

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000845-MR

JAIMIE BAILEY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY PAYNE, JUDGE
ACTION NO. 90-CR-00049

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: BUCKINGHAM, EMBERTON, AND SCHRODER, JUDGES.

EMBERTON, JUDGE. Jaimie Bailey (Bailey) appeals pro se from an order of the Fayette Circuit Court denying his motion for a trial transcript. After review of the record, we affirm.

In November 1990, a jury convicted Bailey of murder, robbery in the first degree, and carrying a concealed weapon. The trial court sentenced Bailey consistent with the recommendation of the jury to concurrent terms of life without the possibility of parole for twenty-five years for murder, twenty years for robbery in the first degree, and twelve months and a \$500.00 fine for carrying a concealed weapon. In May 1993,

the Kentucky Supreme Court affirmed the conviction on direct appeal.

In August 1997, Bailey filed a document entitled "Motion for a Request of Transcript" seeking a free copy of the videotape of his trial. After becoming impatient with the trial court's failure to act on the motion, Bailey filed a petition for a writ of mandamus in this Court in October 1997, seeking a writ ordering the circuit court to provide him a free copy of the trial transcript. On March 16, 1998, this Court issued an order denying Bailey's petition for writ of mandamus. On March 25, 1998, the circuit court issued an order denying Bailey's motion for a trial transcript. This appeal followed.

Bailey argues that he is indigent and needs a copy of the trial transcript in order to prepare a post-conviction collateral attack under RCr 11.42. Bailey maintains that he needs to research the trial transcript so that he can present "only non-frivolous complaints" in his RCr 11.42. He also contends that the trial court abused its discretion by failing to appoint a guardian ad litem under CR 17.04. Bailey claims that failure to provide him a free copy of the trial transcript violates his constitutional right to equal protection as set forth in Griffin v. Illinois, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956).

In Gilliam v. Commonwealth, Ky., 652 S.W.2d 856 (1983), the Kentucky Supreme Court explicitly rejected the position that an indigent defendant is entitled to a free transcript in order to prepare a collateral post-conviction appeal under RCr 11.42.

The Court held that an indigent defendant has no federal or state constitutional or statutory right to obtain a copy of a trial transcript at public expense prior to actually filing an RCr 11.42 motion. "[T]he stated purpose of the rule [RCr 11.42] is to provide a forum for known grievances, not to provide an opportunity to research for grievances." Id. at 858.

The Court in Gilliam also rejected the claim that an indigent defendant is entitled to a transcript based on the Equal Protection Clause. While acknowledging that the United States Supreme Court indicated in Griffin v. Illinois, supra, that an indigent defendant must be provided the basic tools for an appeal, the Gilliam Court noted that the right to a free transcript is limited to situations where the prisoner has already filed a post-conviction motion that "sets out grounds which on their face establish a valid basis on which relief can be granted." Id. See also Jones v. Breslin, Ky., 385 S.W.2d 71 (1964) (denying petition for writ of mandamus to compel trial court to furnish a trial transcript to prepare RCr 11.42 motion). The Court indicated that Griffin was not applicable where the defendant had not already filed the post-judgment motion. Finally, the Court in Gilliam noted that in United States v. MacCollom, 426 U.S. 317, 96 S. Ct. 2086, 48 L. Ed. 2d 666 (1976), the Supreme Court stated that the Equal Protection Clause did not guarantee an indigent defendant a trial transcript at public expense in a collateral proceeding, as opposed to a direct appeal.

More recently, in Bowling v. Commonwealth, Ky., 964 S.W.2d 803, 804 (1998), the Court relied on Gilliam v. Commonwealth, supra, in stating that prior to filing a post-conviction motion under RCr 11.42 or CR 60.02, "[a defendant] is not entitled to funds for investigations or 'fishing expeditions.'" The record reveals that Bailey has not yet filed an RCr 11.42 motion, and thus he is not entitled to a free trial transcript merely to prepare the motion. Cf. Sullivan v. Commonwealth, Ky., 655 S.W.2d 487 (1983) (indigent defendant entitled only to portions of trial transcript necessarily pertaining to the issues raised in his RCr 11.42 motion); Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 909-10 (1998) (holding defendant not entitled to funds for experts prior to filing RCr 11.42 motion).

Similarly, Bailey's claim that the trial court should have appointed a guardian ad litem or attorney to represent him is without merit. CR 17.04 provides for appointment of a guardian ad litem for prisoners in court actions where the prisoner is unable to defend the action. "CR 17.04 has no application where, as here, the action is brought by, rather than against, the prisoner." May v. Coleman, Ky., 945 S.W.2d 426, 427 (1997). Furthermore, in Gilliam, the Court stated that the decision in Commonwealth v. Ivey, Ky., 599 S.W.2d 456 (1980), which held an indigent defendant may be entitled to appointed counsel in a collateral proceeding based on KRS 31.110 did not establish a right to counsel or a trial transcript prior to filing a motion. "The holding in Ivey simply provides the movant

with legal assistance in preparing and presenting grievances. It does not provide a mechanism to search for unknown grievances." 652 S.W.2d at 858. The trial court did not err in failing to appoint a guardian ad litem or an attorney, and properly denied Bailey's request for a trial transcript.

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

ALL CONCUR.

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