

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000343-MR

ONDRA CLAY

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 07-CR-00463

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, D. LAMBERT, AND NICKELL, JUDGES.

NICKELL, JUDGE: Ondra Clay, *pro se*, challenges the Fayette Circuit Court's denial of his RCr¹ 11.42 motion to vacate a 2008 conviction for rape and sodomy, both in the first degree, following a jury trial. Clay alleges appointed counsel rendered ineffective assistance and the trial court should have convened an

¹ Kentucky Rules of Criminal Procedure.

evidentiary hearing before ruling on his motion. Having reviewed the briefs, the law and the record, we affirm.

FACTS

Clay was twice tried for the 1997 rape and sodomy that is the basis of this appeal; the first trial ended with a hung jury and the second trial resulted in conviction. Clay testified at both trials. The same judge presided at both trials and sentenced Clay to a total of thirty years in conformity with the jury's recommendation. Clay pursued a direct appeal, attacking an evidentiary ruling and maintaining there had been a sentencing error. The conviction was affirmed on appeal by the Supreme Court of Kentucky.² Importantly, there was no claim of Clay being incompetent, and no outward manifestation of the need for a mental health evaluation. Under RCr 8.06, a defendant's incapacity must be explored only upon the existence of "reasonable grounds to believe that the defendant lacks the capacity to appreciate the nature and consequences of the proceedings against him or her, or to participate rationally in his or her defense[.]" No such indication was evident in this case.

The rape and sodomy charges were not Clay's only brush with the criminal justice system. A jury had previously convicted him of wanton murder and first-degree sodomy. The same judge who heard the current charges presided over that trial, sentencing Clay to concurrent terms of life without parole for

² *Clay v. Commonwealth*, 2009-SC-000012-MR, 2010 WL 2471862 (Ky. June 17, 2010, unpublished).

twenty-five years on the murder and twenty years on the sodomy. Our Supreme Court affirmed that conviction in *Clay v. Commonwealth*, 291 S.W.3d 210, 212 (Ky. 2008), as modified on denial of reh'g (Aug. 27, 2009). There was no suggestion Clay was mentally infirm in that case either. In a prior case, Clay was acquitted of rape and sodomy.³

With his direct appeal of the rape and sodomy conviction a failure, Clay filed a *pro se* motion to vacate the judgment due to ineffective assistance of counsel because his trial attorney allegedly failed to “properly investigate and prepare an adequate defense.” He requested appointment of post-conviction counsel and an evidentiary hearing. In the accompanying memorandum of law, Clay maintained he had told his trial attorney he had a mental problem for which he received medication while previously incarcerated in Ohio, but his attorney never secured records to determine whether Clay was competent to stand trial. Clay also argued his attorney did not secure alibi witnesses, but identified no one whose testimony would have resulted in an acquittal.

While acting *pro se*, Clay filed a separate motion for an evidentiary hearing and appointment of counsel. In this pleading he stated he was,

alleging primarily that his trial attorney rendered ineffective assistance of counsel in the investigation and preparation of his case and failed to ask for a direct (sic) verdict at the close of the Commonwealth’s case and at the close of the defense when the evidence was insufficient to support a conviction for First Degree Rape and First Degree Sodomy.

³ *Commonwealth v. Clay*, Fayette Circuit Court, Case No. 04-CR-00363.

That same day, May 2, 2013, Clay moved for findings of fact and conclusions of law on his motion to vacate.

On May 7, 2013, the Department of Public Advocacy (DPA) was appointed to represent Clay and “file supplementary grounds, if any, for the relief requested by [Clay] and request any additional relief that [Clay] and his appointed attorney consider appropriate, subject to the pertinent provisions of KRS[⁴] 31.110(3).” On May 22, 2013, Hon. Josh McWilliams, an Assistant Public Advocate, entered an appearance on Clay’s behalf. On October 28, 2014, a Notice of Submission on the Pleadings was filed stating no supplement would be filed because “the *pro se* RCr 11.42 motion adequately alleges the facts underlying [Clay’s] claims.” The pleading was signed by Hon. Aaron Reed Baker, another Assistant Public Advocate.

The Commonwealth filed a response stating all claims were refuted by the record; no “reasonable grounds” had been demonstrated to suspect Clay was mentally incompetent—especially since he had appeared before the same judge in multiple cases with several different attorneys; was tried by four separate Fayette County juries before whom he had testified in two separate trials. Years later, he had still submitted no evidence of incompetency.

As for those alleged exculpatory witnesses he faulted counsel for not discovering, he had offered no proof of who they were, what they saw or knew, or the testimony they would have given. Quoting *Mills v. Commonwealth*, 170

⁴ Kentucky Revised Statutes.

S.W.3d 310, 325 (Ky. 2005), *overruled by Leonard v. Commonwealth*, 279 S.W.3d

151 (Ky. 2009), the Commonwealth wrote,

[w]ithout a “minimum factual basis,” the motion may be summarily overruled. Furthermore, RCr 11.42 exists to provide the movant with an opportunity to air known grievances, not an opportunity to conduct a fishing expedition for possible grievances, and post-conviction discovery is not authorized under the rule.

(Internal citations omitted).

On February 19, 2015, the trial court entered an order denying the motion without an evidentiary hearing. The court stated in part:

RCr 11.42 provides persons under sentence with a procedure to raise collateral attacks on the judgments entered against them. Section (2) of the rule allows the trial court to dismiss motions which do not make a substantial *prima facie* showing of entitlement (to) relief. If [Clay’s] allegations are refuted by the record as a whole, no evidentiary hearing is required. *Hopewell v. Commonwealth*, 687 S.W.2d 153, 154 (Ky. App. 1985), *Robbins v. Commonwealth*, 719 S.W.2d 742 (Ky. App. 1986).

This Court finds that, upon review of the parties’ motions and applicable law, Clay has failed to make a substantial *prima facie* showing that he is entitled to relief under either *Strickland [v. Washington]*, 466 U.S. 668, 104 S.Ct. 205280 L.Ed.2d 674 (1984)] or *Norton [v. Commonwealth]*, 63 S.W.3d 175 (Ky. 2001)]. The Court further finds that Clay’s trial counsel took all reasonable and necessary steps to insure that Clay received a fair trial before an impartial jury.

Upon receipt of the trial court’s order, acting on Clay’s behalf, Baker filed a timely Notice of Appeal, Designation of Record, and Motion to Proceed *in forma pauperis*, thereby ensuring Clay’s ability to appeal the ruling.

ANALYSIS

In his *pro se* capacity, Clay now argues the trial court abused its discretion in denying the motion to vacate because while appointed counsel investigated the case, he filed no supplemental pleading and the trial court should have liberally construed his *pro se* pleading because he is untrained in the law. Clay faults DPA for not advising the court his “case did not meet the criteria for representation,” but he fails to elaborate on precisely what that wording means. Since the trial court appointed counsel, the court obviously believed an appointment was appropriate. Because the record is devoid of supporting evidence, perhaps Clay expected counsel to “create” records and witnesses to support his claims. It goes without saying such would be unethical and beyond all permissible bounds of legal representation. As the order appointing DPA stated, a supplemental pleading was expected only if “appropriate.”

In his second claim, Clay says he was denied “effective” assistance of post-conviction counsel. Clay did not attack post-conviction counsel’s performance in the trial court. We are a court of review. Having failed to raise the claim in the trial court, Clay cannot attack post-conviction counsel’s performance for the first time in this Court. *Williams v. Commonwealth*, 462 S.W.3d 407, 409 (Ky. App. 2015).

Finally, Clay claims an evidentiary hearing should have been convened. We disagree. General allegations of error without supporting proof are wasted breath. *Williams v. Commonwealth*, 336 S.W.3d 42, 50 (Ky. 2011);

Bowling v. Commonwealth, 981 S.W.2d 545, 551 (Ky. 1998). To justify RCr 11.42 relief due to ineffective assistance of counsel, Clay had to show counsel erred and his error probably produced a bad result. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). As stated by our Supreme Court, he had to show “absent errors by trial counsel, there is a ‘reasonable possibility that the jury would have reached a different result.’” *Norton v. Commonwealth*, 63 S.W.3d at 175. Clay has shown neither error nor the probability of a different result.

Based upon the appellate record, we discern no abuse of discretion or other error. Therefore, we affirm the denial of the motion to vacate.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ondra Clay, *pro se*
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BRIEF FOR APPELLEE:

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