

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000120-MR

DAVID LEE LEWIS, JR.

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE FARMER H. HELTON, JUDGE
ACTION NO. 93-CR-00001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: GUDGEL, Chief Judge; COMBS and McANULTY, Judges.

COMBS, JUDGE: On March 2, 1993, David Lee Lewis, Jr., was indicted for Capital Murder. Kentucky Revised Statute (KRS) 507.020. The indictment resulted from the allegation that on December 26, 1992, Lewis assaulted his wife, Sheila Mills Lewis, stabbing her to death with a knife. On December 1, 1993, following a jury trial, Lewis was found guilty of murder and was sentenced to life imprisonment. On January 19, 1995, the Supreme Court rendered an opinion affirming Lewis's conviction.

On October 17, 1995, Lewis filed a motion to vacate his conviction pursuant to Rule of Criminal Procedure (RCr) 11.42.

On March 7, 1996, the trial court entered an order denying the motion. On April 4, 1997, in Case No. 96-CA-0983-MR, we rendered an opinion affirming the trial court.

On October 8, 1999, Lewis filed the present RCr 11.42 motion to vacate his conviction; he also filed a motion to file a successive RCr 11.42 petition. On December 22, 1999, the trial court entered an order denying both the RCr 11.42 motion and the motion to file a successive RCr 11.42 petition. This appeal followed.

First, Lewis contends that the trial court abused its discretion when it denied his motion for leave to file a successive RCr 11.42 motion.

RCr 11.42(3) provides that an RCr 11.42 motion shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding.

A movant is "precluded from raising issues in a successive RCr 11.42 motion which were or could have been raised in the first motion." McQueen v. Commonwealth, Ky., 949 S.W.2d 70, 71 (1997).

Lewis's brief identifies five reasons in support of his position that he should be permitted to file a second RCr 11.42 motion: (1) when he filed his first RCr 11.42 motion, he was incarcerated in Virginia and therefore did not have access to proper and adequate copies of Kentucky statutes and case law to utilize in order to file a complete and meaningful post-conviction motion; (2) he had a three-year time limit in which to file an RCr 11.42 motion; (3) he was unable to procure a copy of

his trial transcript prior to filing his first RCr 11.42 motion; (4) he did not discover until just prior to filing his second RCr 11.42 motion that the Commonwealth had made trial counsel a plea offer – a fact that was not communicated to him; and (5) in December 1999, he was informed that the chief prosecution witness had been romantically involved with his wife, the murder victim.

We have carefully considered the factors identified by Lewis as to why he should be permitted to file a successive RCr 11.42 motion, and we are persuaded that, despite any disadvantages experienced by Lewis by being incarcerated in a foreign jurisdiction, the bases for relief identified in his second RCr 11.42 motion could just as easily have been raised in the first RCr 11.42 motion as in this one and that, therefore, Lewis's second RCr 11.42 motion is barred. Id.

Lewis's second RCr 11.42 motion also violates the three-year limitation of RCr 11.42(10). RCr 11.42(10) provides in relevant part that:

[A]ny motion under this rule shall be filed within three years after the judgment becomes final, unless the motion alleges and the movant proves

(a) that the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence;

The three-year limitations period for filing an RCr 11.42 motion runs from the entry of the judgment on direct appeal by the appellate court. Palmer v. Commonwealth, Ky. App., 3 S.W.3d 763 (1999). The Supreme Court rendered its final decision in this case on January 19, 1995, and, therefore, the three-year

limitations period in this case expired on January 19, 1998. Lewis filed his second motion on October 8, 1999. The facts upon which Lewis's present claim is predicated either were known to him or – with the exercise of reasonable diligence – could have been ascertained within the three-year limitations period. Therefore, Lewis's second RCr 11.42 motion is also barred by RCr 11.42(10).

Nonetheless, we have reviewed the merits of Lewis's arguments for post-conviction relief. Lewis's second RCr 11.42 motion identified the following bases for relief: (1) the trial court erred when it failed to instruct the jury on extreme emotional disturbance; (2) Lewis received ineffective assistance of counsel because trial counsel failed to request funds to hire a forensic witness on stab wounds; (3) Lewis received ineffective assistance because trial counsel failed to inform him that the Commonwealth had made a plea offer available to him prior to trial; (4) Lewis received ineffective assistance because trial counsel failed to object when the prosecutor misstated the evidence during closing argument regarding the location of the stab wound; and (5) trial counsel was ineffective because he failed to request the lesser included offense of manslaughter.

His first allegation concerns an alleged error by the trial court and could have been raised on direct appeal. The trial court's failure to instruct on extreme emotional distress is not a proper issue to raise in an RCr 11.42 motion as such an issue is limited to issues that were not – and could not be –

raised on direct appeal. Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 908-909 (1998).

As to the other four allegations of ineffective assistance of counsel, we are persuaded that those issues do not meet the standard set forth in Strickland v. Washington, 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

For the foregoing reasons, the judgment of the Bell Circuit Court is affirmed.

ALL CONCUR.

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