992 denial of his ex parte request for the appointment of a specially-trained mitigation investigator, in October 1997, Elliott was tried in the Laurel Circuit Court. At trial, the Commonwealth's case was heavily dependant upon an eyewitness identification made by Cowden's neighbor, Ted Proffitt. On the afternoon of Cowden's murder, Proffitt testified that he was working outside of his house when Mrs. Cowden and her grandson ran out of a field that separated their houses and Mrs. Cowden screamed that someone was breaking into her residence. Proffitt immediately ran to the Cowden residence to investigate and saw both a strange car in the Cowden's driveway and Cushman in the basement of the house. Proffitt then returned home to call the state police.

While waiting for the police to arrive, Proffitt saw Cowden driving down the road towards Cowden's house, so he ran towards the Cowden home in an attempt to stop Cowden before he walked in on the intruders. When Proffitt arrived at the Cowden residence, he heard a loud "dynamite" sound in the house, and,

looking through the open front door, saw a man standing over the body of Cowden. While testifying, Proffitt identified Elliott as the man standing over Cowden's body. During cross-examination, Elliott's counsel attempted to impeach Proffitt's testimony by calling to the jury's attention the fact that law enforcement personnel did not ask Proffitt to identify Elliott from a photographic lineup until two years after Cowden's murder, during co-defendant Cushman's trial.

The Commonwealth's case against Elliott was further strengthened by the testimony of one of Elliott's former jail cellmates, Sam Shepard. Shepard testified that he and Elliott became acquainted while playing cards and checkers in jail. Elliott told him that he had met an older man who knew that Cowden kept large sums of cash in his house and they agreed to rob Cowden. Shepard testified that Elliott had told him that things had gone awry during the robbery and that he had put a pillow case over Cowden's head and shot him as he begged for his life. Shepard further testified that Elliott was bragging about his crime and that he showed no remorse. Moreover, Elliott also told Shepard that he was happy when Cushman died because only Cushman could testify against him.

Elliott was convicted of murder, robbery, burglary, and wanton endangerment. He was sentenced to life without

parole for 25 years on the murder conviction, 20 years on the burglary conviction, 20 years on the robbery conviction, and five years on the wanton endangerment conviction. On direct appeal the Supreme Court of Kentucky affirmed Elliott's conviction and sentence by Opinion which was rendered on January 20, 2000, and became final on February 10, 2000.<sup>7</sup>

On January 5, 2001, Elliott filed a pro se motion for post-conviction relief pursuant to RCr 11.42. On March 5, 2001, the trial court entered an order denying the motion. On June 7, 2002, in an unpublished Opinion, this Court affirmed the denial of the motion.<sup>8</sup>

On May 22, 2003, Elliott filed his second motion for post-conviction relief pursuant to RCr 11.42. On October 13, 2003, the trial court entered an order denying Elliott's motion without having conducted an evidentiary hearing. Elliott subsequently filed a motion to alter, amend, or vacate, and a motion requesting that the trial judge recuse himself from presiding over his post-conviction proceedings, which were denied by an order entered on December 3, 2003. This appeal followed.<sup>9</sup>

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<sup>7</sup> Case No. 1997-SC-1038-MR.

<sup>8</sup> Case No. 2001-CA-000751-MR.

<sup>9</sup> As noted by the Commonwealth, the trial court entered the order denying Elliott's RCr 11.42 motion on October 13, 2003. Elliott thereafter filed a motion to alter, amend, or vacate pursuant to CR 59.05, which was denied by an order entered on December 3, 2003. Elliott timely filed his notice of

Elliott contends that he received ineffective assistance of counsel because trial counsel failed to call two exculpatory witnesses at trial, James Saylor and Scott Roberts. Elliott alleges that Saylor was an alibi witness who could have accounted for his whereabouts during the time that the crimes at the Cowden residence occurred,<sup>10</sup> and that Roberts, who at one time was incarcerated with Cushman, could have testified that Cushman had told him that Elliott was not his accomplice, and that Cushman had falsely implicated Elliott as his accomplice in the crime in order to protect his actual accomplice.

To establish ineffective assistance of counsel, a movant must satisfy a two-part test showing both that counsel's performance was deficient and that the deficiency caused actual prejudice resulting in a proceeding that was fundamentally

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appeal on January 7, 2004. Pursuant to Mills v. Commonwealth, 170 S.W.3d 310 (Ky. 2005), which became final on September 22, 2005, the filing of a CR 59.05 motion does not toll the 30-day limitations period contained in RCr 12.04(3) for filing a notice of appeal from an RCr 11.42 motion. Id. at 320-323. In Mills the Supreme Court exempted the defendant from the holding because (1) his case involved a sentence of death, and (2) previous decisions had suggested that the filing of a CR 59.05 motion did toll the time for filing a notice of appeal. It appears that Elliott relied upon the previous decisions which suggested that the filing of a CR 59.05 motion would toll the limitations period. Therefore, even though Elliott is not under a sentence of death, we like apply the exemption in the Mills holding to his notice of appeal from the October 13, 2003, order denying his RCr 11.42 motion.

<sup>10</sup> According to trial testimony, Cushman and his accomplice first came to the Cowden residence at approximately 2:00 p.m., but Mrs. Cowden refused to let them enter the residence. Cushman and the accomplice returned at approximately 4:00 p.m. and committed the murder and other crimes. According to Saylor's statement, he was with Elliott the entire day, except between approximately 3:30 p.m. to approximately 6:00 p.m. Based upon these times, Saylor's statement provides an alibi for the 2:00 p.m. incident at the Cowden residence, but not the 4:00 p.m. incident when the actual crimes occurred.

unfair and a result that was unreliable.<sup>11</sup> The burden is on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient or that under the circumstances counsel's action might be considered "trial strategy."<sup>12</sup> A court must be highly deferential in reviewing defense counsel's performance and should avoid second-guessing counsel's actions based on hindsight.<sup>13</sup> In assessing counsel's performance, the standard is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness.<sup>14</sup> "A defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance."<sup>15</sup> In order to establish actual prejudice, a movant must show a reasonable probability that the outcome of the proceeding would have been different or was rendered fundamentally unfair and

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<sup>11</sup> Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); Commonwealth v. Tamme, 83 S.W.3d 465, 469 (Ky. 2002); Foley v. Commonwealth, 17 S.W.3d 878, 884 (Ky. 2000).

<sup>12</sup> Strickland, 466 U.S. at 689; Moore v. Commonwealth, 983 S.W.2d 479, 482 (Ky. 1998); Sanborn v. Commonwealth, 975 S.W.2d 905, 912 (Ky. 1998).

<sup>13</sup> Haight v. Commonwealth, 41 S.W.3d 436, 442 (Ky. 2001); Harper v. Commonwealth, 978 S.W.2d 311, 315 (Ky. 1998).

<sup>14</sup> Strickland, 466 U.S. at 688-89; Tamme, 83 S.W.3d at 370; Commonwealth v. Pelfrey, 998 S.W.2d 460, 463 (Ky. 1999).

<sup>15</sup> Sanborn, 975 S.W.2d at 911 (quoting McQueen v. Commonwealth, 949 S.W.2d 70 (Ky. 1997)).

unreliable.<sup>16</sup> Where the movant is convicted in a trial, a reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding considering the totality of the evidence before the jury.<sup>17</sup> A movant is not automatically entitled to an evidentiary hearing on an RCr 11.42 motion unless there is an issue of fact which cannot be determined on the face of the record.<sup>18</sup> "Where the movant's allegations are refuted on the face of the record as a whole, no evidentiary hearing is required."<sup>19</sup>

Elliot's conviction and sentence became final on February 10, 2000, when the Opinion rendered by the Supreme Court in his direct appeal became final. Elliott did not file his present RCr 11.42 motion until May 22, 2003. Based upon these dates, his motion was filed over three years and three months after the judgment became final. RCr 11.42(10) provides as follows:

Any motion under this rule shall be filed within three years after the judgment becomes final, unless the motion alleges and the movant proves either:

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<sup>16</sup> Strickland, 466 U.S. at 694; Bowling v. Commonwealth, 80 S.W.3d 405, 411-12 (Ky. 2002).

<sup>17</sup> Strickland, 466 U.S. at 694-95. See also Bowling, 80 S.W.3d at 412; and Foley, 17 S.W.3d at 884.

<sup>18</sup> Stanford v. Commonwealth, 854 S.W.2d 742, 743-44 (Ky. 1993).

<sup>19</sup> Sparks v. Commonwealth, 721 S.W.2d 726 (Ky.App. 1986) (citing Hopewell v. Commonwealth, 687 S.W.2d 153, 154 (Ky.App. 1985)).



(a) that the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence; or

(b) that the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

The fundamental right asserted in this case, effective assistance of counsel, was in existence at all times relevant to these proceedings, thus the exception contained in subsection (b) is not applicable in this case. Elliott, however, alleges that the exception to the limitations period contained in subsection (a) is applicable because he could not have ascertained the existence of the Saylor and Roberts statements within the limitations period through the exercise of due diligence. We disagree.

Following his indictment in this case, the Department of Public Advocacy (DPA), Kentucky's statewide public defender system, was assigned to represent Elliott. The DPA attorneys interviewed Saylor and Roberts. Though apparently not transcribed at the time, the tape recordings of the interviews were placed in Elliott's DPA file.

At some point the DPA attorneys withdrew from the case, and trial counsel was awarded the contract for Elliott's legal representation. All of the DPA attorney files were turned over to the trial counsel, including the taped interviews of

Saylor and Roberts. Saylor and Roberts were not called as witnesses at the trial.

In support of the applicability of the exception contained in RCr 11.42(10)(a), Elliott states in his brief as follows:

The Appellant could not raise the issue in his first RCr 11.42 because he did not know the statements existed. The trial court did appoint counsel to represent the Appellant on his original RCr 11.42 motion but overruled the *pro se* motion before appointed counsel ever entered an appearance, much less reviewed the trial counsel's file and further investigated the matter. It is likely that appointed counsel would have discovered the taped statements if he had had adequate time to investigate but such necessary time was not afforded counsel by the trial court. The trial court itself effectively precluded that Appellant from raising the issue in his first RCr 11.42 motion [citation to record omitted].

. . .

It was only after the Kentucky Innocence Project began investigating the Appellant's case that the taped statements were discovered. The issue was raised as soon as possible by the Appellant under the exception rule of RCr 11.42(10)(a).

In his reply brief, Elliott supplements his argument as follows:

The Appellant filed a pro se RCr 11.42 in January, 2001 and the Department of Public Advocacy was appointed to represent the Appellant on his RCr 11.42 motion on January 18, 2001. Before DPA had adequate time to review and investigate Appellant's

case or supplement the pro se motion, the trial court summarily denied Appellant's RCr 11.42 motion without a hearing on March 2, 2001. The second RCr 11.42 motion was filed after the Kentucky Innocence Project had thoroughly investigated the Appellant's case, filed motions for DNA testing with the trial court and filed a federal lawsuit on behalf of Appellant for DNA testing (the trial court denied Appellant's request for DNA testing of blood samples found at the scene and ordered the destruction of all physical evidence).<sup>20</sup>

Appellee correctly asserts that it was during the investigation by Kentucky Innocence Project (KIP) the information about Jimmy Saylor and Scott Roberts was discovered. When Appellant filed his initial RCr 11.42, he did not know that these taped statements were made to his original attorneys and his subsequent attorneys did not tell him. Appellant was precluded from any further development of this issue because the trial court summarily denied the original RCr 11.42 motion.

RCr 11.42 requires a motion [to] 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. RCr 11.42(3). . . .

The trial court hastily entered a denial of Appellant's original RCr 11.42 without allowing the DPA adequate time to develop an investigation into Appellant's case. That final disposition came on March 2, 2001. The Appellant submits that at the time of that final disposition, he had no knowledge of the taped statements of Saylor and Roberts. In the instant case, the second RCr 11.42 was filed after a complete

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<sup>20</sup> This Court granted a writ of prohibition. The blood was eventually tested and it matched the victim's.

and thorough investigation by the Kentucky Innocence Project (the last interview with Roberts was shortly before the filing of the motion), litigation on both the state and federal level regarding DNA testing of forensic evidence found at the crime scene was completed, and no other issues that could reasonably be presented in the motion were found to exist. The second RCr 11.42 motion meets the exceptions of RCr 11.42(10)(a).

Elliott concedes that tape recordings of the Saylor and Roberts statements were contained in trial counsel's files, and that his current attorneys discovered the statements upon examination of the files. As the statements were discoverable by the mere perfunctory examination of the attorney files in the case, with due diligence, the files could reasonably have been examined and any issues divulged by the statements could have been raised within the three-year limitations period prescribed by RCr 11.42(10)(a), for example, in Elliott's initial RCr 11.42 motion.<sup>21</sup>

In any event, an examination of the attorney files was not necessary to identify trial counsel's failure to call alibi-witness Saylor as an issue supporting a claim of ineffective

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<sup>21</sup> In his brief, Elliott somewhat misportrays his original RCr 11.42 motion as an unskilled pro se prison inmate effort. However, Elliott filed his first RCr 11.42 motion on January 1, 2001. Included in the record is a letter to Elliott from Gordon W. Rahn of the Department of Public Advocacy dated December 18, 2000. The letter begins "Enclosed are the original and two copies of the RCr 11.42 motion I drafted for you. As we discussed, you will file this pro se." Based upon this, it appears that Elliott's original motion, though filed pro se, was prepared by a DPA attorney, not by Elliott acting alone or with the assistance of a prison legal aid.

assistance. Elliott had actual knowledge of all facts necessary to be aware that Elliott could have provided him with at least a partial alibi for the events of August 21, 1991. As a participant in the trial, he was also situated to know that trial counsel failed to call his alibi witness. Based upon this, the tape recording of Saylor's statement was not essential to Elliott's ability to have raised this issue within the limitations period, for example, upon the filing of his initial RCr 11.42 motion.

Similarly, the Roberts statement indicates that Roberts apparently told Elliott about Cushman's statement. In the November 25, 1992, tape recording, the DPA attorney interviewing Roberts asked him if Elliott had ever promised him anything. Roberts replied as follows:

Naugh. (inaudible) I think he's got a kids [sic] mind myself, you know. To myself, he does. He's not got a very good attitude down there. I know that. And nobody don't like him too much on the walk and he stays pretty much by hisself back there in the back cell. I know he want [sic] hardly even talk to me when I first went in his cell because I kept telling him, after I found out his name, I said ["I know who you are, you know, ain't no use trying to keep it a secret who you are because I know who you are. (inaudible) I ain't no kin to this person that you both done this or that to.["] He said, ["I'll let you know flat out know that I'm innocent of the charge[."]] And I said ["well, that guy's [sic]<sup>22</sup> got

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<sup>22</sup> An apparent reference to Cushman.

something to tell you that's why I've been trying to talk to you.["] It was two days before I could even get the boy to even talk to me, you know, and that's when I let him know. About what I said to you all, you know. (Emphasis added).

While somewhat ambiguous, it appears that Elliott may have had actual knowledge of the statement Cushman made to Roberts.<sup>23</sup>

In summary, the Saylor and Roberts statements were easily discoverable simply by examining the attorney files. Further, Elliott had actual knowledge concerning the testimony Saylor could have presented in his favor, and may have had actual knowledge of Cushman's statement to Roberts. Based upon these factors, Elliott has failed to demonstrate that the

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<sup>23</sup> We also note that in his direct appeal Elliott raised as an issue that it was improper for the Commonwealth to have referred to a statement made by Elliott to cellmate Sam Shepherd to the effect that "he was glad that Allen Cushman had died and could not testify against him." The Supreme Court addressed the issue as follows:

Elliott's theory is that the Commonwealth "implied" that Cushman would have testified against him had he lived. In fact, however, the Commonwealth introduced Elliott's own statements in which the appellant indicated that Cushman would have testified against him, and the only thing in the record indicating what Cushman would have said are Elliott's own admissions. Neither the prosecutor not any of the Commonwealth's witnesses spoke about any declaration that Allen Cushman had made against the appellant, and this claim of error is without merit as Elliott's own incriminating statements were relevant, admissible evidence against him. See KRE 801(A)(b)(1) [emphasis added].

So while the Roberts statement indicates that Cushman had falsely implicated Elliott as an accomplice, Cushman's allegedly false implication of Elliott was not introduced against Elliott at trial.

exception to the limitations period contained in RCr 11.42(10)(a) is applicable in this case.

As an additional matter, we also note that for similar reasons to those already discussed, Elliott's RCr 11.42 motion is also barred by RCr 11.42(3), which requires a movant, upon filing a motion pursuant to RCr 11.42, to "state all grounds for holding the sentence invalid of which [he] has knowledge," and that "[f]inal disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding." For the reasons already discussed, issues involving Saylor and Roberts "could reasonably have been presented" in Elliott's initial RCr 11.42 motion.

Elliott also contends that the trial court erred by denying his motion without an evidentiary hearing. However, as his motion is barred by RCr 11.42(10)(a) and RCr 11.42(3), his entitlement for relief is conclusively refuted from the face of the record. As there are no issues of fact concerning this, Elliott was not entitled to a hearing.<sup>24</sup>

Elliott also contends that the trial court erred by denying his motion to recuse. Because of our disposition of this case, however, this issue is moot. Elliott's entitlement to relief is refuted by the face of the record, there are no

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<sup>24</sup> Fraser v. Commonwealth, 59 S.W.3d 448, 452 (Ky. 2001).

discretionary decisions at issue, and any action by the circuit judge which allegedly may have been improper is irrelevant.<sup>25</sup> We accordingly need not address this issue on the merits.

Finally, Elliott alleges that the trial court "erred in denying [his] claim of actual innocence and his wrongful incarceration." As this claim could have been raised in his previous RCr 11.42 motion, this claim is likewise not a proper issue for the present RCr 11.42 petition. RCr 11.42(3).

For the foregoing reasons, the judgment of the Laurel Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General  
  
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<sup>25</sup> James v. Wilson, 95 S.W.3d 875, 884 (Ky.App. 2002).