

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002943-MR

FRANK SANDERS

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS STEPHENS, JUDGE
ACTION NO. 88-CR-00149

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: BUCKINGHAM, EMBERTON, AND SCHRODER, JUDGES.

BUCKINGHAM, JUDGE. Frank Sanders (Sanders) appeals from an order of the Kenton Circuit Court denying his motion to vacate, set aside or correct judgment brought pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. After our review of the record, we affirm.

In July 1988, the Kenton County Grand Jury indicted Sanders on one felony count of bail-jumping in the first degree (KRS 520.070) and one count of being a persistent felony offender in the first degree (PFO I) (KRS 532.080). During the trial, the Commonwealth called five witnesses and the defense called seven

witnesses, including Sanders and his wife. After the jury rendered a verdict finding Sanders guilty of bail-jumping, the trial judge suspended the trial until the next morning for consideration of the appropriate punishment.

Prior to the continuation of the trial on the following morning, Sanders was taken to the hospital after having allegedly swallowed some drugs and two razor blades. Without objection from his attorney, the sentencing phase of the trial continued in Sanders' absence. The jury found Sanders guilty of being a PFO I and recommended a sentence of four and one-half years on the offense of bail-jumping in the first degree with the sentence being enhanced to ten years based on the PFO I charge. Sanders was released from the hospital approximately eight days later, and, on December 9, 1988, the trial court issued a final judgment sentencing him to ten years in prison.

In January 1990, Sanders filed an RCr 11.42 motion seeking to vacate his conviction based on several allegations of ineffective assistance of counsel, including counsel's failure to object to the continuance of the trial in his absence. Due to an ambiguity in the trial transcript concerning Sanders' presence at the trial, the trial judge¹ ordered the Commonwealth attorney and jail personnel to prepare affidavits to verify the date of Sanders' absence from the trial proceedings. The affidavits indicated that Sanders was present for the first day of the trial but was not present for the sentencing phase on the second day.

¹The judge handling the RCr 11.42 motion was not the same judge who presided over Sanders' jury trial.

In April 1992, the trial court issued an order denying the RCr 11.42 motion on the merits. Sanders did not appeal the denial.

On October 16, 1997, Sanders filed a second RCr 11.42 motion challenging his conviction based on the fact that he was not present for the entire trial. On October 29, 1997, the trial court denied his motion noting that the same issue had been raised in the prior RCr 11.42 motion and incorporating the previous order which denied the first motion. This appeal followed.

Sanders argues that his conviction should be vacated because he was tried in absentia in violation of Section 11² of the Kentucky Constitution and RCr 8.28.³ He contends that he had a right to be present to confront the witnesses throughout the entire proceeding and that he did not waive that right. However, Sanders is not entitled to relief on both procedural and substantive grounds.

Sanders' RCr 11.42 motion is procedurally barred for several reasons. First, the current motion represents a second

²Section 11 states in relevant part: "In all criminal prosecutions the accused has the right to be heard by himself and counsel; . . . [and] to meet the witnesses face to face"

³RCr 8.28(1) states:

The defendant shall be present at the arraignment, at every critical stage of the trial including the empaneling of the jury and the return of the verdict, and at the imposition of the sentence. The defendant's voluntary absence after the trial has been commenced in his presence shall not prevent proceeding with the trial up to and including the verdict. The defendant may be permitted to remain on bail during the trial.

collateral post-judgment motion barred by the successive motion principle. In Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983), the Kentucky Supreme Court set out the procedure for challenging a criminal conviction. A defendant must first bring a direct appeal when available and state every ground of error of which he or his counsel is reasonably aware. Id. at 857.

Next, a defendant in custody or on probation or parole must utilize RCr 11.42 to raise errors of which he is aware or should be aware during the period that remedy is available. Id. "Final disposition of that [RCr 11.42] motion, or waiver of the opportunity to make it, shall conclude all issues that reasonably could have been presented in that proceeding." Id. See also RCr 11.42(3); McQueen v. Commonwealth, Ky., 949 S.W.2d 70, 71 (1997), cert. denied, ___ U.S. ___, 117 S. Ct. 2536, 138 L. Ed. 2d 1035 (1997) (defendant "precluded from raising issues in a successive RCr 11.42 motion which were or could have been raised in the first motion"); Hampton v. Commonwealth, Ky., 454 S.W.2d 672, 673 (1970) ("[t]he courts have much more to do than occupy themselves with successive 'reruns' of RCr 11.42 motions stating grounds that have or should have been presented earlier.").

Moreover, the successive motions principle applies even though the merits of the first motion were not addressed on appeal. Lycans v. Commonwealth, Ky., 511 S.W.2d 232 (1974). Sanders challenged the validity of the conviction because of his absence from the sentencing phase of the trial in his first RCr 11.42 motion, which was rejected by the trial court. Even though he failed to appeal the denial of that motion, Sanders is

precluded from raising this issue again because he could have raised it on direct appeal and he previously raised it in his first RCr 11.42 motion.

The current RCr 11.42 motion also is procedurally barred because it was untimely. RCr 11.42(10) requires that any motion under that rule be filed within three years of the final judgment or the effective date of the amendment of the rule, October 1, 1994, unless "(a) . . . the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of reasonable diligence; or (b) . . . the fundamental constitutional right asserted was not established within the [three year] period. . . and has been held to apply retroactively." The fact of Sanders' partial absence from the trial was clearly known to him when he was tried in September 1988. In addition, he raised the issue in his first RCr 11.42 motion filed in January 1990. The constitutional right of confrontation upon which Sanders' claim is based was well-established prior to his trial. See, e.g., Commonwealth v. Willis, Ky., 716 S.W.2d 224 (1986); Kentucky v. Stincer, 482 U.S. 730, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987). Because Sanders did not file the RCr 11.42 motion at issue in this appeal until October 16, 1997, it falls outside the three-year time limitation created by the 1994 amendment to RCr 11.42.

Finally, Sanders' claim lacks merit on substantive grounds as well. Generally, the confrontation clause and due process guarantee a defendant the right to be present at his own trial. See, e.g., Snyder v. Massachusetts, 291 U.S. 97, 54 S.

Ct. 330, 78 L. Ed. 674 (1934); Illinois v. Allen, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970); Riddle v. Commonwealth, 216 Ky. 220, 287 S.W. 704 (1926).⁴ However, this right is not absolute. A conviction is not rendered invalid when the defendant waives the right or when his absence does not render the proceeding fundamentally unfair. Snyder, supra; Allen, supra; Willis, supra. Waiver of the right involves a voluntary absence from the trial. RCr 8.28; Finney v. Commonwealth, Ky. App., 638 S.W.2d 709 (1982), cert. denied, 459 U.S. 1176, 103 S. Ct. 826, 74 L. Ed. 2d 1022 (1983), overruled on other grounds by Hibbard v. Commonwealth, Ky., 661 S.W.2d 473 (1983); Diaz v. United States, 223 U.S. 442, 32 S. Ct. 250, 56 L. Ed. 500 (1912).

In the case sub judice, Sanders was present throughout the entire guilt phase of the proceeding involving the bail-jumping charge. The record indicates that on the morning of the second day of the trial, Sanders' attorney spoke with him after he refused to leave his jail cell. Defense counsel then informed the trial judge that Sanders refused to participate in the conclusion of the trial. After Sanders initially refused to participate, he then apparently swallowed two razor blades necessitating his hospitalization. Defense counsel did not seek a continuance or object to continuing the trial in Sanders' absence. His absence was caused solely by his own deliberate, purposeful actions. Under the circumstances, we cannot say that

⁴The Kentucky Supreme Court has stated that the face-to-face right requirement in Section 11 of the Kentucky Constitution is coextensive with the Confrontation Clause of the Sixth Amendment of the United States Constitution. See Commonwealth v. Willis, supra.

Sanders' conduct did not constitute a conscious, voluntary attempt to absent himself from the trial.

Moreover, even if his actions were not considered a voluntary absence, Sanders has failed to establish that the outcome of the trial was affected by his absence. As the Court stated in Snyder v. Massachusetts, 291 U.S. at 106-07, 54 S. Ct. at 332, due process does not require a defendant's presence "when [his] presence would be useless, or the benefit but a shadow." During the sentencing phase, the Commonwealth clearly established the existence of two prior felony convictions to support the PFO I charge, and the jury had already convicted Sanders of the underlying bail-jumping felony offense. As recommended by the jury, the trial court eventually sentenced Sanders to the minimum ten-year sentence. Thus, Sanders has not demonstrated that the trial proceedings were fundamentally unfair or that he suffered any prejudice despite his partial absence. Cf. Byrd v. Commonwealth, Ky., 825 S.W.2d 272 (1992) (holding that there was no violation of Section 11 or RCr 8.28 by the defendant's absence from in camera inquiry of jurors where no prejudice existed).

For the foregoing reasons, we affirm the order of the Kenton Circuit Court.

ALL CONCUR.

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