

Commonwealth Of Kentucky

Court Of Appeals

No. 1996-CA-001654-MR

DONNIE HILLYARD

APPELLANT

v.

APPEAL FROM UNION CIRCUIT COURT
HONORABLE WILLIAM L. SHADOAN, SPECIAL, JUDGE
ACTION NO. 78-CR-0037

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 1997-CA-000699-MR

BOBBY WAGONER

APPELLANT

v. APPEAL FROM UNION CIRCUIT COURT
HONORABLE CHARLES W. BOTELER, JR., SPECIAL JUDGE
INDICTMENT NO. 78-CR-0037

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: DYCHE, EMBERTON, and JOHNSON, Judges.

DYCHE, JUDGE. Donnie Hillyard and Bobby Wagoner appeal the Union Circuit Court's denial of Kentucky Rule of Criminal Procedure [RCr] 11.42 relief. We affirm.

Hillyard and Wagoner were codefendants charged with the kidnaping, rape, and murder of Jeanine Pyse in 1978. Both were juveniles at the time. Each confessed to the crimes but defended on the theory that the other was the instigator, albeit it was not contested that Hillyard was the triggerman. Appellants were tried together, and the jury found them guilty as charged. They were sentenced to life imprisonment on the murder and kidnaping convictions and twenty years for the rape, all sentences to run consecutively. The Kentucky Supreme Court affirmed the convictions but ordered that the sentences be run concurrently.

Each appellant pursued his own quest for postconviction relief. Hillyard sought RCr 11.42 relief in 1978, 1988, and 1996. He also moved for a new trial pursuant to RCr 10.02 and 10.06 after it was discovered that his expert witness at trial was not a forensic psychologist after all but rather a fraud who never completed a full year of undergraduate studies. All relief was denied, and the adverse ruling on the motion for new trial was affirmed on appeal to this court in 1986.

Wagoner moved to reduce his sentence pursuant to Kentucky Revised Statute [KRS] 532.070 ("Court modification of felony sentence") in January 1996 and again in September of that

same year. Both were denied. Wagoner sought RCr 11.42 relief in October 1996. Again he was unsuccessful.

Hillyard and Wagoner seek appellate review of the denial of their most recent RCr 11.42 motions. We affirm.

RCr 11.42(3) provides: "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." It is clear from the record that this is Hillyard's third attempt at RCr 11.42 relief, and he is thus precluded from launching another collateral assault upon his conviction. See Satterly v. Commonwealth, Ky., 441 S.W.2d 144, 147 (1969); and Odewahn v. Commonwealth, Ky., 407 S.W.2d 137, 138 (1966).

Moreover, the allegations Hillyard makes are refuted on the face of the record, and the trial court was correct in denying the requested relief without an evidentiary hearing. Brewster v. Commonwealth, Ky. App., 723 S.W.2d 863, 865 (1986). We need not discuss the issues further.

We likewise affirm the trial court's ruling regarding Wagoner's motion. Wagoner contends that his two previous motions were pursuant to KRS 532.070 and therefore the present action did not constitute a successive RCr 11.42 motion. We are in agreement with the Commonwealth that Wagoner's second motion to modify sentence was in effect a motion pursuant to RCr 11.42. The record indicates that Wagoner relied on the same grounds in seeking relief.

Even were this not a successive RCr 11.42 motion, the trial court was correct in its ruling. Many of Wagoner's allegations were issues that were either raised or should have been raised on direct appeal. See respectively Estis v. Commonwealth, Ky. App., 864 S.W.2d 317 (1993); and Bronston v. Commonwealth, Ky., 481 S.W.2d 666 (1972). The remaining contentions were refuted on the face of the record, and were appropriately dismissed without a hearing. Brewster, supra. "We have long held that we will uphold a correct result made for the wrong reasons." Jarvis v. Commonwealth, Ky., 960 S.W.2d 466, 469 (1998), citing Commonwealth v. Congleton, 267 Ky. 22, 101 S.W.2d 210 (1937).

The judgments of the Union Circuit Court are affirmed.

EMBERTON, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN 1996-CA-001654-MR AND DISSENTS IN 1997-CA-000699-MR AND WRITES A SEPARATE OPINION.

JOHNSON, JUDGE, CONCURRING IN 1996-CA-001654-MR AND DISSENTING IN 1997-CA-000699-MR. I concur with the Majority Opinion's affirming of the denial of RCr 11.42 relief for Hillyard in case number 1996-CA-001654-MR. I respectfully dissent from the Majority Opinion's affirming of the denial of RCr 11.42 relief for Wagoner in case number 1997-CA-000699-MR.

The Majority Opinion affirms the denial of RCr 11.42 relief to Wagoner on two grounds: (1) that the RCr 11.42 motion that is the subject of this appeal is a successive RCr 11.42 motion since Wagoner's second motion to modify his sentence pursuant to KRS 532.070 was, in effect, a motion pursuant to RCr

11.42; and (2) that many of Wagoner's allegations were issues that were either raised or should have been raised on direct appeal and the remaining contentions were refuted on the face of the record.

Wagoner's second motion pursuant to KRS 532.070 was denied by the circuit court by an order in which the court stated:

The movant, Bobby Wagoner, has made a motion with the Court to proceed in forma pauperis and the Court does hereby grant said motion.

The Court recognizes that the defendant has been incarcerated for a lengthy period. The Court further commends the defendant on the rehabilitation efforts he has made. However, the Court does not believe that it should use KRS 532.070 as a vehicle to modify the 1979 judgment of the Union Circuit Court. Therefore, the motion for modification of sentence is overruled.

This the 12th day of September, 1996.

I fail to see how this order by the circuit court that clearly addressed Wagoner's motion as a motion pursuant to KRS 532.070 and made no reference whatsoever to RCr 11.42 can be considered by the circuit court and the Majority to have adjudicated a motion pursuant to RCr 11.42. The record does not support this holding by the Majority.

As to the Majority's alternative grounds for affirming the circuit court, I believe that this Court should defer to the circuit court for its proper consideration of the RCr 11.42 motion. The circuit court is the appropriate body to consider whether the RCr 11.42 allegations are refuted on the face of the record.

Without any question Wagoner's crimes were heinous, but his RCr 11.42 motion should be addressed under the proper law and not summarily denied. I would vacate the order of the circuit court and remand for appropriate consideration under RCr 11.42.

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