

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001571-MR

JAMES RANDALL MAY

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE CHARLES E. LOWE, JR., JUDGE
ACTION NO. 90-CR-0115

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: COMBS, EMBERTON AND McANULTY, JUDGES.

McANULTY, JUDGE: This is an appeal from the Findings of Fact, Conclusions of Law and Order denying Appellant's motion for relief pursuant to RCr 11.42. Appellant, James Randall May ("May"), contends that the trial court erred in addressing the motion without the benefit of an evidentiary hearing. We find that the trial court did not err in eventually concluding that a hearing was not required. Moreover, we agree with the trial court that May failed to show that he received ineffective assistance of counsel.

In October of 1991, a jury found May guilty of murder and the Pike Circuit Court sentenced him to life in prison. His conviction was affirmed by the Kentucky Supreme Court in James

Randall May Stewart v. Commonwealth, No. 92-SC-201-MR (Rendered April 21, 1994).

On February 23, 1996, May filed a Motion to Vacate, Set Aside or Correct Judgment and Sentence Pursuant to RCr 10.26, RCr 11.42, CR 60.02 and CR 60.3 [sic]. A Motion for an Evidentiary Hearing and a sixty-six page Memorandum of Law accompanied the motion to vacate.

The trial court appointed counsel to assist May in the proceedings. Two years passed and new counsel was appointed. Counsel then moved in February 1998 for an evidentiary hearing. The trial court scheduled the hearing for April 17, 1998. May's counsel then moved for a continuance of the hearing due to the fact that a motion requesting funds for expert services was pending before the court. The court set May 1, 1998 as the new hearing date. Again, May's counsel requested a continuance, which the trial court granted on April 30, 1998. However, rather than reschedule the hearing, the trial court issued its Findings of Fact, Conclusions of Law and Order on June 11, 1998 which thoroughly addressed each of the errors asserted by May and denied the requested relief. This appeal followed.

May now contends that the trial court erred in summarily disposing of his motion because the pleadings allege grounds that are not conclusively refuted by the record. He also asserts that his constitutional rights were violated when the trial court scheduled but did not hold an evidentiary hearing.

We first address the contention that May raised issues which were not clearly refuted by the record. Although May

identified some fifteen grounds to support his 11.42 motion before the trial court, in his brief he specifically focuses on the failure of trial counsel to call the investigator to testify, the failure to move for a change of venue and May's allegations of prosecutorial misconduct.

Where, as here, the trial court denies a motion for an evidentiary hearing on an RCr 11.42 motion, our review is limited to 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). Moreover, where it is clear from the record that a movant who claims ineffective assistance of counsel has not established a reasonable probability that the result would have been different but for the alleged errors of counsel, there is no abuse of discretion in denying the motion without a hearing. Brewster v. Commonwealth, Ky. App., 723 S.W.2d 863 (1986).

At the request of May's trial counsel, John Barton, the court approved funds to hire an investigator, David Caudill. Mr. Caudill did not testify at the trial. May asserts that in the course of Caudill's investigation, he obtained evidence to impeach the chief witnesses against May. These witnesses were the co-defendant, Freddie Scott (who testified that he participated in the robbery but that May shot the victim) and William "Happy" Coleman (who testified that May confessed to him months after the incident that he had shot the victim).

May contends that Caudill ceased his investigation and requested that he not be called to testify due to threats made against him. May further claims that a failure to call Caudill to the stand amounts to ineffective assistance. However, in his assertion that Caudill uncovered evidence to impeach Scott and Coleman, May neglected to inform the trial court as to how Caudill's testimony would have impeached these witnesses. In the absence of an allegation by May that Caudill uncovered evidence that would demonstrate that Scott and Coleman were lying about the events on the evening in question, the trial court did not err in determining that the record refuted May's claims.

Neither Scott or Coleman was held out at trial to be model citizens. Scott testified that he and May had entered the victim's home to sell him some bogus cocaine and steal his jewelry. Testimony also implicated Coleman as being aware of the planned robbery and intending to unload the jewelry for cash. In other words, the jury was well aware that these two witnesses were criminals in their own right and was therefore on notice that they should weigh that testimony accordingly. As such, it is not reasonable to assume that evidence merely attacking the general credibility of these witnesses would have changed the result.

Moreover, it is difficult to imagine what evidence could have impeached Scott's specific testimony that May shot the victim. The same can be said for the testimony of Coleman to the effect that May revealed to him that he had been the triggerman. Under the facts of this case, we hold that a mere allegation that

an investigator possessed evidence to impeach witnesses does not establish a reasonable probability that the result would have been different had the investigator been called to testify. Therefore, the trial court did not abuse its discretion in denying the motion without an evidentiary hearing.

May next suggests that his trial counsel was ineffective in failing to move for a change of venue. In his motion to vacate filed with the trial court, May asserted that the victim was a well-known and well-respected businessman in the community and therefore he could not receive a fair trial. He pointed to the response during voir dire to the Commonwealth's query as to how many of the prospective jurors had known the victim. The Commonwealth commented upon the show of hands, "Almost all of you." However, the test used to determine a change of venue is not familiarity with the victim or the crime but whether public opinion of the crime is so aroused as to preclude a fair trial. Foster v. Commonwealth, Ky., 827 S.W.2d 670 (1992). Absent an allegation of such public opinion, we see no reason for the trial counsel to have moved for a change of venue.

Further, in his appeal to this Court, May refers us to Jacobs v. Commonwealth, Ky., 870 S.W.2d 412 (1994) in which the Supreme Court commented that the community was "one where a court-appointed investigator feared to tread" and the investigator "was immobilized by fear" in finding that the court abused its discretion in denying a motion for change of venue. Id. at 416. However, Jacobs does not stand for the proposition

that a change of venue is warranted when an investigator is threatened, as May would have us believe. Rather, the Jacobs Court made those comments about the investigator to illustrate the pervasiveness of the public opinion concerning Jacobs's guilt. In other words, in Jacobs, the investigator felt threatened by members of the general public who were enraged by the crime whereas May alleges that his investigator was intimidated and threatened by a witness in the case. The two situations are distinguishable in that the first warrants a change of venue while the second does not.

We next move to May's allegation of prosecutorial misconduct. May contends that the prosecutor's conduct in being informed that Happy Coleman was intimidating the defense investigator and failing to charge Coleman with a crime amounted to fraud in obtaining May's conviction. The trial court dismissed this argument as being refuted by the record. We are of the opinion that this issue is improperly raised in May's 11.42 motion as it should have been raised on direct appeal.

A RCr 11.42 motion provides the trial court the opportunity to "review its judgment and sentence for constitutional invalidity of the proceedings prior to judgment or in the sentence and judgment itself." Commonwealth v. Wine, Ky., 694 S.W.2d 689, 694 (1985). "It is not the purpose of RCr 11.42 to permit a convicted defendant to retry issues which could and should have been raised in the original proceedings . . . where the grounds of his RCr 11.42 motion are matters which must have been known to him at the time of trial." Hoskins v.

Commonwealth, Ky., 420 S.W.2d 560, 561 (1967), cert. denied, 391 U.S. 968, 88 S. Ct. 2041, 20 L. Ed. 2d 882 (1968). Further, arguments relating to prosecutorial misconduct are not proper for a RCr 11.42 motion as they are issues which should have been raised on direct appeal. See Thacker v. Commonwealth, Ky., 476 S.W.2d 838, 839 (1972).

There is no question that May was aware, at the time of trial and his subsequent appeal, of the prosecutor's alleged failure to prosecute Coleman for intimidation. Therefore this matter should have been raised to the Supreme Court on direct appeal. We find no error in the trial court's denial of the requested relief on the basis of prosecutorial misconduct.

Finally, May asks us to carve out a new requirement to RCr 11.42 which would provide that once a trial court assigns a date for an evidentiary hearing, it is forever bound by a determination that a hearing is mandated under the rule. This we decline to do.

May argues that the trial court's actions in at first setting the matter for an evidentiary hearing and subsequently ruling on the motion without holding a hearing amounts to an arbitrary exercise of power in violation of Section 2 of the Kentucky Constitution and a denial of due process rights. As previously stated, we reject May's assertion that once a trial court sets a hearing date in an 11.42 motion, a movant becomes constitutionally entitled to an evidentiary hearing under the rule. The trial court has broad discretion to search the motion and the Commonwealth's response to the motion for grounds or

allegations which cannot be determined from the record. We see no reason or basis in law to hold that once the court schedules a hearing it is compelled to hold the hearing even if it no longer believes that one is required.

The decision of the Pike Circuit Court is affirmed.

ALL CONCUR.

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