

Commonwealth Of Kentucky
Court Of Appeals

NO. 1998-CA-001931-MR

CHARLES R. CAVINS

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES E. KELLER, JUDGE
ACTION NO. 95-CR-00599

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, KNOFF, AND MILLER, JUDGES.

MILLER, JUDGE: Charles R. Cavins brings this appeal from a July 16, 1998 Opinion and Order of the Fayette Circuit Court. We affirm.

On July 5, 1995, Cavins was indicted on two counts of first-degree burglary (Ky. Rev. Stat.(KRS) 511.020), three counts of theft by unlawful taking over \$300 (KRS 514.030), one count of second-degree burglary (KRS 511.030), four counts of second-degree criminal possession of a forged instrument(KRS 516.060), two counts of fraudulent use of a credit card (KRS 434.650), and one count of being a first-degree persistent felony offender (KRS 532.080). A trial was held February 5 - 7, 1996. Pursuant to

his request, Cavins was tried *in absentia*. The jury found Cavins guilty on all of the above charges except for three of the criminal possession of a forged instrument charges. He was sentenced to 95 years in prison. As a matter of right, he appealed his conviction to the Kentucky Supreme Court. 96-SC-000269-MR. The sole issue on appeal involved Cavins' competency to stand trial. Specifically, Cavins argued that he was not competent; thus, he was denied a fair trial. The Supreme Court held that reasonable grounds did not exist to believe that Cavins was incompetent to stand trial. Therefore, the Court held, the trial court did not err by denying Cavins' motion for continuance.

On January 28, 1998, Cavins filed a Ky. R. Crim. P. (RCr) 11.42 motion to vacate his sentence. Therein, he contended: 1) that he was incompetent at the time of his trial as the result of his failure to take the medication needed to maintain his competency, 2) that the trial court relied upon "erroneous and incomplete" evidence when it held that there were no reasonable grounds to believe Cavins was incompetent; and, 3) that he was denied effective assistance of counsel. The trial court denied Cavins' motion without a hearing. This appeal followed.

Cavins contends that the trial court committed error by denying the RCr 11.42 motion without an evidentiary hearing. A RCr 11.42 motion is properly denied without an evidentiary hearing if claimant's allegations are refuted upon the face of

the record. See Hopewell v. Commonwealth, Ky. App., 687 S.W.2d 153 (1985).

Cavins recapitulates the arguments made to the trial court. We, however, are prevented from reviewing his first two arguments as they were already raised or should have been raised on direct appeal to the Kentucky Supreme Court. See Wilson v. Commonwealth, Ky., 975 S.W.2d 901 (1998) and Brown v. Commonwealth, Ky., 788 S.W.2d 500 (1990).

Cavins' third assertion is that he was denied effective assistance of counsel. In order to succeed, Cavins must prove that trial counsel's performance was deficient and that such deficiency resulted in actual prejudice. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), *accord*, 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). That is, there must be a reasonable probability that, but for the errors of counsel, the result of the proceedings would have been different. Gall, 702 S.W.2d 37.

Cavins contends that counsel was ineffective for failing to move for a new trial when it was discovered that he (Cavins) was not on his medication for bipolar disorder on the day of trial. We disagree. Bipolar disorder, in and of itself, does not automatically render a person incompetent. The trial judge thoroughly questioned Cavins on the day of trial, when he allegedly was off his medication. The court found him to be rational and lucid. Further, his counsel stated to the court that Cavins was able to assist her in preparation of the case the

night before trial. In sum, we do not believe there were reasonable grounds to believe that Cavins was incompetent on the day of trial. Hence, we cannot say counsel was ineffective in failing to move for a new trial based on Cavins' alleged incompetence.

Cavins also complains that on two occasions, counsel allowed the trial court to erroneously believe that he had previously been found competent by the Scott County circuit court. Even if this allegation were true, we do not believe that it prejudiced Cavins. Although the Scott County circuit court did not hold a competency hearing before dismissing the charges against Cavins, he was evaluated by one Dr. Victoria Yunker pursuant to order of said court. Dr. Yunker issued a report stating her opinion that Cavins was, indeed, competent to stand trial. This, along with the trial court's first-hand observations of Cavins lead us to believe that even if counsel had corrected the court's alleged misunderstanding, the result would have been the same. Hence, under the precepts of Strickland, we perceive no error in the trial court's ruling.

For the aforementioned reasons, the order of the Fayette Circuit Court is hereby affirmed.

ALL CONCUR.

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