

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-001351-MR

CUSTER RAY SMITH

APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT  
HONORABLE FARMER H. HELTON, JUDGE  
INDICTMENT NO. 98-CR-00072

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION

### AFFIRMING

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BEFORE: BARBER, GUIDUGLI and HUDDLESTON, Judges.

HUDDLESTON, Judge: Custer Ray Smith appeals from a judgment based on a jury verdict finding him guilty of manslaughter in the first degree<sup>1</sup> and sentencing him to fifteen years' imprisonment. Smith's arguments in this direct appeal are that he was denied effective assistance of counsel due to counsel's failure to investigate properly and prepare a proper defense, to make an effective opening statement, to conduct effective cross-examination and to make an effective closing argument.

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<sup>1</sup> Ky. Rev. Stat. (KRS) 507.030.

On April 4, 1998, Smith entered his sister's store and intentionally killed William Taylor by shooting him with a 10-millimeter semi-automatic pistol. The police found Taylor lying on the floor with a .38 caliber derringer pistol lying near his body. Smith's pistol had been fired twice; the derringer had been fired once. Smith told Detective Don Perry that he had been shot and claimed that he had shot Taylor in self-defense. However, Smith did not have any wounds as a result of the shooting.

On April 13, 1999, Smith was tried and, on April 15, 1999, was found guilty of manslaughter in the first degree. On May 5, 1999, appellate counsel for Smith entered their appearance. On May 7, 1999, Smith's trial counsel, Lowell W. Lundy, filed a motion<sup>2</sup> for a new trial. The grounds for the motion were that there was not sufficient evidence to justify submitting the case to the jury or to sustain the guilty verdict, that the instructions did not correctly set forth the law applicable to the case, and that the court improperly admitted evidence and exhibits and permitted the exhibits to be viewed by the jury. The court entered judgment and sentence on June 7, 1999, stating that Smith had shown no sufficient cause why judgment should not be pronounced. Smith filed a notice of appeal on June 9, 1999.

Smith did not file a Kentucky Rules of Criminal Procedure (RCr) 11.42 motion with the circuit court. RCr 11.42 is not the exclusive remedy for an ineffective assistance claim, but Smith could preserve such a claim for direct appeal only by filing a

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<sup>2</sup> The motion was brought "pursuant to the provisions of RCr [Kentucky Rules of Criminal Procedure]." Smith did not cite to a specific provision in the rules.

proper post-conviction motion.<sup>3</sup> No claim of ineffective assistance of counsel was included in the motion for a new trial submitted by Smith's trial counsel if, for no other reason, because it would have been unethical for trial counsel to assert his own ineffectiveness.<sup>4</sup> Arguably, such a claim could only have been properly raised either by pro se motion or by counsel for Smith other than trial counsel. This Court reviews only claims of error presented to the trial court.<sup>5</sup> Smith's wholly unpreserved claims will not be considered on this direct appeal, but this does not preclude consideration in a proper collateral attack proceeding.<sup>6</sup>

The judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Otis Doan, Jr.  
Harlan, Kentucky

Dan Partin  
Harlan, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III  
Attorney General of Kentucky

Todd D. Ferguson  
Assistant Attorney General  
Frankfort, Kentucky

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<sup>3</sup> See Humphrey v. Commonwealth, Ky., 962 S.W.2d 870 (1998); see also Hibbs v. Commonwealth, Ky. App. 570 S.W.2d 642 (1978) (recognizing viability of ineffective assistance of counsel claim on direct appeal raised in new trial motion).

<sup>4</sup> See Humphrey, supra, n. 3.

<sup>5</sup> Humphrey, supra, n. 3, at 872, citing Caslin v. Commonwealth, Ky., 491 S.W.2d 832 (1973).

<sup>6</sup> See Hennemeyer v. Commonwealth, Ky., 580 S.W.2d 211 (1979).