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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001800-MR

DANNY SHELLEY — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE ROBERT MCGINNIS, SPECIAL JUDGE
ACTION NO. 02-CR-00094

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, COMBS, AND STUMBO, JUDGES.

COMBS, JUDGE: Danny Shelley, *pro se*, appeals from an order of the Pulaski Circuit Court denying his second motion made pursuant to RCr[1] 11.42. After our review, we affirm.

On January 17, 2003, Shelley entered into an agreement with the Commonwealth in which he agreed to plead guilty to the 2002 murder of Pulaski County Sheriff, Sam Catron. In exchange for his guilty plea, the Commonwealth

[1] Kentucky Rules of Criminal Procedure.

agreed to recommend a sentence of life without the possibility of parole for twenty-five years. Shelley subsequently entered his guilty plea and the trial court sentenced him according to the Commonwealth's recommendation.

On February 21, 2006, Shelley filed his first motion to set aside his conviction and sentence pursuant to RCr 11.42. In that motion, Shelley contended his guilty plea had not been made voluntarily, knowingly, and intelligently due to ineffective assistance of his trial counsel. Specifically, Shelley claimed that his trial counsel rendered ineffective assistance by: (1) advising Shelley that he could be sentenced to death if found guilty at trial; (2) failing to assert affirmative defenses; and (3) failing to seek suppression of evidence against Shelley.

On April 24, 2006, the trial court denied Shelley's RCr 11.42 motion without an evidentiary hearing. We dismissed his subsequent appeal due to the untimeliness of his notice of appeal. The Kentucky Supreme Court denied Shelley's motion for discretionary review regarding that dismissal.

Shelley, *pro se*, then moved the trial court to vacate his sentence pursuant to CR[2] 60.02. In that motion, Shelley argued that he was entitled to relief on several grounds, including, *inter alia*, ineffective assistance of counsel, incompetence, insufficient evidence, and conspiracies involving the DEA and the FBI. The trial court denied Shelley's motion upon determining that it did not raise any issues that could not – or should not – have been raised either by a direct

[2] Kentucky Rules of Civil Procedure.

appeal or in an RCr 11.42 motion. We affirmed. *Shelley v. Commonwealth*, 2009-CA-000323, 2010 WL 1133237 (Ky. App. 2010).

On August 11, 2009, while the appeal from the denial of his CR 60.02 motion was pending before this Court, Shelley filed his second RCr 11.42 motion in the trial court. He alleged that his trial counsel was ineffective for failing to seek suppression of his statement to the police based on his being intoxicated at the time he gave the statement. He contended that new evidence (in the form of a statement from one of the arresting officers) supported this allegation. He based his motion on his claim that an officer approached him five years after his guilty plea and confirmed that Shelley had been intoxicated during his police interview.

There was no activity regarding Shelley's second RCr 11.42 motion until July 20, 2011, when the trial court entered an order appointing the Department of Public Advocacy (DPA) to represent him. On August 31, 2011, the DPA moved to withdraw as counsel on the basis that the matter was not one that a reasonable person with adequate means would pursue at his or her own expense.[3] That motion was granted on September 7, 2011.

On October 31, 2012, Shelley filed an amended RCr 11.42 motion alleging that his trial counsel was ineffective for failing to advise him of an offer from the Commonwealth of "straight life." Shelley subsequently hired private counsel, who supplemented his motion on October 9, 2013. In the supplemental

[3] *See Fraser v. Commonwealth*, 59 S.W.3d 448, 454 (Ky. 2001) (citing Kentucky Revised Statutes (KRS) 31.110(2)(c), and *Anders v. California*, 386 U.S. 738, 744, 87 S.Ct. 1396, 1400, 18 L.Ed.2d 493 (1967)).

motion, Shelley argued that his trial counsel had been ineffective for failing to request an evaluation for mental competency and criminal responsibility and for failing to present mitigating factors as well.

The trial court denied Shelley's motion on July 20, 2015, holding that: (1) Shelley's claim that his trial counsel failed to seek suppression had already been resolved in the previous RCr 11.42 motion; (2) his claim that trial counsel failed to advise of an alleged offer was not timely; and (3) his claims that trial counsel failed to seek a mental evaluation and failed to present mitigating factors had been raised in his previous RCr 11.42 and CR 60.02 motions. This appeal followed.

On appeal, Shelley argues that the trial court erred in denying his motion without first allowing him to present evidence at an evidentiary hearing. In response, the Commonwealth contends that an evidentiary hearing was unnecessary because Shelley's motion was untimely and his claims either had been – or should have been – raised in his prior post-conviction motion. We agree with the Commonwealth.

RCr 11.42 allows a person who has been convicted of a crime to collaterally attack his sentence. RCr 11.42(3) provides that 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).

On the issue of whether an evidentiary hearing was proper, *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001), is controlling. Pursuant to *Fraser*, a hearing on the issues raised in an RCr 11.42 motion is required only if there is a material issue of fact that cannot be conclusively resolved by an examination of the record. *Id*. at 452.

Shelley first argues that based on the coercive nature of his police interview, his trial counsel was ineffective for failing to seek suppression of his statement. He claims that due to his extreme intoxication, his confession was involuntary. He acknowledges that he raised a similar issue in his previous RCr 11.42 motion. However, he claims to have discovered new evidence that supports his contention; *i.e.*, admissions by the interrogating officer that he was "out of it."

Although Shelley did not directly raise this issue in his first RCr 11.42 motion, he certainly was aware of it at the time his motion was filed. He demonstrated his awareness when he stated in his initial RCr 11.42 motion: "while the police interrogated movant, movant was intoxicated on drugs, also in pain from the wreck, possible head injuries, and the police never once took him to see a doctor or any sort of medical treatment." It may be true that he was unaware of the interrogating officer's thoughts until 2008. However, such evidence was in existence and could have been raised and developed at an evidentiary hearing. Because this issue could have been raised in Shelley's previous motion, the trial court properly found that he was precluded from raising the claim in a successive RCr 11.42 motion.

We also note that Shelley was not prejudiced by his attorney's failure to seek suppression of his statement. Shelley contends that "without the confession, the prosecution would have had incredible difficulty creating a complete case." However, several witnesses saw him fleeing the scene after the shot was fired, and he was in possession of the murder weapon when he was apprehended. If the trial court had reached the merits of Shelley's claim, we are persuaded that it would have failed.

Shelley additionally contends that his attorney was ineffective because he failed to have him evaluated for mental competency and failed to present mitigating factors. However, this very claim was raised and rejected in his first RCr 11.42 motion. In that motion, Shelley argued:

> The movant's counsel's failure to gather mitigative evidence or to prepare an affirmative defense for him was ineffective assistance of counsel. Movant's counsel knew that Movant had been on suicide watch, and had just been arrested for a killing, and did not consider getting Movant an evaluation. This was not any sort of tactical move on counsel's part. . . . Movant's counsel did not even consider having Movant evaluated by a professional doctor, to determine what sort of state his mind was in during the offense in this case. . . . Movant further avers that he was entitled to an expert doctor to help him determine his mental state of mind in this case, at the time of the killing, before the offense, and even afterwards, such as at the time of the plea.

The trial court stated that this issue was "moot because Shelley chose to accept responsibility for his crime and enter a plea of guilty."

RCr 11.42 is not intended as a vehicle for defendants "to relitigate previously determined issues." *Baze v. Commonwealth,* 276 S.W.3d 761, 766 (Ky. 2008) (citation omitted). Because Shelley previously raised this exact issue, the trial court correctly determined that he is barred from raising the issue again in a successive RCr 11.42 motion.

Shelley also contends that his trial counsel was ineffective by failing to inform him of a plea offer of twenty years to life. His claim is based upon a handwritten note from his attorney's file that merely states, "Eddy's offer of straight life." The trial court denied his claim as having been untimely raised. Shelley admits that when he raised this issue, he did so more than three years after he discovered the handwritten note in 2008. However, he claims that the issue "relates back" to earlier issues that he raised in his timely 2009 RCr 11.42 motion. Therefore, he argues that it should have been considered. We do not agree.

RCr 11.42 requires that a motion must be filed within three years of final judgment unless the facts upon which the motion is based were unknown and could not have been known – or unless the fundamental right asserted had not yet been established and was later held to apply retroactively. RCr 11.42(10). In *Roach v. Commonwealth*, 384 S.W.3d 131 (Ky. 2012), the Kentucky Supreme Court held that new claims asserted in amended RCr 11.42 motions were untimely if filed outside the three-year period set forth in RCr 11.42(10) unless the amended claims amplified or clarified the original claims or "arose from the same 'conduct,

transaction, or occurrence'" as claims set out in the original motion. *Id*. at 136 (quoting CR 15.03(1)). The Court explained:

> As was the Supreme Court in *Mayle* [*v. Felix*, 545 U.S. 644, 125 S.Ct. 2562, 162 L.Ed.2d 582 (2005)], we too are concerned that CR 15.03's relation-back provision not be read so broadly as to undermine the already generous RCr 11.42 three-year limitations period. To that end, we hold that relation back in the RCr 11.42 context should be limited to amended pleadings amplifying and clarifying the original claims, and to amendments adding claims only if the new, otherwise untimely claims are related to the original ones by *shared facts* such that the claims can genuinely be said to have arisen from the same "conduct, transaction, or occurrence." New claims based on facts of a different time or type will not meet that standard and so, generally, should not be allowed.

Id. at 137 (emphasis added).

The facts underlying Shelley's **amended** claim are that his attorney received a plea offer from the Commonwealth and that he failed to deliver the offer to Shelley. Those facts are wholly different from the facts underlying Shelley's **original** claims – that trial counsel failed to seek suppression of Shelley's statement to police and failed to challenge Shelley's mental competency or present mitigating evidence. Because there are no shared facts between the amended claim and the original timely claims, it cannot be said that Shelley's amended claim arose from the same conduct, transaction, or occurrence as his original claims. Therefore, the trial court was correct in disallowing Shelley's amended claim as having been untimely filed. It did not "relate back" to any of his original timely claims pursuant to *Roach*, *supra*.

We affirm the order of the Pulaski Circuit Court.

ALL CONCUR.

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