

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000780-MR

QUAYNELL KING

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 04-CR-00793

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: KELLER, THOMPSON AND WINE, JUDGES.

THOMPSON, JUDGE: Quaynell King appeals from an opinion and order of the Fayette Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. We affirm.

On April 24, 2004, King and Dominico Morbley fired guns near a crowd of people standing outside of a Lexington nightclub. A bullet fired from

Morbley's gun struck and killed Dontay Kendrick. King and Morbley were indicted by a Fayette County grand jury for murder, and King was additionally indicted for possession of a handgun by a convicted felon and for being a second-degree persistent felony offender (PFO-II). Both men were then tried together.

At the conclusion of the trial, King was found guilty of wanton endangerment in the first degree and for being a PFO-II. In accordance with the jury's recommendation, the trial court sentenced King to a ten-year sentence, which had been enhanced by virtue of the PFO-II conviction. However, King's sentence was suspended and he was placed on probation for five years.

While serving probation, King was indicted for first-degree trafficking in a controlled substance, first offense; possession of marijuana; resisting arrest; first-degree fleeing or evading police; and being a PFO-I. Subsequently, King was arrested for first-degree burglary and third-degree criminal mischief. King was then released to attend a substance abuse counseling session but failed to return to the Fayette County Detention Center. After remaining at large for months, King was arrested on outstanding warrants and returned to the detention center.

Following his arrest, King filed a motion for post-conviction relief pursuant to RCr 11.42, alleging that his defense counsel failed to object to jury instructions in his murder trial. He contended that his defense counsel should have objected to the trial court's instruction on wanton endangerment because it was not a lesser included offense of murder and was, thus, improper. The trial court appointed counsel for King, but appointed counsel chose not to supplement the

record in support of King's RCr 11.42 motion. The trial court then denied King's motion by an opinion and order.

King contends that his post-conviction counsel rendered ineffective assistance by failing to file a motion to hold King's RCr 11.42 case in abeyance while King filed a belated appeal. He contends that his post-conviction counsel should have recognized that his trial counsel failed to file a direct appeal and, thus, deprived him of his right to at least one level of appellate review. King argues that this fact required his post-conviction counsel to move for an abeyance of his case.

When an RCr 11.42 action is filed, a defendant has a conditional right to counsel under certain conditions. *Moore v. Commonwealth*, 199 S.W.3d 132, 138 (Ky. 2006). If an RCr 11.42 motion raises a material issue of fact that cannot be determined on the face of the record and the movant is financially unable to employ counsel, a trial court shall appoint counsel on request of the movant. *Id.* However, a defendant has no constitutional right to appointment of counsel in a state post-conviction proceeding. *Bowling v. Commonwealth*, 981 S.W.2d 545, 552 (Ky. 1998). Therefore, unless a defendant's action meets the requirements of RCr 11.42, appointment of counsel is not required. *Moore*, 199 S.W.3d at 138. If a defendant has no right to appointment of counsel, a defendant cannot claim ineffective assistance of counsel. *Bowling*, 981 S.W.2d at 552.

The trial court initially appointed counsel for King, but appointed counsel informed the trial court that she would not be supplementing the record in King's RCr 11.42 case. Soon thereafter, the trial court denied King's RCr 11.42

motion without holding a hearing. Based on this procedural history, if the trial court properly denied King's RCr 11.42 motion without a hearing, King cannot allege post-conviction ineffective assistance of counsel because he would not be entitled to appointment of post-conviction counsel. *Bowling*, 981 S.W.2d at 552. Thus, we must determine whether the trial court properly denied King's motion without a hearing.

King contends that his trial counsel failed to properly object to the trial court's wanton endangerment instructions because wanton endangerment is not a lesser included offense of murder. King further contends that his trial counsel's ineffectiveness prejudiced his case.

The standard of review for claims of ineffective assistance of counsel was established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under this standard, the movant must show (1) that counsel made serious errors resulting in a performance outside the range of professionally competent assistance guaranteed by the Sixth Amendment; and (2) that the deficient performance prejudiced the defense so seriously that there is a reasonable likelihood that the outcome of the trial would have been different absent the errors. *MacLaughlin v. Commonwealth*, 717 S.W.2d 506, 507 (Ky.App. 1986).

A reviewing court must focus on the totality of the evidence before the judge when assessing the performance of defense counsel and must presume that counsel rendered effective assistance of counsel. *Kimmelman v. Morrison*, 477 U.S. 365, 381, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). Counsel's

performance is not judged in a vacuum but by the degree that the performance deviates from the quality of representation customarily provided by the legal profession. *Centers v. Commonwealth*, 799 S.W.2d 51, 55 (Ky.App. 1990).

Based on our review, we conclude that the trial court's decision that King received effective assistance of counsel was not erroneous. The record reveals that the Commonwealth requested that a first-degree wanton endangerment instruction be given to the jury based on King firing shots near a crowd. King's counsel objected on the basis that wanton endangerment was not a lesser included offense of wanton murder. The trial court granted the Commonwealth's request and gave the first-degree wanton endangerment instruction. The jury acquitted King of wanton murder but found him guilty of first-degree wanton endangerment.

King's counsel then filed a motion for a new trial arguing that the trial court failed to instruct on second-degree manslaughter, which denied King the benefit of having the jury instructed on the whole law of the case. On December 6, 2005, the trial court denied this motion, but King was granted probation. Thus, the record is clear that counsel specifically and fervently objected to the trial court's instruction on first-degree wanton endangerment. The record refutes King's claim that his trial counsel failed to properly object to the trial court's instructions. When reviewing a trial court's findings in an RCr 11.42 action, we must uphold these findings if they are not clearly erroneous. *Commonwealth v. Bussell*, 226 S.W.3d 96, 99 (Ky. 2007). We conclude that the trial court's ruling was not erroneous.

Additionally, because the record refuted King's RCr 11.42 claim, he was neither entitled to appointment of post-conviction counsel nor an evidentiary hearing regarding his motion. *Vaughn v. Commonwealth*, 258 S.W.3d 435, 441 (Ky.App. 2008). Therefore, he cannot claim that his post-conviction counsel was constitutionally ineffective. *Bowling*, 981 S.W.2d at 552.

King contends that the trial court erred by giving the jury an instruction on the offense of wanton endangerment in the first degree. He argues that wanton endangerment in the first degree is not a lesser included offense of wanton murder and, thus, was improper.

King's allegation of trial error was argued in the trial court, but he failed to bring this issue, or any issue, in a direct appeal. RCr 11.42 motions are not designed to permit defendants to relitigate issues which could and should have been raised on direct appeal. *Martin v. Commonwealth*, 203 S.W.3d 173, 175 (Ky.App. 2006). When an issue that should have but was not brought on direct appeal is pursued through an RCr 11.42 motion, we will not reach the issue. *Hatcher v. Commonwealth*, 310 S.W.3d 691, 697 (Ky.App. 2010).

For the foregoing reasons, we affirm the Fayette Circuit Court's opinion and order denying King's RCr 11.42 motion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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