

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001386-MR

AMOS STILTNER

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, SPECIAL JUDGE
ACTION NO. 00-CR-00115

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, LAMBERT, AND NICKELL, JUDGES.

CAPERTON, JUDGE: Amos Stiltner appeals from the denial of his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion without an evidentiary hearing by the Montgomery Circuit Court. Stiltner argues that the court erred in its denial. The Commonwealth argues that the court did not err. After a thorough review of the parties' arguments, the record, and the applicable law, we affirm.

On November 13, 2000, Stiltner was indicted by a Montgomery County Grand Jury on four counts of Conspiracy to Commit Murder and one count of being a Persistent Felony Offender (PFO) in the First Degree. Specifically the indictment charged that Stiltner conspired to kill Judge William Mains and the Commonwealth's Attorney, George Moore, along with his wife and his daughter.

The matter proceeded to trial, where evidence was presented that Stiltner was incarcerated in the Montgomery County jail in 1999. He was approved for work-release in November of 1999 and he began to work at the local animal shelter. In April of 2000, Stiltner's mother passed away and Stiltner requested that he be allowed to attend her funeral. The Department of Corrections denied his request for furlough because the funeral was to be held outside of Kentucky. Stiltner then attempted to obtain early release through other avenues, notably, by filing a motion for shock probation, a motion for pre-release probation, and a request for release to attend the funeral, all with Judge Mains, who had originally presided over Stiltner's case that lead to his incarceration. Commonwealth Attorney Moore objected to any such early release. Judge Mains denied all motions.

Based on the denial of his motions, Stiltner became very upset. Larry Durham, a fellow inmate at the jail, testified that Stiltner had told him that he was very upset with Judge Mains and Moore because "they wouldn't let him go to her funeral." Stiltner then informed Durham that he would get even with them. Durham then wrote to Moore about what he had learned from Stiltner.

Gary Wells, another inmate at the jail, confirmed Stiltner's state of mind concerning Moore and Judge Mains. Wells and Stiltner met during a haircut at the jail. Stiltner asked Wells how he felt about Moore. Stiltner informed Wells that he "hated" Moore because his mother had died and he could not attend her funeral. During the next few months, Wells and Stiltner had repeated conversations about Stiltner's hatred of Moore and Judge Mains. During these conversations, Stiltner revealed that he intended to kill Moore and Judge Mains.

In fact, Stiltner stated, "he couldn't sleep at night thinking about killing [Moore]" and that it was giving him "goose bumps." Stiltner further revealed that he wanted to "kill [Moore's] whole family. He was going to rape his daughter, kill the dog, rape his wife, and he wanted [Moore] to sit and watch and show him what it felt like to sit hopelessly and watch someone [he] loved die and not be able to do anything about it. And then he was going to kill [Moore]." At first Wells did not think Stiltner was serious but as time passed, Wells became convinced that Stiltner was going to kill them.

Stiltner went even further and described to Wells how he was going to kill Judge Mains, Moore and his family. He considered a multitude of ways to kill his potential victims, which included using dynamite to blow up their house, or ether and the electric panel to blow up the house, poison, or a shotgun. Stiltner then determined that he would cut the daughter's throat after raping her, break the wife's neck after raping her, but could not decide on how to kill Moore. He thought he would like "to take a 410 shotgun barrel and shove it down his throat

and pull the trigger, but he wanted him to die slow, and he had [poison], and he thought he'd just fill him full of [poison] until he died, and then he was going to blow the house up and set it afire.”

During this time, Wells shared a cell with Donnie Alfrey. Stiltner knew that Wells could communicate with the Alfrey family. Throughout this time, Moore prosecuted and Judge Mains presided over proceedings involving Donnie's relative, Bill Alfrey. Bill Alfrey's case involved a criminal syndicate, including an illegal drug trafficking operation.

In May of 2000, Judge Mains was informed that Bill Alfrey had been making phone calls intending to set up a contract on the lives of Mains and Moore. Bill Alfrey was upset because his bond had been set so high. Thereafter, Judge Mains recused himself from Bill Alfrey's case.

Meanwhile, in jail, Stiltner heard about the potential contracts and told Wells about it. Stiltner explained to Wells that Alfrey had a \$200,000 contract out on the lives of Moore and Judge Mains. Knowing that Wells could communicate with the Alfrey family, Stiltner wanted Wells to inform Donnie Alfrey, his cell mate, that he was willing to carry out the contract. This plan was halted when Wells learned that Donnie Alfrey, his cellmate, was planning to testify against Bill Alfrey, who allegedly desired to put out a contract on the lives of Mains and Moore.

Thereafter, Stiltner asked Wells for his help in getting the word to Bill Alfrey that he was willing to carry out the hit directly. Stiltner kept pressuring

Wells to see whether he had talked to Bill Alfrey. Instead of talking to Bill Alfrey, Wells spoke to his attorney, Steve Hughes, and informed him of the conversations. Thereafter, Hughes went to Moore and informed him of the threat. Hughes then withdrew from Wells's case and suggested that if the police wanted to talk to Wells that they should do it outside of the jail for Wells's safety.

The Kentucky State Police ("KSP") met with Wells at the Montgomery County courthouse. Wells informed KSP that Stiltner was attempting to present himself as a person who was for hire to commit the murders of Moore and Judge Mains. Wells informed KSP that he was to contact Bill Alfrey to relay the information. Based on this, KSP set up an undercover sting operation.

Wells informed Stiltner that he had gotten word out and that he had talked to someone who could help. Stiltner wanted to meet the contact person at the jail but Wells told him the person would not meet with him inside the jail. Stiltner then informed Wells to tell the person to come to the animal shelter and speak to him there. Stiltner told Wells that the contact person should ask to see the "Mountain Man" and then ask to speak to him about a "cat."¹ The information was provided to KSP.

Detective Doyle Wilson went undercover for the investigation. Det. Wilson arrived at the animal shelter wearing a tape recorder and a video camera. Both the audio- and videotape of the meeting were played for the jury and introduced into evidence. After using the aforementioned code words, Det. Wilson

¹ The shelter did have cats available for adoption.

told Stiltner that Bill Alfrey had gotten word that Stiltner wanted to talk. Stiltner then attempted to discern whether Wilson had a wire on him. Wilson opened his jacket and told Stiltner that he was not wired. Stiltner then told Wilson that he had heard that Bill Alfrey had a couple hundred thousand dollars to give away for “somebody to take care of business.” Stiltner then stated that “whatever he wants done, I will do it.” In exchange, Stiltner needed something up front to ensure that everyone was serious. Specifically, Stiltner wanted a four-wheel drive truck and \$20,000 up front, and an additional \$100,000 later. When asked what Bill Alfrey was going to get in return, Stiltner stated “the word is Judge Mains and George Moore is to be wiped out.”

Stiltner stated that he wanted the truck registered and insured in his name and he wanted this ready, and the cash, by the time he got out of jail in a few weeks. Within thirty days of his release, Stiltner promised that the murders would be done. Wilson told Stiltner that he would discuss this with Bill Alfrey and get back in touch with him.

On October 25, 2000, Wilson met with Stiltner for a second time. While Wilson was wired with a video and an audio recorder, the videotape malfunctioned and could not be introduced. However, the audio recording was working and an additional surveillance video made from a nearby building was also introduced to the jury.

In this second meeting, Wilson informed Stiltner that Bill Alfrey would not agree to pay \$20,000 up front, but would pay \$10,000 in cash plus the

truck. Wilson informed Stiltner that Bill Alfrey agreed with the final amount. Wilson told Stiltner that Bill Alfrey was concerned that Stiltner would run off with the money without performing and wanted some assurances that the murders would be done. Stiltner reassured Wilson that he would carry them out, and that “I’ve made up my mind somebody else is going to . . . pay.”

The discussion then turned to whether or not the bodies would be found as it would be on the local news. Stiltner realized that Bill Alfrey would “get heat” so that if he did not want the bodies found, “they won’t be found.” Stiltner accepted the terms of the deal but insisted that he get between \$2000 and \$4000 immediately to pay people who were helping him. Stiltner then described the make and color of the truck he wanted.

Wilson and Stiltner then discussed how the murders would occur. Stiltner explained he was going to try to make it look like an accident. He stated that he planned to poison Moore’s family, and to shoot Moore himself. Again, the meeting ended with Wilson explaining that he would discuss the terms of the deal with Bill Alfrey and get back in touch.

On the third meeting, held on November 9, 2000, Wilson met with Stiltner and had both audio- and videotapes recording and functioning. The tapes revealed that Wilson offered Stiltner \$2000 as a payment and that if he accepted the money, Bill Alfrey expected him to complete the murders. Stiltner responded, “I’m going to do it.” Then Stiltner offered to kill another person, Angie Sons, if they left cocaine inside the truck when they dropped it off. Stiltner walked to

Wilson's truck to obtain the money from an envelope in the seat. When Stiltner grabbed the envelope, Wilson told him that he would tell Bill Alfrey that "You accepted and that the deal is on."

After taking the money, Stiltner walked inside the animal shelter and showed the money to Clyde Walker, a coworker at the shelter. KSP then converged on the shelter, and found Stiltner sitting by the front door with the envelope lying beside a trash can within reach of Stiltner. The money was inside the envelope.

At trial, Stiltner testified that he was attempting to set up Wilson who he thought worked for Bill Alfrey. However, Moore, the officers, and the jailer, all testified that they never received word that Stiltner was attempting his own undercover operation. Thereafter, the jury convicted Stiltner of four counts of conspiracy to commit murder. During the penalty phase, the Commonwealth presented evidence that Stiltner had twenty-six prior felony convictions. The jury recommended twenty years on each count of conspiracy and with a guilty verdict of PFO in the first degree, which enhanced the sentence to fifty years on each count, with the sentences to run consecutively.

Thereafter, Stiltner appealed to the Kentucky Supreme Court and on August 21, 2003, the Court rendered a unanimous unpublished opinion affirming the conviction but reversing the sentence, as there was only one conspiracy to murder and PFO in the first degree conviction.

On September 3, 2002, as his direct appeal was pending, Stiltner filed a motion for a new trial and asserted that he had newly discovered evidence that a previously unknown witness, Billy Ray Miles, could provide testimony that contradicted Wells's and supported Stiltner's version. Based on this, the trial court conducted an evidentiary hearing.

At the hearing, the only witness was Miles, who was an inmate with Stiltner and Wells. However, Miles revealed that he was not personal friends with either one, that he did not have regular contact with Stiltner, and that he did not know Wells that well. Nevertheless, Miles testified that while in jail, he heard Wells discussing the contract to kill both Moore and Judge Mains. He claimed that Wells had said that he knew someone who was willing to pay to have both Moore and Judge Mains killed. He further claimed that Wells said if anyone was interested that they should contact him. Miles never told anyone about this in jail. He stated that he had decided "he wasn't going to get tied up in nothing."

Thereafter, Stiltner was transferred into the same jail as Miles and Wells. According to Miles, Stiltner informed him that Wells had implicated him in the crimes. Based on this news, Miles told Stiltner what he allegedly heard Wells say in jail. This was the basis for the motion. At the close of this testimony, Stiltner argued that this testimony clearly contradicted Wells's trial testimony and would show Wells lied at trial. Based on this, he further asserted that the testimony would have had a significant impact on the verdict.

The Commonwealth asserted that this was information that Stiltner had before trial, that he did not file an affidavit verifying his diligence in finding this witness, and that the evidence was cumulative and merely impeached Wells's credibility. The Commonwealth argued that the undercover tapes contained overwhelming evidence of guilt and, thus, there was no indication that this testimony would have affected the verdict. The trial court denied the motion for new trial on October 24, 2002.

The trial court determined that the tapes were the compelling evidence; that this testimony would not have led to an acquittal; that the testimony was impeachment evidence at best; and that at the time, it was common knowledge in the jail that there were rumors of a contract kill on Moore and Judge Mains. Stiltner appealed the trial court's denial of his motion for a new trial, which the Kentucky Supreme Court affirmed

On July 13, 2005, Stiltner, *pro se*, filed his current motion for relief pursuant to RCr 11.42. On July 15, 2005, the trial court ordered that the Department of Public Advocacy be appointed to represent Stiltner. The court's order further noted that a hearing on the motion "shall be conducted upon motion duly filed by appointed counsel." On February 16, 2009, more than three and a half years later, appellate counsel filed a supplemental memorandum in support of Stiltner's *pro se* motion and renewed the request for an evidentiary hearing.² On June 23, 2009, the Commonwealth filed an answer objecting to the motion.

² The supplemental memorandum addressed venue.

On June 20, 2009, the trial court overruled the RCr 11.42 motion and denied the request for an evidentiary hearing.³ In so ruling, the court noted that Stiltner failed to properly certify his *pro se* motion and that, while the Commonwealth asserted that the motion was not timely filed, the court reviewed the motion assuming it was timely. The court further explained that it had not previously granted an evidentiary hearing with its prior order that a hearing on the motion “shall be conducted upon motion duly filed by appointed counsel.” It stated instead that the filing of a proper motion setting forth the facts which would necessitate an evidentiary hearing would result in said hearing. Thus, the court determined from the review of the record that Stiltner’s allegations were without merit and denied the RCr 11.42 motion.⁴ It is from this denial that Stiltner now appeals.

On appeal, Stiltner argues that the court erred when it failed to conduct an evidentiary hearing where the court had previously ordered such proceedings during its order appointing counsel. The Commonwealth argues that the trial court had not previously granted an evidentiary hearing and that the trial court did not abuse its discretion by denying Stiltner’s motion for an evidentiary hearing. Instead, the Commonwealth asserts that the trial court correctly determined that Stiltner’s argument was a misinterpretation of the order and that a

³ Stiltner then filed a Kentucky Rules of Civil Procedure (CR) 59.05 motion to which the trial court overruled on August 19, 2009.

⁴ The court also noted that it was very familiar with the record as it had presided over Stiltner’s trial.

hearing would only be conducted upon a proper motion alleging facts that would justify a hearing. Moreover, the Commonwealth argues that Stiltner's argument must fail as he did not state specifically why he was entitled to an evidentiary hearing and that Stiltner previously filed a direct appeal based on the sufficiency of the evidence. Thus, the Commonwealth argues that the trial court properly denied Stiltner's RCr 11.42 motion without an evidentiary hearing.

With these arguments in mind we now turn to our established jurisprudence. We review the trial court's denial of an RCr 11.42 motion for an abuse of discretion. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citing 5 Am. Jur. 2d *Appellate Review* § 695 (1995)).

An RCr 11.42 movant is not entitled to an evidentiary hearing on the motion where the allegations contained in the motion are justiciable by reference to the record. *Hodge v. Commonwealth*, 68 S.W.3d 338, 341 (Ky. 2001). In *Hodge*, the Supreme Court of Kentucky held that the dispositive inquiry on the issue of whether a hearing is required is whether the record refutes the allegations raised. *Id.* at 341-342.

Moreover, an RCr 11.42 motion is limited to the issues that were not and could not be raised on direct appeal. "It is not the purpose of RCr 11.42 to permit a convicted defendant to retry issues which could and should have been raised in the original proceeding, nor those that were raised in the trial court and

upon an appeal considered by this court.” *Thacker v. Commonwealth*, 476 S.W.2d 838, 839 (Ky. 1972); *see also Mills v. Commonwealth*, 170 S.W.3d 310, 326 (Ky. 2005) (“[A]n RCr 11.42 motion is limited to issues that were not and could not be raised on direct appeal.”); and *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983) (“The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete. That structure is set out in the rules related to direct appeals, in RCr 11.42, and *thereafter* in CR 60.02.”)

In addressing Stiltner’s argument that the trial court had reneged on granting an evidentiary hearing with its prior order appointing Stiltner counsel, which stated that a hearing on the motion “shall be conducted upon motion duly filed by appointed counsel,” the court explicitly found that Stiltner’s argument was a misinterpretation of its order and that only by the filing of a proper motion setting forth the facts which would necessitate an evidentiary hearing would a hearing occur.

The trial court’s explanation is in accord with our jurisprudence that an RCr 11.42 movant is not entitled to an evidentiary hearing on the motion where the allegations contained in the motion are justiciable by reference to the record. *See Hodge, supra*. Thus, we disagree with Stiltner that the trial court granted an evidentiary hearing and then later disallowed said hearing.

Moreover, the trial court did not abuse its discretion in denying Stiltner’s RCr 11.42 motion. Stiltner had previously addressed the insufficiency of

the evidence upon direct appeal, which precludes the same argument in his post-conviction relief motion. *See Mills, supra*. We do not find an abuse of discretion in denying Stiltner's RCr 11.42 motion based on the record, especially given that the same court which presided over Stiltner's trial determined from the record that Stiltner's allegations were without merit and did not mandate an evidentiary hearing. Accordingly, we affirm the denial of Stiltner's RCr 11.42 motion without an evidentiary hearing.

In light of the foregoing, we affirm.

ALL CONCUR.

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