

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002419-MR

ROBERT CHARLES NELLOM

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 90-CR-000801

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: DYCHE, JOHNSON, AND TACKETT JUDGES.

JOHNSON, JUDGE: Robert Charles Nellom has appealed the order of the Jefferson Circuit Court entered on July 21, 1998, that denied his motion for RCr¹ 11.42 relief. Having concluded that Nellom is not entitled to RCr 11.42 relief, we affirm.

On April 25, 1990, Nellom was indicted for the offenses of sodomy in the first degree (KRS² 510.070) and burglary in the first degree (KRS 511.020). A jury found him guilty of those charges and he pled guilty to the charge of persistent felony

¹Kentucky Rules of Criminal Procedure.

²Kentucky Revised Statutes.

offender in the second degree (PFO II). On September 14, 1990, the trial court sentenced Nellom to prison for thirty years. On direct appeal, the Supreme Court of Kentucky unanimously affirmed Nellom's conviction.³

The record reflects that Nellom first moved for RCr 11.42 relief in March 1992. The trial court summarily denied this motion. Thereafter, in September 1996, Nellom once again moved the trial court for RCr 11.42 relief claiming, inter alia, ineffective assistance of counsel.⁴ The trial court, without granting a hearing, denied the motion. This appeal followed.

Nellom argues that he was denied effective assistance of counsel due to trial counsel's alleged failure to contact or interview certain exculpatory witnesses. He claims that the testimony elicited from these witnesses would have exonerated him at trial. Additionally, Nellom claims that since his allegations are not refuted on the face of the record, the trial court should have granted him an evidentiary hearing.

In order to prevail on a claim of ineffective assistance of counsel, "[t]he burden of proof [is] upon the appellant to show that he was not adequately represented"⁵ For the movant to establish that counsel's assistance was so prejudicially ineffective as to require reversal, he must satisfy

³Supreme Court Opinion #90-SC-780-MR, rendered September 26, 1991.

⁴Initially, on October 23, 1996, the trial court denied the motion as untimely filed. On appeal that decision was vacated and the matter was remanded by this Court to the trial court for further consideration. (1996-CA-3196-MR rendered May 15, 1998).

⁵Jordan v. Commonwealth, Ky., 445 S.W.2d 878, 879 (1969).

a two-part test: (1) "that counsel's representation fell below an objective standard of reasonableness . . . [and, (2)] there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different.'"⁶ It is well-settled that there is no need to conduct an evidentiary hearing on a RCr 11.42 motion where the face of the record refutes the claim of error.⁷

First, Nellom argues that defense counsel failed to interview and subpoena one Sherman Brasher, who allegedly overheard the victim state that Nellom was not the perpetrator of the charged offenses. He claims this testimony was crucial to his defense as it would have exonerated him. In his first RCr 11.42 motion filed in 1992, Nellom failed to raise an issue concerning Sherman Brasher or the substance of any testimony that he would have provided. The law is well-settled that a RCr 11.42 motion "shall state all grounds for holding the sentence invalid of which the movant has knowledge."⁸ "Final disposition of the motion shall conclude all issues that could reasonably have been

⁶Hill v. Lockhart, 474 U.S. 52, 57, 106 S.Ct. 366, 88 L.Ed. 203 (1985) (quoting Strickland v. Washington, 466 U.S. 668, 687-88, 694, 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).

⁷ RCr 11.42(5) provides, in pertinent part: "If the answer raises a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing" See also Harper v. Commonwealth, Ky., 978 S.W.2d 311, 314 (1998).

⁸RCr 11.42(3).

presented in the same proceeding.”⁹ The complaints Nellom raises now “could have been raised in the first application for post-conviction relief.” Nellom is “not entitled to another opportunity in these circumstances.”¹⁰

Second, Nellom contends that certain hospital personnel should have been called as witnesses to provide additional alibi testimony. He claims these witnesses would have stated that he was at the hospital during the time the offenses took place. This claim was raised by Nellom in his 1992 RCr 11.42 motion and relief was denied. Successive motions under RCr 11.42 are not allowed.¹¹ “The courts have much more to do than occupy themselves with successive ‘reruns’ of RCr 11.42 motions stating grounds that have or should have been presented earlier.”¹²

Accordingly, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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⁹Id.

¹⁰Butler v. Commonwealth, Ky., 473 S.W.2d 108, 109 (1971) (citations omitted).

¹¹Hampton v. Commonwealth, Ky., 454 S.W.2d 672 (1970).

¹²Hampton, supra at 673 (citing Kennedy v. Commonwealth, Ky., 451 S.W.2d 158, 159 (1970)).