

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002764-MR

VERONICA RUTHANN RADER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN ADAMS, JUDGE
ACTION NO. 94-CR-1044

COMMONWEALTH OF KENTUCKY

APPELLEE

TBHW: NO. 1999-CA-000238-MR

VERONICA RUTHANN RADER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN ADAMS, JUDGE
ACTION NO. 94-CR-01044

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

DISMISSING APPEAL NO. 1998-CA-002764-MR

AFFIRMING APPEAL NO. 1999-CA-000238-MR

** ** * * * * *

BEFORE: BUCKINGHAM, KNOPF, AND MILLER, JUDGES.

MILLER, JUDGE: Veronica Ruthann Rader brings *pro se* Appeal No. 1998-CA-002764-MR from an October 20, 1998 Opinion and Order of the Fayette Circuit Court and brings Appeal No. 1999-CA-0000238-MR from a January 6, 1999 Opinion and Order of the Fayette

Circuit Court. We dismiss Appeal No. 1998-CA-002764-MR and affirm Appeal No. 1999-CA-000238-MR.

The facts are these: On September 22, 1997, Rader was sentenced to ten years imprisonment for the offenses of robbery in the second degree, (Ky. Rev. Stat. (KRS) 515.030), giving police a false name (KRS 523.100), and being a persistent felony offender in the first degree (PFO I) (KRS 532.080(3)). In July 1998, Rader filed a *pro se* motion under Ky. R. Crim. P. (RCr) 11.42. Therein, Rader requested appointment of counsel and an evidentiary hearing. On October 20, 1998, the circuit court entered an order: (1) overruling Rader's objection to the Commonwealth's extension of time, (2) overruling Rader's motion to strike the Commonwealth's response, and (3) overruling Rader's motion for reconsideration of a prior order denying appointment of counsel. Rader appealed the October order to this Court on October 30, 1998 (Appeal No. 1998-CA-002764-MR). The circuit court, thereafter, considered Rader's RCr 11.42 motion upon the merits and denied same in a January 6, 1999 opinion and order. Rader appealed the January order denying the RCr 11.42 motion by filing a notice of appeal in this Court on January 14, 1999 (Appeal No. 1999-CA-000238-MR). We consider the appeals separately.

APPEAL NO. 1998-CA-002764-MR

Tipton brings Appeal No. 1998-CA-02764-MR from an October order of the circuit court which stated in relevant part as follows:

The Defendant objects to an extension of time for the Commonwealth to respond to her motion pursuant to RCr 11.42. The Commonwealth has responded. The Court **OVERRULES** the objection. The Defendant also moves to strike Commonwealth's response. That motion is **OVERRULED**. The Defendant also moves for re-consideration of a prior order denying appointment of counsel under RCr 11.42, that motion is **OVERRULED**.

It is undisputed that the underlying RCr 11.42 motion was still pending upon the merits in the circuit court as of the October order. As such, we perceive the October order as being non-final and the appeal therefrom as being interlocutory under Ky. R. Civ. Proc. 54.01.

Therefore, Appeal No. 1998-CA-002764-MR is DISMISSED.

APPEAL NO. 1999-CA-000238-MR

We now consider Appeal No. 1999-CA-000238-MR. Rader contends that the circuit 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). Rader specifically asserts that she received ineffective assistance of trial counsel. In order to succeed, Rader 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.

In the case *sub judice*, Rader raises a plethora of allegations relating to trial counsel's alleged ineffective assistance:

[1.] The trial court erred in determining that trial counsel was effective without first determining factually whether counsel failed to investigate exculpatory evidence and witness testimony;

[2.] Trial counsel [was] ineffective through negligence in failure to notify Commonwealth's attorney off [sic] Rader's request to appear before grand jury;

[3.] Counsel's failure to conduct proper pre-trial investigation of Rader's version of events;

[4.] Counsel deliberately misled Rader into belief that expert witnesses had been retained for testimony at trial;

[5.] Counsel failed to challenge conflict of interest and pursue impeachment materials related to prosecution's key witness;

[6.] Counsel failed to introduce medical and psychiatric records of Mobley;

[7.] Counsel failed to travel to site of alleged offense to inspect physical area to obtain exculpatory evidence;

[8.] Cumulative errors may constitute ineffective assistance of counsel;

[9.] The trial court erred holding that separation of charged offenses not mandated pursuant to RCr 9.16 and RCr 6.18;

[10.] The trial court erred in ruling that trial counsel was effective at trial despite lack of knowledge of relevant law;

[11.] Counsel [was] ineffective because of failure to properly interview defense witnesses and to have relevant understanding of each witness' factual testimony;

[12.] Rader [was] denied fair adversarial testing of the evidence because of a breakdown in the attorney-client relationship;

[13.] The trial court erred in making final determination as to Rader's multiple claims of ineffective assistance of counsel without holding evidentiary hearing to determine issues related to the constitutionality of her conviction not contained within the trial record.

We view the above allegations to be without merit. We are of the opinion that Rader either failed to prove that trial counsel's performance was deficient or that such deficiency resulted in actual prejudice. Id.

Next, Rader argues that the circuit court utilized the incorrect standard of law in disposing of the RCr 11.42 motion. The circuit court, however, utilized the Strickland standard. We simply perceive no merit to this argument.

Rader also maintains that her PFO I guilty plea was not entered knowingly, intelligently or voluntarily. Specifically, appellant contends that trial counsel erroneously advised her that if the direct appeal succeeded the PFO I guilty plea would be automatically vacated. Even when the court informed her

otherwise, she alleged that trial counsel instructed her to remain silent and he would take care of the matter. Rader argues that she would not have entered the guilty plea if she had known the truth, but would have insisted upon going to trial. The face of the record, however, refutes appellant's allegations. Upon entering the guilty plea, the court specifically asked Rader if anyone had made any "commitments" to her concerning her plea to which she answered "no". Moreover, appellant affirmatively stated that she understood the nature and consequences of the plea and entered into it upon her own accord. Upon the whole, we are of the opinion that the face of the record refutes appellant's allegations that the PFO I guilty plea was not entered knowingly, intelligently or voluntarily. Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726 (1986); Hopewell, 687 S.W.2d 153.

As Rader's claims were refuted upon the face of the record, we are of the opinion that the circuit court did not err in summarily denying Rader's RCr 11.42 motion.

For the foregoing reasons, Appeal No. 1999-CA-000238-MR is AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

Veronica Ruthann Rader,
Pro Se
Pewee Valley, KY

BRIEF FOR APPELLEE:

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Attorney General of Kentucky
and
Samuel J. Floyd, Jr.
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