

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002999-MR

CORNELL MCQUARTER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN MERSHON, JUDGE
ACTION NO. 93-CR-00815

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: GUIDUGLI, HUDDLESTON AND McANULTY, JUDGES.

GUIDUGLI, JUDGE. This is a pro se appeal from an order of the Jefferson Circuit Court denying Cornell McQuarter's (McQuarter) RCr 11.42, CR 60.02 and 60.03 motions for relief from a judgment of conviction for manslaughter in the first degree and wanton endangerment in the first degree. We affirm.

On February 2, 1994, the Jefferson Circuit Court entered a judgment of conviction, pursuant to a jury verdict, adjudging McQuarter guilty of manslaughter in the first degree and wanton endangerment in the first degree. McQuarter was sentenced to twenty years (20) for manslaughter and one (1) year for wanton endangerment with the sentences to run concurrently.

McQuarter appealed directly to the Kentucky Supreme Court and raised the following two issues:

1. The trial court's refusal to grant the appellant's motion for mistrial; and
2. The Commonwealth's improper comments during closing arguments served to inflame and prejudice the jury.

McQuarter did not raise any other issues during his direct appeal. More specifically, he did not raise any issue with regard to jury instructions. On February 10, 1997, the Kentucky Supreme Court affirmed and thereafter denied McQuarter's petition for a rehearing.

On February 20, 1997, McQuarter filed a RCr 11.42 motion for relief, which the Jefferson Circuit Court denied. No timely notice of appeal was filed from the denial of this RCr 11.42 motion. On October 1, 1997, McQuarter filed a motion for relief pursuant to CR 60.02 and 60.03, which the Jefferson Circuit Court denied. On May 1, 1998, the Kentucky Court of Appeals granted McQuarter's motion for a belated appeal. The present appeal relates to the Jefferson Circuit Court's 1997 post-conviction rulings.

Initially, it should be noted that the trial court's decision in this case will not be reversed unless there was a clear abuse of discretion. "RCr 11.42 supplements CR 60.02 and provides a post-conviction review procedure which must be followed if the relief demanded is to be obtained." Commonwealth v. Miler, Ky., 416 S.W.2d 358, 360 (1967). "Any action under CR 60.02 addresses itself to the sound discretion of the court and the exercise of that discretion will not be disturbed on appeal

except for abuse." Richardson v. Brunner, Ky., 327 S.W.2d 572, 574 (1959).

Although McQuarter raises seven issues in this appeal, these seven issues may be broken down into two categories for purposes of this appeal. First, McQuarter argues ineffective assistance of counsel during his first appeal. Second, McQuarter argues various insufficiencies with regard to jury instructions given at his trial.

The purpose of RCr 11.42 and CR 60.02 and 60.03 motions is to provide a mechanism for collateral attack of a judgment or sentence by an independent action as opposed to a direct attack. A thorough description of this rule is found in Commonwealth v. Basnight, Ky. App., 770 S.W.2d 231, 237 (1989), which held that:

[T]he relief sought by the RCr 11.42 [and 60.02 and 60.03] motion must by nature be a collateral attack upon the judgment or sentence, as contrasted with a direct attack. A direct attack is made within the same action as a judgment or on its appeal. A collateral attack will impeach a judgment or sentence by an independent action, but other than in the action in which the judgment or sentence was rendered, or its appeal. Constitutional grounds must form the basis upon which relief can be granted by collateral attack.

Furthermore, in Commonwealth v. Wine, Ky., 694 S.W.2d 689 (1985), the Court stated that:

...RCr 11.42 is designed to permit a trial court an opportunity after entry of judgment to review its judgment and sentence for constitutional invalidity of the proceedings prior to judgment or in the sentence and judgment itself. It is not an appropriate remedy for a frustrated appeal.

McQuarter first argues in the present appeal that he was denied effective assistance of counsel because his attorney failed to raise the "jury instructions" issues during his first appeal. Thus, he claims that he was effectively denied a right of appeal. McQuarter's argument mirrors those made in Hicks v. Commonwealth, Ky., 825 S.W.2d 280 (1992). In Hicks, the defendant was convicted of the murders of two individuals. The defendant appealed the conviction, which was thoroughly reviewed by the Kentucky Supreme Court and affirmed. Thereafter, the defendant made a RCr 11.42 motion to vacate claiming that his counsel was so ineffective in failing to present an issue in the appeal that the result was the same as if he had been denied a right of appeal. The defendant's motion was denied and he appealed.

In affirming the appeal, the Kentucky Supreme Court noted that a defendant whose conviction had not been appealed due to neglect of counsel could upon motion obtain a belated appeal or a defendant whose appeal had been dismissed due to neglect of counsel could upon motion obtain a reinstatement of the appeal. Id. at 281. However, the Court held:

We think there is a substantial difference in the situation of a convicted defendant for whom no appeal was even taken or one whose appeal was dismissed solely due to neglect of counsel and the situation of a defendant whose appeal was completely processed and the judgment affirmed. In the first case, there was never any consideration of the merits of any substantive issue by the appellate court. In the latter case, the appellate court has considered and decided the merits of the appeal. We will not examine anew an appeal reviewed, considered and decided by this Court. Id.

McQuarter appealed his conviction, which the Kentucky Supreme Court considered and decided on the merits. Therefore, we cannot say that the trial court abused its discretion in denying McQuarter's RCr 11.42 motion for relief based upon ineffective assistance of counsel.

McQuarter's second category of issues regards what he claims were errors in the jury instructions. Specifically, McQuarter makes the following arguments:

1. The jury instruction allowing the appellant to be found guilty of manslaughter in the first degree under alternative theories denied appellant's right to a unanimous verdict under Section 7 of the Kentucky Constitution;
2. The trial court did not give a sufficient self-defense instruction on any of the homicide instructions;
3. There was no definition defining self-protection;
4. There was no opportunity for the jury to find the appellant innocent of the homicide offenses for which justification is a defense;
5. That a reasonable juror could easily have viewed as mandatory Instruction No. 3 self-protection as finding appellant guilty; and
6. The trial judge improperly instructed the jury on self-defense with limitations.

However, we do not reach the merits of McQuarter's jury instructions arguments because the law in the Commonwealth is clear on this point: claimed errors in the jury instructions are not reviewable upon an RCr 11.42 motion. Boles v. Commonwealth, Ky., 406 S.W.2d 853 (1966); Davenport v. Commonwealth, Ky., 390 S.W.2d 662 (1965); Langdon v. Commonwealth, Ky., 384 S.W.2d 508

(1964). RCr 11.42, CR 60.02 and 60.03 are not substitutes for direct appeal. Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983). The proper procedure for reviewing claimed errors in jury instructions is upon direct appeal and not through a collateral attack under RCr 11.42, CR 60.02 or 60.03. Therefore, the trial court correctly denied appellant's motions.

For the foregoing reasons, the orders of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

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