

RENDERED: JANUARY 15, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000884-MR

GEORGE GLENN SMITH

APPELLANT

v.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 01-CR-00044 & NO. 01-CR-00124

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KELLER AND WINE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: George Glenn Smith presents two issues in his appeal from the trial court's denial of relief pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. Upon review of the record, we conclude that a hearing was

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

not required and affirm the conclusion that post-conviction counsel was not ineffective.

Smith was indicted by the Graves Circuit Court grand jury and charged with attempted murder and wanton endangerment in the first degree. Following a verdict of guilty, he was sentenced to serve 25 years' imprisonment. At the outset of the proceeding, a public advocate was assigned to represent Smith, but she withdrew when it became evident that her office also represented others involved in the trial. A second public advocate was then appointed but also withdrew because of a conflict of interest. Next, Smith hired private counsel, but she too withdrew when it was disclosed that her secretary's sister was to be a witness against Smith. Finally, another public advocate was appointed who proceeded to represent Smith.

Smith appealed as a matter of right to the Supreme Court of Kentucky which affirmed the judgment and conviction. *Smith v. Commonwealth*, 2004 WL 102495 (Ky. 2004) (2002-SC-0988-TG). Smith then filed a motion in the trial court alleging ineffective assistance of trial counsel. His specific issue in that motion was that the Commonwealth had extended a plea offer of 3 years to one of Smith's attorneys but that Smith was never informed of that potential plea bargain. The trial court rejected the argument and denied the motion but without an evidentiary hearing. Smith appealed from that decision to this court. We reversed

and remanded the matter to the trial court for an evidentiary hearing on the issue raised. *Smith v. Commonwealth*, 2005 WL 2045952 (Ky. App. 2005) (2004-CA-002152-MR).

The trial court conducted a hearing but again denied relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Smith's actual trial attorney testified in that proceeding, but the other three attorneys who had represented Smith were not called as witnesses. Smith appealed from that denial of RCr 11.42 relief and this court affirmed the trial court determination. *Smith v. Commonwealth*, 2008 WL 1991644 (Ky. App. 2008) (2007-CA-000186-MR).

Smith next sought relief pursuant to CR 60.02 alleging that counsel at the RCr 11.42 hearing rendered constitutionally ineffective service due to the failure to subpoena the first three attorneys. Smith's central allegation was that the Commonwealth had extended an offer of 3 years' imprisonment but that he was never informed of that offer. The trial court rejected the argument finding that Smith knew of the 3-year plea offer but that he had rejected it prior to trial. The trial court based its finding on testimony from the RCr 11.42 evidentiary hearing. There was no new evidentiary hearing on the CR 60.02 motion.

Smith now appeals from the adverse order in the CR 60.02 proceeding and argues that post-conviction counsel was constitutionally deficient during the RCr 11.42 proceeding by failing to subpoena all of the prior trial attorneys. He contends that the trial court abused its discretion when it denied CR 60.02 relief without a new evidentiary hearing.

The Commonwealth argues that Smith's CR 60.02 motion was, in effect, a successive motion for relief pursuant to RCr 11.42. Although successive motions for relief pursuant to RCr 11.42 are disfavored, this is not such a case. *See McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). Smith's RCr 11.42 motion alleged a failure by trial counsel to inform him of a potential 3-year plea offer. His CR 60.02 motion alleged a failure of post-conviction counsel to properly represent him by failing to subpoena all of his former trial attorneys to prove that a 3-year plea bargain offer was made. These are entirely different issues, and a plea for relief pursuant to CR 60.02 was an appropriate procedural vehicle.

Despite the foregoing, we must not overlook that “[t]he decision to hold an evidentiary hearing is within the trial court’s discretion and we will not disturb such absent any abuse of that discretion.” *Land v. Commonwealth*, 986 S.W.2d 440, 442 (Ky. 1999). An evidentiary hearing on a motion for post-conviction relief is “not necessary when the record in the case refutes the movant’s allegations.” *Hopewell v. Commonwealth*, 687 S.W.2d 153, 154 (Ky. App. 1985). Here, the trial court determined that the record was sufficient to decide the issue and we do not disagree.

We are obligated to respect the trial court’s findings of fact and determinations regarding the credibility of witnesses. *Commonwealth v. Bussell*, 226 S.W.3d 96, 99 (Ky. 2007). Such findings are conclusive unless clearly erroneous. *Id.* In this regard, we note that during the hearing held in conjunction

with Smith's RCr 11.42 motion, his final trial counsel testified. She was asked if she ever received an offer on a plea from the Commonwealth in Smith's case. Her response indicated that she had received a 10-year offer but not a 3-year offer. She testified that she went to visit Smith prior to trial and had an assistant with her that day. She further noted that Smith was very upset and that he said, "How could they offer me 10 years when they offered me 3 years before?"

This testimony was sufficient for the trial court to find that Smith knew of the prior 3-year offer and that contrary to his claim, he had been informed of the offer by prior counsel. This testimony relieved any need for prior counsel to present direct testimony. The trial court was within its discretion to make such a determination from the prior RCr 11.42 record. As such, it was not ineffective assistance for post-conviction counsel to refrain from issuing a subpoena for all of Smith's trial attorneys. The testimony referred to hereinabove answered the question before the trial court.

The judgment of the Graves Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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