

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-001694-MR

THOMAS HENSLEY

APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT  
HONORABLE RODERICK MESSER, JUDGE  
ACTION NO. 92-CR-00011

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: BUCKINGHAM, EMBERTON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a judgment of the Laurel Circuit Court denying appellant's motion to vacate judgment pursuant to RCr 11.42. Because appellant did not receive ineffective assistance of counsel and the trial court did not abuse its discretion in denying appellant a continuance for his evidentiary hearing, we affirm.

On December 31, 1991, Snowden Baker, Jr. (Baker) and Jeffrey Payne (Payne) were shot while at the residence of appellant, Thomas Hensley. Baker died as a result of his wounds. Payne was seriously injured, but recovered. On February 21, 1992, appellant was indicted for murder, assault in the first

degree, and persistent felony offender in the second degree. Appellant's trial commenced on January 19, 1993. At trial, Payne testified that he and Baker had gone to the residence to purchase Xanax from appellant. Payne testified that while the three men were talking, appellant, who had been drinking, pulled a gun out of a wastebasket and shot Baker and Payne for no reason. Appellant was represented by retained counsel, and testified in his own defense. Appellant denied that he shot Baker and Payne, rather, he asserted that another man, Billy Parker, entered his residence, pulled a gun on appellant, and as they struggled for the gun, it went off, shooting Baker and Payne. The jury received instructions on murder, first-degree manslaughter, second-degree manslaughter, reckless homicide, first-degree assault, second-degree assault, intentional fourth-degree assault, reckless fourth-degree assault, and self-protection. The jury found appellant guilty of murder and first-degree assault. On February 12, 1993, appellant was sentenced in accordance with the jury's recommendation, to 50 years for murder and 20 years for first-degree assault, with the sentences to run consecutively. Appellant's conviction was affirmed by the Kentucky Supreme Court on February 25, 1994.

On September 30, 1997, appellant filed a motion to vacate judgment pursuant to RCr 11.42, requesting appointed counsel and an evidentiary hearing. The Office of Public Advocacy was ordered to represent appellant. On December 31, 1997, the court reporter for the Laurel Circuit Court filed notice that the audiotapes of appellant's trial proceedings had

been filed in the record. On October 26, 1998, appellant indicated that he would require the services of an audiotape expert, as he was alleging that the trial transcript and trial audiotapes had been altered. Appellant therefore requested that the evidentiary hearing be set in the spring of 1999 in order to allow the expert time to analyze the tapes. On December 18, 1998, in accordance with appellant's request, the court set the evidentiary hearing for April 15, 1999. On April 13, 1999, appellant's counsel filed a motion requesting a continuance of the hearing, on the grounds that he was still working with the audiotape analyst, and also because he had a trial scheduled for April 15, 1999. The motion was denied, and the evidentiary hearing was held on April 15, 1999. Appellant called no witnesses at the hearing, except for Snowden Baker's wife, Wendy Baker, who had not been subpoenaed but was present at the hearing. On May 20, 1999, the Laurel Circuit Court denied appellant's RCr 11.42 motion, issuing a lengthy written order addressing all of appellant's claims. Appellant filed a motion for reconsideration, requesting the court to reconsider its denial of appellant's motion for a continuance and requesting a second evidentiary hearing. On May 25, 1999, the court denied the motion. This appeal followed.

Appellant first argues that the trial court abused its discretion by failing to grant a continuance for his evidentiary hearing. Appellant contends that the continuance was necessary in order to present evidence from the audiotape expert concerning appellant's allegations that the audiotapes of his trial had been

altered. Appellant argues that he needed the extra time as he was in the process of attempting to refine the amount of work to be done to reduce the expense. Appellant alleges that the reason his counsel didn't subpoena any witnesses for the evidentiary hearing was because he believed the continuance would be granted, and therefore, did not prepare. As such, appellant contends he was denied the right to a meaningful hearing.

A motion for a continuance is directed to the sound discretion of the trial court and the action of the court will not be disturbed on appeal absent an abuse of that discretion. Eldred v. Commonwealth, Ky., 906 S.W.2d 694 (1995), cert. denied, 516 U.S. 1154, 116 S. Ct. 1034, 134 L. Ed. 2d 111 (1996); Snodgrass v. Commonwealth, Ky., 814 S.W.2d 579 (1991); Rosenzweig v. Commonwealth, Ky. App., 705 S.W.2d 956 (1986). The Kentucky Supreme Court has set forth the following factors which a trial court should consider in exercising its discretion to grant or deny a continuance: 1) length of delay; 2) previous continuances; 3) inconvenience to litigants, witnesses, counsel, and the court; 4) whether the delay is purposeful or is caused by the accused; 5) availability of other competent counsel; 6) complexity of the case; and 6) whether denying the continuance will lead to identifiable prejudice. Snodgrass, 814 S.W.2d at 581.

We do not believe the trial court abused its discretion in denying the continuance. The evidentiary hearing had been set in accordance with appellant's specific request for a spring hearing. Appellant had four months to prepare for the

evidentiary hearing, and did not move for the continuance until two days prior. Further, we find no identifiable prejudice resulting to appellant from the denial of the continuance. Appellant contends that he needed the continuance to have more time to work with the audiotape expert. However, the trial court believed that appellant's claim of alterations in the trial record should have been raised on direct appeal, and was not appropriate for the RCr 11.42 proceeding. The trial court, nevertheless, considered each of appellant's 19 claims of discrepancies in the transcript, and concluded that, even if appellant's version of what occurred at trial was true, it would not rise to the level of a constitutional due process violation justifying relief. Commonwealth v. Basnight, Ky. App., 770 S.W.2d 231, 237 (1989). Accordingly, the trial court did not err in denying appellant a continuance.

Appellant next argues that he received ineffective assistance of counsel at trial. In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing that counsel's performance was deficient and that the deficiency resulted in actual prejudice affecting the outcome. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The burden is on the appellant to overcome the strong presumption that trial counsel's assistance was constitutionally sufficient. Jordan v. Commonwealth, Ky., 445 S.W.2d 878, 879 (1969); McKinney v. Commonwealth, Ky., 445 S.W.2d 874, 878 (1969). "In the absence of a showing that some alternative action by counsel would have compelled a mistrial or

a dismissal . . . ineffective assistance will rarely be shown." Robbins v. Commonwealth, Ky. App., 719 S.W.2d 742, 743 (1986).

Appellant first argues that counsel was ineffective for failing to raise issues of appellant's competency at the time of the trial and at the time of the offense. Appellant asserts that at the time of the offense, he was without mental competence to understand right or wrong, and that at the time of trial he was without the mental capacity to participate in his defense. Appellant offers no other evidence that he was mentally ill other than his own allegations. "RCr 11.42(2) requires that the motion state specific grounds for relief and facts supporting those grounds". Skaggs v. Commonwealth, Ky., 803 S.W.2d 573, 576 (1990). Further, according to the trial court, appellant offered no proof whatsoever at the evidentiary hearing to support his claim of incompetency. Accordingly, counsel was not deficient in choosing not to pursue an insanity defense.

Appellant next argues that counsel was ineffective for failing to carefully investigate his case and prepare for trial. Appellant's brief sets forth only a general allegation, but refers to eighteen specific errors by counsel listed in his RCr 11.42 motion. Upon review of the record, we adjudge appellant's list of eighteen errors to be without merit. Twelve of these alleged errors involve actions appellant contends counsel should have taken to impeach eyewitness Payne. However, contrary to appellant's allegations, the record shows that counsel made a substantial effort to impeach Payne. Counsel's cross-examination of the medical examiner elicited testimony which contradicted

Payne's version of events. The jury was aware of Payne's prior drug use, prior felony conviction, and his prior inconsistent statements as to why he went to appellant's house on the night of the crime. The record indicates that counsel questioned Payne in detail as to the location in the room of Payne, Baker, and appellant at the time of the shooting, and Payne's actions after the shooting. As such, we conclude appellant's claims that counsel's performance was deficient with regard to Payne to be without merit.

Appellant also contends that counsel was deficient in not interviewing Parker before trial. However, the record shows that counsel called Parker as a witness and questioned him thoroughly as to his whereabouts on the night of the murder, and his hostile relationship with appellant. Appellant fails to specify how counsel's interviewing Parker prior to trial would have led to a different outcome of the case. There is a presumption that counsel's actions were a part of sound trial strategy and within the wide range of reasonable, professional assistance. Robbins v. Commonwealth, 719 S.W.2d at 743.

Appellant further contends that counsel was deficient for not calling other defense witnesses, who he claims would have also refuted Payne's testimony. However appellant fails to state with any specificity what these witnesses would have testified. In the absence of an allegation that the testimony would have compelled an acquittal, the mere failure to produce defense witnesses does not amount to ineffective assistance. Id.

Two of the 18 errors concerned alleged failures by counsel concerning a bullet found in the kitchen wall of appellant's residence nine days after the shooting. This issue was raised on direct appeal, with the Supreme Court upholding the trial court's ruling that this bullet was inadmissible. RCr 11.42 does not permit a convicted defendant to retry issues previously raised on direct appeal. Thacker v. Commonwealth, Ky., 476 S.W.2d 838, 839 (1972).

The remainder of the list of eighteen errors are either refuted by the record, or were very general and speculative. In seeking post-conviction relief, the movant must aver facts with sufficient specificity to generate a basis for relief. Lucas v. Commonwealth, Ky., 465 S.W.2d 267, 268 (1971). Further, the trial court noted in its May 20, 1999 order that appellant "offered absolutely no proof" at the evidentiary hearing to support these eighteen claims. Effective assistance of counsel does not deny counsel the freedom of discretion in determining the means of presenting his client's case. Hibbs v. Commonwealth, Ky. App., 570 S.W.2d 642, 644 (1978). The record indicates that appellant's counsel was well-prepared and provided competent representation. We choose not to retry the case and second guess the trial counsel as to what he should have or should not have done at the time. Dorton v. Commonwealth, Ky., 433 S.W.2d 117 (1968). Hibbs, 570 S.W.2d at 644.

Appellant next argues that counsel was ineffective for failing to call up to 25 witnesses that could have testified on his behalf at the sentencing. However, as the trial court



correctly stated, as appellant was not facing the death penalty, KRS 532.055 applied to his sentencing. At the time appellant was tried, in 1993, KRS 532.055(2)(b) provided that the only evidence he could introduce in mitigation at his sentencing hearing would be evidence that he had no significant history of criminal activity. As the record shows appellant had prior convictions of first-degree manslaughter and first-degree assault, there was nothing that these witnesses could have testified to in mitigation. Accordingly, there was no deficiency on the part of counsel for not calling these witnesses, nor any prejudice resulting to appellant.

Appellant next argues that he was denied proper appellate review as a result of his allegation that the record on appeal was altered. Appellant was sentenced on February 12, 1993. The Department of Public Advocacy was appointed to represent appellant on appeal, and appellant's notice of appeal to the Kentucky Supreme Court was filed on February 17, 1993. On February 18, 1993, appellant's appointed counsel requested a transcript of the proceedings. The record shows that on May 27, 1993 the transcript of the proceedings was filed and the record on appeal was certified by the Laurel Circuit Court Clerk. CR 75.08 states:

. . . if any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that

court and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the trial court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected.

Appellant filed several motions in late 1993 in the Laurel Circuit Court attempting to obtain copies of tapes of the trial proceedings, but was unsuccessful. The Supreme Court affirmed appellant's conviction on February 25, 1994. Appellant's claim of inaccuracies in the transcript should have been raised on direct appeal and is not appropriate for RCr 11.42 relief. An appellant is not permitted to raise issues in RCr 11.42 proceedings that could have or should have been raised in the original proceedings or on direct appeal. Commonwealth v. Ivey, Ky., 599 S.W.2d 456 (1980). Assignments of error not raised on direct appeal are waived. Williamson v. Commonwealth, Ky., 767 S.W.2d 323 (1989).

Appellant argues that it was the duty of defense counsel to have the trial court settle the matter of discrepancies in the record pursuant to CR 75.08. The trial

court stated that appellant "made no claim that he and his appellate counsel ever sought to take advantage of the procedures allowed by CR 75" which sets out procedures appellant could have followed pursuant to his claim of inaccuracies in the transcript. Appellant made no motion to correct or modify the record pursuant to CR 75.08. See Campbell v. Commonwealth, Ky., 732 S.W.2d 878, 880 (1987). However, as the trial court noted, appellant was represented by appellate counsel when the trial record was certified and a copy provided to him. An RCr 11.42 motion is not the appropriate method to seek relief based on the ineffective assistance of appellate counsel. Vunetich v. Commonwealth, Ky., 847 S.W.2d 51 (1990); Hicks v. Commonwealth, Ky., 825 S.W.2d 280 (1992).

Appellant's final argument is that the cumulative effect of trial counsel's errors constituted ineffective assistance. Having determined that the individual allegations have no merit, they can have no cumulative value. McQueen v. Commonwealth, Ky., 721 S.W.2d 694, 701 (1986).

The judgment of the Laurel Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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