

RENDERED: APRIL 12, 2002; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001416-MR

RICKY L. DAUGHERTY

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE HENRY M. GRIFFIN, III, JUDGE
ACTION NO. 97-CR-00242

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: GUDGEL, CHIEF JUDGE; COMBS AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Ricky L. Daugherty, pro se, has appealed from an order of the Daviess Circuit Court entered on April 24, 2000, which denied his motion to vacate sentence and conviction pursuant to RCr¹ 11.42. Having concluded that all issues raised by Daugherty in the case sub judice were either raised or should have been raised in his direct appeal² to this Court or that he

¹Kentucky Rules of Criminal Procedure.

²Daugherty v. Commonwealth, 1998-CA-001641-MR, rendered November 19, 1999, not-to-be-published.

has otherwise failed to establish that he is entitled to relief, we affirm.

Daugherty was indicted by a Daviess County grand jury on July 7, 1997, for the offenses of theft by unlawful taking of property valued at \$300.00 or more,³ criminal attempt to commit theft by unlawful taking of property valued at \$300.00 or more,⁴ and for being a persistent felony offender in the first degree (PFO I).⁵ The Commonwealth moved the trial court to dismiss the charge of criminal attempt and to amend the PFO I charge to PFO II. On June 18, 1998, Daugherty was tried for the theft of a motor vehicle which had been found wrecked and abandoned. The jury convicted Daugherty of theft by unlawful taking over \$300.00 and for being a PFO II. The jury recommended a sentence of five years in prison, enhanced to 10 years by virtue of the conviction for PFO II. Daugherty filed a motion for a new trial and for judgment notwithstanding the verdict on June 25, 1998, which the trial court denied on June 30, 1998. Also, on June 30, 1998, the trial court sentenced Daugherty to 10 years in prison in accordance with the jury's recommendations. Daugherty filed several motions for shock probation, which were also denied by the trial court.

Daugherty directly appealed his conviction to this Court, which in a non-published opinion rendered on November 19,

³Kentucky Revised Statutes (KRS) 514.030.

⁴KRS 506.010.

⁵KRS 532.080.

1999, affirmed the conviction. On April 17, 2000, Daugherty filed a motion to vacate sentence and conviction pursuant to RCr 11.42, raising issues of ineffective assistance of counsel and alleging violations of his constitutional right to a fair trial. On April 24, 2000, the trial court denied Daugherty's RCr 11.42 motion. Daugherty then filed a motion for findings of fact and conclusions of law stating that the trial court failed to address all of his arguments as set forth in the RCr 11.42 motion. On May 5, 2000, the trial court summarily denied the motion stating that "the Defendant's other arguments were considered or should have been considered on appeal." This appeal followed.

Daugherty claims in his first two arguments that his "right to a fair trial guaranteed him by the Fourteenth Amendment to the United States Constitution and Sections Two and Eleven of the Kentucky Constitution was violated when the prosecutor introduced false evidence against him at trial" and "when the prosecution introduced evidence in violation of the Kentucky Rules of Evidence" (KRE) 404(b) dealing with other bad acts. Daugherty takes issue with the remarks made in the opening statement by the Commonwealth's Attorney which referred to expected testimony from Detective Keith Cain that Daugherty had stated "[h]e was not responsible for any other thefts." The Commonwealth argues that since this issue was raised and decided in Daugherty's direct appeal, it cannot be raised in his RCr 11.42 motion. We agree.

In Gross v. Commonwealth,⁶ our Supreme Court stated:

We hold that the proper procedure for a defendant aggrieved by a judgment in a criminal case is to directly appeal that judgment, stating every ground of error which it is reasonable to expect that he or his counsel is aware of when the appeal is taken [emphasis added].

In Brown v. Commonwealth, the Supreme Court further stated:

It is an established principle that this Court will not address an issue which was raised in a direct appeal or which should have been raised in a direct appeal. In Thacker v. Commonwealth, Ky., 476 S.W.2d 838 (1972), the court stated as follows:

It is not the purpose of RCr 11.42 to permit a convicted defendant to retry issues which could and should have been raised in the original proceeding, nor those that were raised in the trial court and upon an appeal considered by this Court.⁷

Both of the issues concerning the Commonwealth's opening statement were decided adversely to Daugherty by this Court in his direct appeal. Thus, these two issues cannot be addressed again by an RCr 11.42 motion.

Daugherty also argues that his "right to effective assistance of trial counsel and due process of the law . . . were violated when his defense counsel failed to object to introduction of prior bad acts by [a] witness." This allegation

⁶Ky., 648 S.W.2d 853 (1983).

⁷Brown v. Commonwealth, Ky., 788 S.W.2d 500, 501 (1990) (quoting Thacker at 839).

concerns a statement made by Det. Cain. When the Commonwealth's Attorney asked Det. Cain how he knew Daugherty, Det. Cain responded "[w]ell, I have known him and his family for a number of years. And in addition to that, I know him from previous investigations." Daugherty claims that this statement by Det. Cain was an improper inference to prior bad acts that he may have committed. Since this issue involves an evidentiary matter from the trial, Daugherty could have raised this issue in his direct appeal and requested that this Court review the issue as palpable error. However, since the error most likely would not have been deemed to be palpable error, we will not deny Daugherty review of the issue through this RCr 11.42 proceeding. Nonetheless, we do not believe that trial counsel's failure to object to this testimony constituted ineffective assistance of counsel.

"A showing that counsel's assistance is so ineffective as to require reversal has two components: (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so prejudiced the defense that, but for the errors of counsel, there is a reasonable likelihood that the result would have been different."⁸ The burden of proof is upon

⁸Robbins v. Commonwealth, Ky.App., 719 S.W.2d 742, 743 (1986) (citing Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Accord Gall v. Commonwealth, Ky., 702 S.W.2d 37, 39-40 (1986).

the appellant to demonstrate that both prongs of Strickland have been met.⁹

Even if we were to conclude that trial counsel committed an error by not objecting to Det. Cain's reference to "previous investigations," any such error would not have been so prejudicial that we can say there is a reasonable likelihood that Daugherty would not have been found guilty. In this Court's Opinion in Daugherty's direct appeal, the Court went into some detail discussing the sufficiency of the evidence. From our review of the evidence, we do not believe that Daugherty has met his burden of demonstrating that any such error would have prejudiced him. We quote from this Court's previous Opinion as follows:

Grant saw Daugherty only a few minutes after and a short distance away from the accident. Daugherty's injuries were consistent with an automobile accident. Daugherty used a false name to identify himself to Grant. Daugherty was unwilling to allow Grant to call for an ambulance. He gave a story about a four-wheeler accident which could never be confirmed. Daugherty also directed Grant to drive him home by a less than direct route which avoided the scene of the accident. Furthermore, when he was admitted to the hospital, Daugherty told the emergency room staff a story different from the one he had told Grant about how his injuries happened.

Accordingly, even if trial counsel's failure to object to Det. Cain's testimony was error, Daugherty has failed to meet his

⁹Osborne v. Commonwealth, Ky.App., 992 S.W.2d 860, 863 (1998).

burden of showing that the outcome of the trial would have been different.

Daugherty also claims the trial court failed to properly admonish the jury pursuant to RCr 9.70. This claim is clearly refuted by the record, where the trial court can be seen properly admonishing the jury.

Daugherty also claims that "the cumulative effect of the preceding errors substantially prejudiced" him and "deprived him of his due process rights to a fair trial." The allegation that he was denied a fair trial due to cumulative errors is obviously without merit as Daugherty has failed to establish that any prejudicial errors occurred during his trial.

Finally, Daugherty claims the trial court erred by denying his motion "pursuant to CR 52.02 and RCr 11.42(6) for findings of fact and conclusions of law." Based on our previous discussion of the issues raised by Daugherty, we conclude that the trial court's orders sufficiently addressed the issues and further findings of fact and conclusions of law were not necessary.

For the foregoing reasons, the order of the Daviess Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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