RENDERED: MAY 21, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000636-MR

DESIRA LOUISMAS — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 99-CR-00653

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND KELLER, JUDGES; KNOPF,[1] SENIOR JUDGE.

KELLER, JUDGE: Desira Louismas (Louismas), *pro se*, appeals from an opinion and order of the Fayette Circuit Court which denied his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. For the reasons stated below, we affirm.

[1] Judge William L. Knopf concurred in this opinion prior to the expiration of his term of Senior Judge service on May 7, 2010. Release of this opinion was delayed by administrative handling.

FACTS

Louismas and Richard Best had an altercation that resulted in Best's death. On March 27, 2000, a jury convicted Louismas of first-degree manslaughter. Consistent with the recommendation of the jury, the trial court sentenced Louismas to twenty-years' imprisonment. The Supreme Court of Kentucky affirmed his conviction and sentence on May 24, 2001. *Louismas v. Commonwealth,* 2000-SC-000445-MR.

On January 15, 2002, Louismas filed his initial *pro se* RCr 11.42 motion, and on March 25, 2003, the trial court denied his motion. Louismas appealed the trial court's decision, which this Court affirmed. *See Louismas v. Commonwealth*, 2004 WL 1699684 (Ky. App. 2004)(2003-CA-000723-MR). The Supreme Court of Kentucky denied discretionary review on January 12, 2005.

Louismas filed his second RCr 11.42 motion on July 8, 2008, and on March 31, 2009, the trial court denied that motion. In denying Louismas' motion, the trial court noted that the claims raised in his second RCr 11.42 motion either were asserted or could have been asserted in his initial RCr 11.42 motion. Thus, the trial court found it unnecessary to address the merits of Louismas' claims. This appeal followed.

STANDARD OF REVIEW

In order to prevail on a claim of ineffective assistance of counsel, the defendant must satisfy the two-part test set forth in *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). *See Gall v.*

Commonwealth, 702 S.W.2d 37 (Ky. 1985). Under this standard, a party asserting such a claim is required to show: (1) that the trial counsel's performance was deficient in that it fell outside the range of professionally competent assistance; and (2) that the deficiency was prejudicial because there is a reasonable probability that the outcome would have been different but for counsel's performance. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. A defendant must overcome a strong presumption that counsel's performance falls within the wide range of reasonable professional assistance. *Id.* at 690, 104 S. Ct. at 2066.

ANALYSIS

On appeal, Louismas raises two claims of ineffective assistance of counsel: (1) trial counsel was ineffective in failing to contact specific defense witnesses; and (2) trial counsel was ineffective in failing to investigate and adequately prepare a viable defense. With respect to his defenses, Louismas argues that his trial counsel failed to investigate and present the defenses of extreme emotional distress and self defense.

As correctly noted by the trial court, the claims raised by Louismas in his second RCr 11.42 motion either were asserted or could have been asserted in his initial RCr 11.42 motion. RCr 11.42(3) provides:

> 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 added). A defendant "is required to avail himself of RCr 11.42 as to any ground of which he is aware, or should be aware, during the period when the remedy is available to him." *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). Our case law has long held that we will not consider successive motions to vacate a conviction when those motions recite grounds for relief that have been raised earlier. *See Butler v. Commonwealth*, 473 S.W.2d 108, 109 (Ky. 1971); *Hampton v. Commonwealth*, 454 S.W.2d 672, 673 (Ky. 1970); *Kennedy v. Commonwealth*, 451 S.W.2d 158, 159 (Ky. 1970).

Louismas' argument that his counsel failed to contact witnesses was raised in his initial RCr 11.42 motion. Therefore, we decline to consider this renewed argument again in this appeal. *See Hampton*, 454 S.W.2d at 673.

Louismas' remaining argument – that trial counsel was ineffective in failing to investigate and adequately prepare a viable defense – was not raised during his prior RCr 11.42 proceeding, but is of the type that should have been. Therefore, he is not entitled to another opportunity to present this argument. RCr 11.42(3); *Butler*, 473 S.W.2d at 109.

We also note that Louismas' arguments are time-barred on their face by RCr 11.42(10), which provides:

> 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:
>
> (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.
>
> If the judgment becomes final before the effective date of this rule, the time for filing the motion shall commence upon the effective date of this rule. If the motion qualifies under one of the foregoing exceptions to the three year time limit, the motion shall be filed within three years after the event establishing the exception occurred. Nothing in this section shall preclude the Commonwealth from relying upon the defense of laches to bar a motion upon the ground of unreasonable delay in filing when the delay has prejudiced the Commonwealth's opportunity to present relevant evidence to contradict or impeach the movant's evidence.

The judgment at issue became final almost a decade ago. Moreover, Louismas' arguments do not fit within any of the exceptions set forth in RCr 11.42(10). Although Louismas argues that he did not know about the defenses of extreme emotional distress and self defense, he does not raise any newly-discovered facts, and does not raise newly-established constitutional rights that have been held to apply retroactively. Therefore, Louismas' claims for relief are time-barred under RCr 11.42.

For the foregoing reasons, we affirm the opinion and order of the Fayette Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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