

Commonwealth Of Kentucky

Court Of Appeals

NOS. 1997-CA-002159-MR
AND 1998-CA-002115-MR

WILLIAM A. SEARCY

APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
ACTION NO. 92-CR-00028

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
AND ORDER DENYING MOTION TO DISMISS AS MOOT
** ** * * * * *

BEFORE: BUCKINGHAM, GUIDUGLI AND KNOPF, JUDGES.

KNOPF, JUDGE: These are consolidated appeals from judgments of the Bullitt Circuit Court ordering forfeiture of property, and denying a motion to vacate a criminal sentence pursuant to RCr 11.42. Finding no error, we affirm in both appeals.

The appellant, William A. Searcy, was found guilty following a jury trial of trafficking in Dilaudid (a Schedule II narcotic) and being a persistent felony offender in the second degree. Shortly thereafter, a plea bargain with respect to sentencing was reached. On December 10, 1992, the Bullitt Circuit Court sentenced Searcy to ten years in the penitentiary

on the trafficking conviction, enhanced to fifteen years as the result of his PFO II status. His conviction was affirmed by this Court in an unpublished opinion.¹

Prior to the disposition of his appeal, Searcy filed a motion to vacate his conviction pursuant to RCr 11.42, alleging ineffective assistance of counsel. The trial court denied the motion without a hearing. This Court again affirmed the trial court in an unpublished opinion.² Since this time, he has filed three additional actions. The first was an open records request concerning the indictment of his co-defendant. The trial court denied this motion, and this Court dismissed Searcy's appeal for failure to file a brief.³

Thereafter, the Commonwealth moved for an order of forfeiture of property pursuant to KRS 218A.400 et seq. The trial court granted the Commonwealth's motion on August 18, 1997, and ordered Searcy's 1984 Ford Bronco and \$214.00 in cash forfeited. Thereafter, the Bullitt Circuit Court amended its order, finding that the \$214.00 in cash was not subject to forfeiture. Searcy now appeals (Appeal No. 1997-CA-002159).

On April 7, 1998, Searcy filed a pro se "Supplement [sic] RCr 11.42 motion," again asserting ineffective assistance of counsel. His pro se motion was later supplemented by appointed counsel. The trial court denied his motion on June 3,

¹ William A. Searcy v. Commonwealth, Ky. App., No. 1992-CA-003051 (Not-To-Be-Published Opinion rendered 07/15/1994).

² William A. Searcy v. Commonwealth, Ky. App., No. 1994-CA-002738 (Not-To-Be-Published Opinion rendered 2/9/1995).

³ William A. Searcy v. Commonwealth, No. 1996-CA-003054 (Order dismissing 7/22/1997).

1998. Searcy's appeal in Action No. 1998-CA-002115 followed. These two appeals were consolidated before this Court.

In his appeal from the forfeiture order, Searcy's primary ground of error is that the trial court erred in denying his motion for appointment of counsel. Except in limited circumstances which are not applicable in this case, a defendant's right to counsel only attaches in criminal proceedings. Parsley v. Knuckles, Ky., 346 S.W.2d 1, 3 (1961). Since forfeiture is civil in nature, Searcy had no right to appointed counsel. United States v. \$100,375.00 in U.S. Currency, 70 F.3d 438, 440 (6th Cir., 1995).

Searcy further claims that the trial court should have appointed counsel for him pursuant to CR 17.04. Under that rule, if a prisoner fails to defend a civil action brought against him, a guardian ad litem must be appointed for him before judgment may be entered. CR 17.04; May v. Coleman, Ky., 945 S.W.2d 426, 427 (1997); Davidson v. Boggs, Ky. App., 859 S.W.2d 662 (1993). However, Searcy appeared and defended the forfeiture action. Therefore, CR 17.04 did not require the trial court to appoint a guardian ad litem for him.

In the appeal from the denial of his RCr 11.42 motion, Searcy first argues that the trial court erred in denying him a hearing on his ineffective assistance of counsel claims. The Commonwealth responds that Searcy's RCr 11.42 motion is improper

as successive,⁴ and was properly dismissed. RCr 11.42(3) requires that:

The motion shall state all grounds for holding the sentence invalid of which the movant had knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding.

This rule has been consistently interpreted to bar successive motions under RCr 11.42. Vunetich v. Commonwealth, Ky., 847 S.W.2d 51, 52 (1990). Searcy's motion raised a number of claims of ineffective assistance involving his trial counsel. We find no reason why these issues could not have been presented in his earlier motion. Therefore, the trial court properly denied the motion without a hearing.⁵

Searcy further contends that the trial court erred in not entering a default judgment against the Commonwealth for failure to file a timely response to his RCr 11.42 motion. However, CR 55.04 provides that no default judgment shall be entered against the Commonwealth. Even if it was permitted, the granting of a default judgment is in most cases discretionary with the trial court. Harris v. Commonwealth, Ky. App., 688

⁴ The Commonwealth further characterizes Searcy's motion as "duplicitous". "Duplicitous" is defined as meaning "marked by duplicity: Deceitful". Webster's II New College Dictionary, (Riverside, 1995), p. 351. However, since the remainder of the Commonwealth's argument on this point does not follow this definition, we shall presume the Commonwealth intended to use the word "duplicative".

⁵ Searcy argues that this Court should not affirm the trial court's denial of his RCr 11.42 motion on this basis because the Commonwealth failed to raise the issue before the trial court. We disagree. The sufficiency of a motion pursuant to RCr 11.42 is a matter of law. Based upon RCr 11.42(3), Searcy was not entitled to an evidentiary hearing on his motion.

S.W.2d 341, 452 (1984). We find no abuse of discretion in this case.

Searcy also alleges that the trial judge was biased against him during the RCr 11.42 proceedings, and that the trial judge demonstrated this bias by allowing the Commonwealth additional time to respond. Inasmuch as we have found that the motion did not state adequate grounds for the granting of relief, this argument is moot. Moreover, the issues relating to Searcy's motion to recuse the trial judge are not before this Court.

Accordingly, the judgments of the Bullitt Circuit Court in both matters are affirmed. The Commonwealth's motion to dismiss the appeal is denied as moot.

ALL CONCUR.

DATE: February 25, 2000

/s/ William L. Knopf
JUDGE, COURT OF APPEALS

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