

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001417-MR

MORRIS DUNCAN, SR.

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE T. STEVEN BLAND, JUDGE
ACTION NO. 98-CR-00001 AND 98-CR-00188

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GUIDUGLI, HUDDLESTON AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Morris Duncan, pro se, has appealed from an order entered by the Hardin Circuit Court on June 1, 2000, which denied his RCr¹ 11.42 motion to vacate, set aside, or correct his sentence. Having concluded that Duncan has waived his right to contest subject-matter jurisdiction and that Duncan did not receive ineffective assistance of counsel, we affirm.

On November 24, 1997, three assailants broke into the Hardin County home of James Willian and Virginia Williams. The assailants were armed with a handgun and a knife. In the course

¹Kentucky Rules of Criminal Procedure.

of robbing Willian and Williams, the assailants stabbed both victims. Willian was killed and Williams was critically injured.

On June 27, 1998, the Hardin County grand jury indicted Duncan, and co-defendants Thomas Eugene Stewart and Aaron L. Camp, for complicity to commit capital murder,² complicity to commit burglary in the first-degree,³ complicity to commit robbery in the first-degree,⁴ and complicity to commit assault in the first-degree.⁵ Subsequently, Duncan was also indicted for criminal mischief in the first-degree⁶ for allegedly causing \$1,000.00 in damage to his Hardin County jail cell. On May 3, 1999, Duncan entered into a plea agreement with the Commonwealth. In exchange for his guilty plea, the Commonwealth agreed to amend the felony charge of criminal mischief in the first-degree to the misdemeanor charge of attempt to commit criminal mischief. The Commonwealth also agreed to recommend a 40-year prison sentence for complicity to the murder of Willian; 20-year prison sentences for each charge of burglary in the first-degree, robbery in the first-degree and assault in the first-degree; a 12-month jail sentence for the criminal mischief charge, with all sentences to run concurrently. After assessing Duncan's competency and apprizing him of his rights, the Hardin Circuit Court accepted

²Kentucky Revised Statutes (KRS) 502.020 and KRS 507.020.

³KRS 502.020 and KRS 511.020.

⁴KRS 502.020 and KRS 515.020.

⁵KRS 502.020 and KRS 508.010.

⁶KRS 512.020.

the guilty plea and entered a sentence in accordance with the Commonwealth's recommendations.

On May 9, 2000, Duncan filed a pro se motion pursuant to RCr 11.42, alleging that his trial counsel rendered ineffective assistance of counsel. Particularly, Duncan contended that his attorney's advice for him to accept the Commonwealth's proposed plea agreement was deficient because the Commonwealth failed to obtain a murder conviction against his co-defendant, Stewart. Since Stewart was convicted of manslaughter in the second-degree,⁷ Duncan argued that he could not have been convicted as an accomplice to capital murder. Without holding an evidentiary hearing, the Hardin Circuit Court entered an order on June 1, 2000, denying Duncan's RCr 11.42 motion. This appeal followed.

On appeal Duncan argues, for the first time, that the Hardin Circuit Court never acquired subject-matter jurisdiction over his motion because he failed to "verify" it as required by the plain language of the rule.⁸ We disagree. We believe that Duncan's substantial compliance with the mandates of RCr 11.42

⁷KRS 507.040. Duncan's other co-defendant, Camp, also pleaded guilty to complicity to murder.

⁸RCr 11.42(2) states that:

The motion shall be signed and verified by the movant and shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion [emphasis added].

was sufficient to invoke the jurisdiction of the circuit court.⁹ We further believe that Duncan's failure to bring the issue of lack of proper verification to the attention of the trial court constitutes a waiver of the defect.

While, as a general proposition, subject-matter jurisdiction cannot be waived,¹⁰ this principle is not absolute. In Duncan v. O'Nan,¹¹ the Court distinguished the cases in which jurisdictional defects could be waived and those in which it could not, by stating:

"[T]he rule that subject-matter jurisdiction cannot be born of waiver, consent or estoppel has to do with those cases only where the court has not been given any power to do anything at all in such a case, as where a tribunal vested with civil competence attempts to convict a citizen of a crime. In other words, 'subject matter' does not mean 'this case' but 'this kind of case'"¹²

Since the Hardin Circuit Court clearly has jurisdiction over RCr 11.42 motions arising out of criminal convictions in that circuit, we hold that Duncan's failure to verify his motion does not rise to the level of a jurisdictional defect, which could not be waived by him.¹³

⁹Cleaver v. Commonwealth, Ky., 569 S.W.2d 166, 169 (1978).

¹⁰Commonwealth, Department of Highways v. Berryman, Ky., 363 S.W.2d 525, 526 (1962).

¹¹Ky., 451 S.W.2d 626, 631 (1970).

¹²Id. (quoting In Re Estate of Rougeron, 17 N.Y.2d 264, 271, 270 N.Y.S.2d 578, 583, 217 N.E.2d 639, 643 (1966)).

¹³See id. (holding that where a district court's judgment had not been signed in a will contest, the contestant had waived the jurisdictional defect by failing to inform the circuit court).

Duncan also contends that the trial court abused its discretion when it rejected his claim of ineffective assistance of counsel. In general, the Sixth and Fourteenth Amendments to the United States Constitution mandate that a defendant in a criminal case receive effective assistance of counsel.¹⁴ To prove counsel's ineffectiveness, a movant must show (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally-competent assistance guaranteed by the Sixth Amendment, and (2) that the deficient performance prejudiced the defense so seriously that it affected the process whereby the end result would have been different.¹⁵ For a motion alleging ineffective assistance of counsel to state sufficient grounds for relief under RCr 11.42, the motion must allege sufficient facts to show that counsel's representation was inadequate.¹⁶ If the record refutes the claim of error, there is no basis for granting an evidentiary hearing on an RCr 11.42 motion.¹⁷ An evidentiary hearing is not required in an RCr 11.42

¹⁴United States v. Ash, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973); Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); Hopewell v. Commonwealth, Ky.App., 687 S.W.2d 153, 154 (1985).

¹⁵Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); Taylor v. Commonwealth, Ky.App., 724 S.W.2d 223, 226 (1986); Brewster v. Commonwealth, Ky.App., 723 S.W.2d 863, 864 (1986).

¹⁶Thomas v. Commonwealth, Ky., 459 S.W.2d 72 (1970); Evans v. Commonwealth, Ky., 453 S.W.2d 601 (1970); McCarthy v. Commonwealth, Ky., 432 S.W.2d 50 (1968).

¹⁷Glass v. Commonwealth, Ky., 474 S.W.2d 400, 401 (1971).

case where the issue presented can be fairly determined on the face of the record.¹⁸

After a thorough review of the record, we hold that Duncan's claim of ineffective assistance of counsel is without merit. Duncan claims that his counsel was ineffective because his attorney advised him to plead guilty to the amended charges as recommended by the Commonwealth, even though one of his accomplices was adjudged guilty of manslaughter instead of murder. Duncan is apparently under the erroneous belief that his accomplice's acquittal of murder renders him innocent of the charge as an aider and abettor.

In Kentucky, a defendant may be convicted on a separate trial of aiding and abetting the principal in the commission of a crime after the principal has been acquitted.¹⁹ For it is evident that different juries may reach different conclusions as to the guilt of the principal.²⁰ Therefore, had Duncan proceeded to trial on the charge of complicity to commit capital murder, he could have been convicted and potentially sentenced to death or life in prison, regardless of the outcome of his co-defendant Stewart's trial. Duncan's claim of ineffective assistance of counsel is refuted on the face of the record and an evidentiary hearing was not required.

Duncan's final claim on appeal is that he received ineffective assistance of counsel because his lawyer "failed to

¹⁸Newsome v. Commonwealth, Ky., 456 S.W.2d 686, 687 (1970).

¹⁹Gambrel v. Commonwealth, 283 Ky. 816, 820, 143 S.W.2d 514, 516 (1940).

²⁰Id.

investigate the circumstances surrounding the charges and failed to effectively advise [him] on . . . defenses readily available to counter the Commonwealth's case." However, in his motion to enter a guilty plea, which Duncan signed and acknowledged, Duncan stated that he had "reviewed a copy of the indictment and told [his] attorney all the facts known to [him] concerning [his] charges." Duncan further stated that he believed his attorney was "fully informed about his case" and that he and his attorney had "fully discussed [his] charges and any possible defenses to them." We note that such solemn declarations in open court carry a strong presumption of verity.²¹ We also note that Duncan's bare allegations of ineffective assistance of counsel, which are unsupported by specific facts, do not warrant an evidentiary hearing.²²

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Morris Duncan, Sr., Pro Se
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BRIEF FOR APPELLEE:

Albert B. Chandler, III
Attorney General

Matthew D. Nelson
Assistant Attorney General
Frankfort, Kentucky

²¹Centers v. Commonwealth, Ky.App., 799 S.W.2d 51, 54 (1990).

²²See Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 909 (1998) (holding that conclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of a discovery deposition).