

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001972-MR

WILLIAM E. WADDELL JR.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOHN POTTER, JUDGE
ACTION NO. 94-CR-02715

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * ** **

BEFORE: DYCHE, MCANULTY, AND MILLER, JUDGES.

MILLER, JUDGE: William E. Waddell Jr. brings this appeal from a July 23, 1998, order of the Jefferson Circuit Court. We affirm.

On October 7, 1994, Waddell, while driving intoxicated, caused his vehicle to collide with another. The driver of the other vehicle was killed and a passenger therein was injured. Waddell was indicted on one count of murder (Ky. Rev. Stat. (KRS) 507.020) and one count of first-degree wanton endangerment (KRS 508.060). A jury trial ensued, whereafter, Waddell was found

guilty as charged and sentenced to a total of 25 years' imprisonment. The conviction was affirmed by the Kentucky Supreme Court on April 24, 1997, in Appeal No. 96-SC-000008-MR (unpublished). On May 11, 1998, Waddell filed a *pro se* motion to vacate his sentence pursuant to Ky. R. Crim. P. (RCr) 11.42. He also requested an evidentiary hearing. Both were denied on July 23, 1998. This appeal followed.

Waddell argues that the circuit court erred by denying his motion for an evidentiary hearing and by denying his RCr 11.42 motion. As the circuit court denied Waddell's motion for an evidentiary hearing on the merits of his RCr 11.42 motion, the question on review is whether the motion "on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." Lewis v. Commonwealth, Ky., 411 S.W.2d 321, 322 (1967).

Waddell specifically claims that his motion alleged relief grounds that were unsuitable for summary disposition. The first such issue raised was that he was denied effective assistance of counsel because his trial counsel (counsel) had a conflict of interest. Prior to trial, Waddell filed a complaint against his counsel with the Kentucky Bar Association. The filing of the complaint, in and of itself, is the basis of the alleged conflict. Waddell states that, preceding trial, counsel told him that "if objection to the conflict was not waived, he (Waddell) could go back up to the jail and wait additional time before trial, or be left without an attorney [at trial]." On the morning of trial, counsel brought the issue to the court's

attention and requested the court to inquire, on the record, whether Waddell was comfortable with counsel's representation. Waddell responded in the affirmative.

We believe the record reveals that Waddell clearly and unambiguously waived any objection to counsel's alleged conflict. Waddell intimates, however, that this waiver was somehow coerced because counsel informed him that any objection to counsel's representation would result in Waddell having to stay in jail longer while awaiting appointment of new trial counsel or proceeding to trial *pro se*. We believe Waddell's counsel correctly informed him of his choices. Certainly, the court would have advised him similarly had he objected to counsel. In sum, we are of the opinion that Waddell's allegation was clearly refuted on the face of the record. Hence, we perceive no error in the circuit court denying an evidentiary hearing on same.

Last, Waddell asserts the court erred by summarily denying his claim of ineffective assistance of counsel for failure to interview and call certain witnesses. In ruling upon this issue, we believe the circuit court correctly relied upon Robbins v. Commonwealth, Ky. App., 719 S.W.2d 742 (1986). Therein, this court held that "merely failing to produce witnesses in the appellant's defense is not error in the absence of any allegation that their testimony would have compelled an acquittal." Id. at 743. Waddell does not allege, nor do we perceive, that the proposed witnesses' testimony would have compelled a reversal of his conviction in light of the

overwhelming evidence supporting same. As such, we recognize no error in the circuit court's denial of a hearing on this issue.

Upon the whole, we cannot say the circuit court erred in summarily denying Waddell's request for relief under RCr 11.42.

For the foregoing reasons, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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