

RENDERED: April 3, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NOS. 96-CA-1495-MR and 96-CA-2358-MR

CARL CURTIS HUFFINES

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DANIEL A. SCHNEIDER, JUDGE
ACTION NO. 92-CR-3555

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: ABRAMSON, KNOPF, and MILLER, Judges.

ABRAMSON, JUDGE: This is a consolidated appeal by Carl Curtis Huffines, who appeals the trial court's denial of his CR 60.02 motion as well as his RCr 11.42 motion to vacate his sentence. On April 29, 1994, Huffines was convicted of attempted rape in the first degree and sexual abuse in the first degree as a result of his conduct on September 26, 1992. On June 6, 1994, the trial court entered a judgment of conviction on only the attempted rape charge and sentenced Huffines to a seven-year prison term. Having reviewed the record and the applicable law, we affirm.

Huffines appealed his 1994 conviction, arguing that the trial court erred when it (1) failed to direct a verdict of

acquittal based upon the insufficiency of the evidence, which allegedly contained numerous inconsistencies, contradictions and improbabilities; (2) refused to instruct the jury on a lesser included offense; and (3) failed to correct the allegedly inconsistent findings of the jury. On March 22, 1996, this Court affirmed Huffines's conviction.

On April 28, 1995, Huffines filed a motion for relief from the judgment of conviction pursuant to CR 60.02(e) and (f). In the motion, Huffines reiterated the contention made by him on direct appeal, arguing that the jury's verdict finding him guilty of attempted rape in the first degree and sexual abuse in the first degree were inconsistent. The trial court overruled Huffines's CR 60.02 motion on February 26, 1996. Huffines did not appeal the trial court's ruling.

On April 24, 1996, Huffines filed a motion for a new trial on the basis of newly discovered evidence, pursuant to CR 60.02 (d), (e), and (f) and CR 61.02. In the motion, Huffines again reiterated a contention made by him on direct appeal, contending that the trial court erred when it denied his motion at trial for a directed verdict of acquittal. He claimed that (1) the inconsistencies, improbabilities and contradictions in the trial proof were perjurious; and (2) the trial court's denial of his directed verdict motion constituted palpable error, entitling him to a new trial based upon his claim of newly discovered evidence. The trial court overruled Huffines's second CR 60.02 motion on May 8, 1996. Case No. 96-CA-1495-MR is an appeal from the trial court's denial of that motion.

On April 2, 1996, Huffines filed an RCr 11.42 motion to vacate and set aside the judgment of conviction and the sentence. In his motion, Huffines argued that he was entitled to have his conviction set aside because his trial attorney provided constitutionally ineffective assistance of counsel. The gist of his motion is that his trial counsel failed to sufficiently identify impeachment and other evidence in order to challenge the credibility of the Commonwealth's case against him. On May 6, 1996, Huffines again filed an RCr 11.42 motion to vacate and set aside his judgment of conviction and sentence. That RCr 11.42 motion argued the same grounds as the prior motion, and was essentially an amended version of Huffines's April 2, 1996 RCr 11.42 motion. The trial court overruled Huffines's RCr 11.42 motion on May 24, 1996. Case No. 96-CA-2358-MR is Huffines's appeal from the trial court's denial of the RCr 11.42 motion.

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Huffines filed two post-judgment CR 60.02 motions. The trial court summarily denied the first motion which revisited a ground already resolved by Huffines's direct appeal. Huffines did not appeal that ruling. The trial court also denied Huffines's second CR 60.02 motion which substantively repeated an issue from the direct appeal, i.e., that the trial court erred by denying his motion for a directed verdict of acquittal. His repetitious motion added two features unasserted in either his direct appeal or his first CR 60.02 motion: (1) he was entitled to a new trial under CR 60.02 on the basis of newly discovered evidence; and (2) the trial court's denial of his directed

verdict motion constituted palpable error under CR 61.02.

Initially, we note that Huffines's April 24, 1996 CR 60.02 motion was not filed within the CR 60.02 one-year period following the June 6, 1994 judgment. In addition, several prerequisites for a successful motion based upon newly discovered evidence are lacking here. First, when a motion for relief based upon newly discovered evidence is filed, it is incumbent upon the defendant and counsel to submit affidavits showing that the allegedly newly discovered evidence could not have been discovered before trial by the exercise of due diligence. See Spradlin v. Commonwealth, Ky., 473 S.W.2d 818 (1971). Huffines's motion contained no affidavits. Second, the motion must indicate that the alleged evidence was unavailable at trial but became available after the trial. Third, the motion should also indicate how the new evidence would have changed the outcome of the trial if it had been available. Skaggs v. Commonwealth, Ky., 803 S.W.2d 573 (1990), cert. denied 502 U.S. 844, 112 S. Ct. 140, 116 L. Ed. 2d 106 (1991). Again, Huffines's motion is deficient. Indeed, nowhere in his motion does he even identify the nature of the newly discovered evidence. Huffines's motion leaves the impression that he added the reference to "newly discovered evidence" merely to provide a basis for renewal of his earlier, overruled CR 60.02 motion. The trial court did not abuse its discretion when it overruled Huffines's second CR 60.02 motion. See Gibbs v. Commonwealth, Ky. App., 723 S.W.2d 871 (1986).

In his motion, Huffines also claimed that the trial court's failure to grant his trial motion for a directed verdict

constituted palpable error, per CR 61.02. We reject that argument. CR 61.02 restates RCr 10.26, declaring that on a motion for a new trial or on appeal a court can consider errors affecting the substantial rights of a party. Courts invoke palpable error when issues were insufficiently raised or preserved for review. In this case, the propriety of the denial of Huffines's directed verdict motion was preserved for review and considered by this Court on direct appeal but was rejected on the merits. Therefore, Huffines's allegation of palpable error in his second CR 60.02 motion is misplaced.

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Huffines filed two RCr 11.42 motions, five weeks apart, which argued essentially the same grounds for relief. He asserted that his judgment of conviction should be set aside and vacated due to the constitutional deprivation of his right to the effective assistance of counsel at trial. In particular, he contended that his trial counsel violated the United States Supreme Court standard articulated in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) for review of an ineffective assistance of counsel claim. Under the federal constitutional standard, the reviewing court must find: (1) an error in counsel's performance; and (2) prejudice resulting from the error affecting the outcome of the proceedings, i.e., a reasonable probability that but for counsel's unprofessional conduct, the result would have been different. Kentucky adopted the Strickland standard in Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985), cert. denied 478 U.S. 1010, 106 S. Ct. 3311, 92 L. Ed.

2d 724 (1986).

We need not reach the merits of Huffines's ineffective assistance claim. Successive RCr 11.42 motions are forbidden in Kentucky. Commonwealth v. Ivey, Ky., 599 S.W.2d 456 (1980). Huffines's RCr 11.42 motion was properly dismissed as a de facto successive motion. It argued essentially the same credibility grounds as he had claimed in his earlier CR 60.02 motion, which in turn (as noted previously) had argued the same grounds which he had raised in his direct appeal. The only distinction between the two motions is that the RCr 11.42 motion alleges that the proof's inconsistencies, contradictions and improbabilities were caused by trial counsel's alleged failure to (1) impeach the victim on several issues; (2) properly argue other facts; (3) ask questions about certain subjects; and (4) call a prosecution witness to testify.

The RCr 11.42 motion alleged that the inconsistencies, contradictions and improbabilities of the evidence at trial were caused by trial counsel's aforementioned inadequate performance. Even if Huffines's RCr 11.42 motion did not constitute a prohibited successive motion, the trial court still properly dismissed the motion because the alleged deficiencies related to counsel's strategic decisions regarding how to present his client's case. The Strickland Court stated that a reviewing court "must indulge in the strong presumption" that counsel's strategy and tactics were "within the wide range of reasonable professional assistance." 466 U.S. at 689. The Kentucky Supreme Court has specifically recognized that a "reasonable trial

tactic" cannot satisfy the first prong of Strickland. See Gall v. Commonwealth, 702 S.W.2d at 40. Given Huffines's motion, the trial court did not err in denying Huffines a hearing on his allegation that his trial counsel was ineffective.

The order of Jefferson Circuit Court denying Huffines's RCr 11.42 motion is affirmed.

ALL CONCUR.

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