

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001663-MR

THOMAS HENSLEY

APPELLANT

v.

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

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * **

BEFORE: BARBER, GUIDUGLI and HUDDLESTON, Judges.

HUDDLESTON, JUDGE: Thomas Hensley appeals from a Laurel Circuit Court order denying his motion filed pursuant to Kentucky Rule of Civil Procedure (CR) 60.02 and Kentucky Rule of Criminal Procedure (RCr) 10.06 seeking to vacate his conviction for first-degree murder and first-degree assault based on alleged fraudulent conduct by his trial counsel in connection with post-judgment review of his conviction. Having concluded that Hensley's claims have or could have been raised in prior proceedings, we find that the trial court did not err in denying the motion.

In December 1991, Snowden Baker Jr. and Jeffrey Payne were shot while at Hensley's residence. Baker died as a result of his wounds and Payne was seriously injured. In February 1992, the Laurel County grand jury indicted Hensley on one capital felony count of murder, one felony count of assault in the first degree and for being a persistent felony offender in the second degree (PFO II).

At the jury trial conducted between January 19-22, 1993, Hensley was represented by Warren Scoville. During the trial, Payne testified that Hensley had shot him and Baker while they were having an uneventful conversation. Hensley testified that Baker and Payne had accidentally been shot while he was fighting with Bill Parker, who was attempting to shoot him. Scoville cross-examined Payne extensively, especially concerning inconsistencies in two statements he had given to the police. The jury found Hensley guilty of murder and assault in the first degree. On February 12, 1993, the circuit court sentenced Hensley consistent with the jury's recommendation to 50 years for murder and 20 years for assault in the first degree to run consecutively for a total sentence of 70 years. In January 1994, the Kentucky Supreme Court affirmed the convictions on direct appeal.

In February 1995, Hensley filed a motion in circuit court seeking to obtain all court records associated with his case. In September 1995, he filed another motion for production of specific court documents and audio recordings of his court appearances.¹ On

¹ At the time of Hensley's trial in February 1993, court proceedings in Laurel County were recorded on audiotape and by a
(continued...)

December 18, 1995, the circuit court denied Hensley's request for a transcript of all pretrial and trial proceedings because he had already been provided this material for his direct appeal. On May 23, 1997, this Court reversed the circuit court in part and ordered that Hensley be provided transcripts and audiotapes of various pretrial hearings and the grand jury proceedings. On August 29, 1997, the circuit court entered an order in conformity with this Court's opinion.

On September 30, 1997, Hensley filed an RCr 11.42 motion pro se challenging his conviction based on ineffective assistance of counsel on several grounds including counsel's failure to: (1) request a psychological evaluation on Hensley's competency at the time of the offense and competency to stand trial; (2) request a change of venue; (3) adequately investigate and prepare the case; (4) obtain expert witnesses; and (5) call various lay witnesses, especially mitigation witnesses at sentencing. Hensley also alleged that he had been denied a fair appellate review because the official trial transcript had been altered in numerous places and testimony left out. Hensley requested appointment of counsel and an evidentiary hearing on his RCr 11.42 motion.

On December 8, 1997, Hensley filed a motion for production of the audiotapes of his trial. On December 13, 1997, the circuit court appointed counsel to represent Hensley and also ordered that he be provided copies of the audiotapes of the trial. The court stated that counsel would be allowed to file a

¹(...continued)
court reporter.

supplemental memorandum supporting the RCr 11.42 motion. The Commonwealth opposed the order, but the court overruled the objection and in June 1998, counsel with the Department of Public Advocacy was assigned to assist Hensley. Defense counsel filed a motion for extension of time to supplement the RCr 11.42 motion. In October 1998, counsel renewed the request for an evidentiary hearing and asked for funds to hire an expert to evaluate the audiotape record of the trial. With the consent of counsel, the court scheduled a hearing for April 1998 to allow time for the expert's analysis of the tapes. On April 13, 1998, defense counsel requested a continuance of the hearing, which the circuit court denied.

On April 15, 1998, the circuit court conducted an evidentiary hearing on the RCr 11.42 motion. At the beginning of the hearing, defense counsel again moved for a continuance stating he had been unable to obtain an expert to analyze the audiotapes for alleged alterations. The circuit court again denied the motion and defense counsel indicated that he had not subpoenaed any witnesses for the hearing; but Snowden Baker's wife, who happened to be present for the hearing, was called by Hensley to testify. The Commonwealth called no live witnesses but did offer an affidavit by Hensley's trial attorney, Warren Scoville, disputing Hensley's allegations of ineffective assistance of counsel and alterations in the trial transcript. Scoville also stated in his affidavit that Hensley had rejected a guilty plea agreement for a 20-year sentence offered by the Commonwealth after extensive plea bargain negotiations. Hensley also offered questionnaires

purportedly answered and signed by several of the trial jurors concerning testimony presented at the trial and defense counsel's performance.

On May 20, 1999, the circuit court entered an extensive order and opinion denying the RCr 11.42 motion. The circuit court noted that Hensley had failed to present evidence at the hearing to support many of his allegations of ineffective assistance of counsel, that the record refuted some of the claims and that he had failed to establish either deficient performance by counsel or prejudicial effect from counsel's errors. With respect to the trial transcript, the court stated that Hensley effectively waived the argument by failing to raise the issue or seek correction of the record before the trial court or appellate court on direct appeal. Despite the procedural waiver, the circuit court reviewed the individual claims of alterations or inaccuracies in the trial transcript identified by Hensley. It found that none of the claims, even if accepted as true, rose to the level of constitutional significance resulting in an unfair trial. The circuit court noted that Hensley's failure to call witnesses to authenticate the juror questionnaires diminished their validity. Hensley appealed the denial of his motion.

On May 5, 2000, this Court affirmed the circuit court's denial of Hensley's RCr 11.42 motion in an unpublished opinion.² We held that the circuit court had not abused its discretion in denying a continuance of the evidentiary hearing. We also held that Hensley had not established ineffective assistance of counsel

² Hensley v. Commonwealth, 1999-CA-001694.

and agreed with the circuit court that Hensley should have raised his claim of an altered record in his direct appeal. On November 15, 2000, the Kentucky Supreme Court denied discretionary review of this Court's decision.

Meanwhile, on March 6, 2000, while the appeal of the circuit court's denial of his RCr 11.42 motion was pending, Hensley filed the motion to vacate or set aside his conviction based on CR 60.02 and RCr 10.06 involved in the current appeal. Hensley alleged that Warren Scoville committed fraud by altering the record in the murder prosecution and lying in his affidavit presented in the RCr 11.42 proceeding in an attempt to cover up his inadequate performance in representing him.³ Hensley identified four statements by Scoville in his affidavit that he claimed were inaccurate. First, he asserted that Scoville had not notified or discussed with him a 20-year guilty plea offer from the Commonwealth. Second, he stated that Scoville erred in asserting there was no question about his mental competence at the time of the offenses or during preparation for trial. Third, he challenged Scoville's statement that both of Jeffrey Payne's statements to the police had been blown up as exhibits and revealed to the jury during the trial. Fourth, Hensley disputed Scoville's assertion that the trial transcript was accurate. Hensley argued that each of these areas involved instances of ineffective assistance of counsel sufficient to justify a hearing or reversal of his conviction. In support of his motion, Hensley attached various

³ Hensley also later filed a legal malpractice action against Scoville that was dismissed by way of summary judgment. See Hensley v. Scoville, 1999-CA-002157.

excerpts from the trial transcript and questionnaires purportedly completed and signed by six of the jurors who participated at his trial. The Commonwealth filed a brief response stating these issues had been presented previously and did not satisfy the requirements of CR 60.02 and RCr 10.06.

On May 26, 2000, the circuit court entered an order denying the motion to vacate. It held that review under RCr 10.06 was unavailable as untimely because under that rule, the motion must be filed within five days after the verdict or within one year after the entry of judgment when based on newly discovered evidence. The court further held that to the extent the motion sought relief under CR 60.02 based on ineffective assistance of trial counsel, it was barred by the successive motions principle. To the extent the motion was based on false evidence in Scoville's affidavit, the court stated that these statements occurred far after the trial and did not affect the outcome of the trial. This appeal followed.

On appeal, Hensley argues that his trial attorney rendered ineffective assistance of counsel and lied in his affidavit presented in the RCr 11.42 proceeding. He contends the affidavit represents new evidence because he did not learn about the contents of the affidavit until after the hearing. Hensley discusses several examples of alleged discrepancies in the trial transcript and alleges that Scoville altered the trial audiotapes to conceal his ineffective performance. He maintains that Scoville

did not inform him of the guilty plea offer and that there was evidence he was not mentally competent.⁴

We agree with the trial court that the issues raised by Hensley in the current appeal are barred by the successive motions principle. In Gross v. Commonwealth,⁵ the Kentucky Supreme Court set out the procedure for appellate review in criminal cases. The Court stated that the structure for appellate review is not haphazard or overlapping.⁶ It held that a criminal defendant must first bring a direct appeal when available, then utilize RCr 11.42 by raising every error of which he should be aware, and only utilize CR 60.02 for extraordinary situations not otherwise subject to relief by direct appeal or by way of RCr 11.42.⁷ More recently, in McQueen v. Commonwealth,⁸ the Court reaffirmed the procedural requirements set out in Gross, when it said:

A defendant who is in custody under sentence or on probation, parole or conditional discharge is required to avail himself of RCr 11.42 as to any ground of which he is aware, or should be aware, during the period when the remedy is available to him. Civil Rule 60.02 is not

⁴ The Attorney General's appellate brief fails to address Hensley's arguments in any meaningful way.

⁵ Ky., 648 S.W.2d 853 (1983).

⁶ Id. at 856.

⁷ Id. See also Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 908-09 (1998), cert. denied, 526 U.S. 1025, 119 S.Ct. 1266, 143 L.Ed.2d 361 (1999); Bowling v. Commonwealth, Ky., 981 S.W.2d 545, 549 (1998), cert. denied, 527 U.S. 1026, 119 S.Ct. 2375, 144 L.Ed.2d 778 (1999).

⁸ Ky., 948 S.W.2d 415 (1997), cert. denied, 521 U.S. 1130, 117 S.Ct. 2535, 138 L.Ed.2d 1035 (1998).

intended merely as an additional opportunity to relitigate the same issues which could "reasonably have been presented" by direct appeal or RCr 11.42 proceedings. RCr 11.42(3); Gross v. Commonwealth, [supra, n. 5, at 855, 856]. The obvious purpose of this principle is to prevent the relitigation of issues which either were or could have been litigated in a similar proceeding.⁹

Generally, absent new evidence, a defendant cannot raise the issue of ineffective assistance of counsel in a post-judgment motion where that issue was raised and decided in an earlier proceeding.¹⁰

In the current case, the issue of ineffective assistance of counsel was fully litigated in Hensley's prior RCr 11.42 motion. In fact, the ineffective assistance claim in that proceeding was based on the same grounds as those raised in his CR 60.02 motion. The issue of discrepancies or alterations of the trial transcript was raised and decided adversely to Hensley in the RCr 11.42 proceeding. The circuit court reviewed all of the alleged alterations and found that even if Hensley's allegations were

⁹ Id. at 416. See also Hampton v. Commonwealth, Ky., 454 S.W.2d 672 (1970) (courts have more to do than occupy themselves with successive reruns of RCr 11.42 motions); Case v. Commonwealth, Ky., 467 S.W.2d 367 (1971); Shepherd v. Commonwealth, Ky., 477 S.W.2d 798 (1972); Land v. Commonwealth, Ky., 986 S.W.2d 440, 442 (1999).

¹⁰ See, e.g., Wilson v. Commonwealth, Ky., 975 S.W.2d 901 (1998), cert. denied, 526 U.S. 1023, 119 S.Ct. 1263, 143 L.Ed.2d 359 (1999) (involving claim of ineffective counsel in RCr 11.42 motion after issue decided on direct appeal); McQueen v. Commonwealth, Ky., 949 S.W.2d 70 (1997), cert. denied, 521 U.S. 1130, 117 S.Ct. 2536, 138 L.Ed.2d 1035 (1997) (involving successive RCr 11.42 motion).

accepted as true, they did not rise to the level of a due process violation. The court also noted that the issue of discrepancies in the trial transcript could and should have been raised in the direct appeal.

Hensley's assertion that his CR 60.02 motion is not procedurally barred because Scoville's affidavit constitutes "new evidence" is without merit. First, the affidavit was presented at the RCr 11.42 hearing and represented the Commonwealth's only evidence. Hensley's assertion that he only learned of the contents of the affidavit later and did not have an opportunity to challenge it earlier is disingenuous. He was present at the RCr 11.42 hearing and took an active part in the hearing as evidenced by his insistence on calling Snowden Baker's wife as a witness despite objections by his attorney. Hensley was not prevented from reviewing Scoville's affidavit at the hearing and he should have raised any challenges to it at that time. In any event, the grounds underlying the ineffective assistance claim were reviewed and the circuit court held that Hensley suffered no actual prejudice due to errors by trial counsel. Scoville's affidavit did not materially affect that analysis. Hensley is merely seeking to relitigate issues that either were or could have been decided in the earlier post-judgment proceedings.

The only issue contained in the RCr 60.02 motion that was not specifically addressed by the circuit court in its order in the RCr 11.42 proceeding was Hensley's claim of ineffective assistance of counsel based on counsel's alleged failure to inform him of the Commonwealth's guilty plea offer. As the circuit court noted,

Hensley offered no evidence at the RCr 11.42 proceeding to contradict Scoville's statement that Hensley rejected the offer. Again, we reiterate that Hensley was present at the hearing and could have testified on this issue at that time. Because this issue was raised in the RCr 11.42 proceeding, Hensley cannot seek review of it by way of a CR 60.02 motion.

The order denying Hensley's CR 60.02 and RCr 10.56 motions is affirmed.

ALL CONCUR.

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