

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001812-MR

ERNEST MAC COYLE III

APPELLANT

v. APPEAL FROM OHIO CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 01-CR-00008

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: NICKELL, THOMPSON, AND VANMETER, JUDGES.

NICKELL, JUDGE: Ernest Mac Coyle, III (“Coyle”), *pro se*, has appealed from the June 30, 2005, order of the Ohio Circuit Court denying his RCr¹ 11.42 motion to vacate, set aside or correct the judgment of conviction entered April 26, 2001. We affirm.

Coyle was tried by a jury² in February 2002 for three counts of second-degree rape, one count of first-degree rape, and two counts of second-degree sodomy. He

¹ Kentucky Rules of Criminal Procedure.

² Coyle was jointly tried with his two co-defendants.

was convicted of the four counts of rape and acquitted of the sodomy charges. On April 26, 2001, a final judgment was entered sentencing him to fifty-five years' imprisonment. The Supreme Court of Kentucky affirmed his conviction on direct appeal on November 18, 2004.³ On June 13, 2005, Coyle filed a *pro se* RCr 11.42 motion to vacate, accompanied by a memorandum of law, together with motions for an evidentiary hearing and to proceed *in forma pauperis*. On June 30, 2005, the trial court denied the motion to vacate and the motion for an evidentiary hearing, but granted the motion to proceed *in forma pauperis*. This appeal followed.

Initially, we note that Coyle's brief filed with this Court is essentially identical to the memorandum of law which accompanied his RCr 11.42 motion filed in the trial court. In his brief, Coyle cites to a videotape of the proceedings. However, there is no such videotape in the record before us. In general, when presented with an incomplete record, we must assume the missing portions of the record would support the decision of the trial court. *See Commonwealth v. Thompson*, 697 S.W.2d 143 (Ky. 1985). However, even had Coyle properly ensured a complete record on appeal, we would still be compelled to affirm the trial court's decision.

Before this Court, Coyle argues his counsel was ineffective in failing to object to the trial court's allocation of peremptory challenges, failing to object to certain lines of questioning by the Commonwealth, and failing to object to the presence of a social worker in the trial court's chambers during an *in camera* interview with one of the

³ 2002-SC-000419-MR.

minor victims. After a careful review of the limited record before us, we hold that the issues raised here either were presented or could and should have been presented in Coyle's direct appeal.

A motion made pursuant to RCr 11.42 “is limited to issues that were not and could not be raised on direct appeal.” *Sanborn v. Commonwealth*, 975 S.W.2d 905, 909 (Ky. 1998). Additionally, issues which were raised and rejected on direct appeal are not properly presented in collateral proceedings merely by alleging the errors amounted to ineffective assistance of counsel. *Id.* (citing *Stanford v. Commonwealth*, 854 S.W.2d 742 (Ky. 1993); *Brown v. Commonwealth*, 788 S.W.2d 500 (Ky. 1990)). A defendant aggrieved by a final judgment in a criminal proceeding is required to directly appeal that judgment and present every allegation of error of which he is reasonably aware. *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983).

There is no doubt the allegations Coyle now raises are actually allegations of error which were or should have been raised in his direct appeal. In upholding Coyle's conviction, the Supreme Court specifically referenced the activities which form the basis for Coyle's third allegation of error, i.e., the presence of the social worker during an in-chambers interview of a child witness.⁴ Further, the issue raised in Coyle's second contention of error was raised in the direct appeal of one of his co-defendants.⁵

⁴ The Supreme Court concluded, after carefully reviewing the record before it, that “no manifest injustice occurred” in regard to the child's testimony or the presence of the social worker during such testimony. The same issue was also raised on direct appeal by both of Coyle's co-defendants.

⁵ *Wilson v. Commonwealth*, 2002-SC-000370-MR. The Supreme Court did not address the merits of Wilson's claim on this issue as her conviction was being reversed on other grounds.

Therefore, there is no question these two theories of error were raised and rejected on direct appeal, or could have been properly presented upon such direct appeal. Finally, Coyle's allegation of error regarding the improper allocation of peremptory challenges is a question of law which should be raised on direct appeal. *See Commonwealth v. Young*, 212 S.W.3d 117 (Ky. 2006). Coyle is now attempting to “back-door” his allegations of trial error by couching them in terms of ineffective assistance of counsel, the very practice condemned in *Sanborn, supra*. Such efforts will not be condoned by this Court, and we therefore reject Coyle's oblique attack on the effectiveness of his trial counsel.

Further, even looking to the merits of his claims, Coyle has failed to rebut the strong presumption that his trial counsel's performance fell within the wide range of acceptable and reasonable assistance. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct 2052, 80 L.Ed.2d 674 (1984); *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). Coyle has further failed to show that any of the alleged errors resulted in undue prejudice or manifest injustice, nor that the outcome of the trial would have been different but for the alleged errors. *See Stringer v. Commonwealth*, 956 S.W.2d 883 (Ky. 1997); *Martin v. Commonwealth*, 207 S.W.3d 1 (Ky. 2006). We perceive no ineffectiveness of counsel as each of Coyle's contentions are clearly refuted by the face of the record. Thus, the trial court correctly denied Coyle's motion to vacate and motion for an evidentiary hearing.

For the foregoing reasons, the order of the Ohio Circuit Court is affirmed.

ALL CONCUR.

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