

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002635-MR

ANTHONY SAYLOR

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NOS. 96-CR-00125 & 98-CR-00088

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: EMBERTON, GUIDUGLI, AND MILLER, JUDGES.

MILLER, JUDGE: Anthony Saylor brings this appeal from a September 26, 2000 order of the Laurel Circuit Court. We affirm.

On May 12, 1998, Saylor was convicted on various criminal charges and sentenced to fourteen years in the penitentiary. Saylor's direct appeal was affirmed by this Court in Appeal No. 1998-CA-001606-MR. Saylor's then filed a Ky. R. Crim. P. (RCr) 11.42 motion. The circuit court summarily denied Saylor's motion on September 26, 2000. This appeal follows.

Saylor contends the circuit court erred in summarily denying his RCr 11.42 motion. Specifically, Saylor maintains he received ineffective assistance of counsel at trial. In order to

prevail, Saylor must demonstrate that trial counsel performance was deficient and that such deficiency was prejudicial. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We observe Saylor filed a handwritten *pro se* brief. Therein, he raises numerous allegations of error. We shall utilize our best efforts to discern his arguments on appeal.

Saylor initially maintains his trial counsel failed to conduct an investigation or otherwise prepare for trial, and failed to introduce mitigating evidence during the penalty phase of trial. Saylor fails to indicate specifically how the investigation was deficient. Moreover, we are directed to no exact evidence that such investigation would have produced. Nor, are we directed to specific mitigating evidence Saylor sought to use during the penalty phase of the trial. Without more, we view this contention to be without merit. RCr 11.42(2); Lucas v. Commonwealth, Ky., 465 S.W.2d 267 (1971).

Saylor contends trial counsel was ineffective in failing to object to testimony of two witnesses, and in failing to introduce certain photographs into evidence. Again, Saylor fails to provide specific details. Though it appears from the record the testimony dealt with prior bad acts, we are not directed to specific testimony, or to how its admission prejudiced Saylor. Regarding the photographs, Saylor does not describe, or direct us to the photographs. He also fails to indicate how the photographs would have been beneficial to him.

We view these bare contentions as meritless. RCr 11.42(2); Lucas, 467 S.W.2d 265.

Saylor asserts his trial counsel failed to "present all the relevant facts and circumstances," supporting his motion for a continuance. Again, we are not directed to the "relevant facts and circumstances," that his trial counsel allegedly failed to present. As such, we attach no merit to this claim. RCr 11.42(2); Lucas, 467 S.W.2d 265.

Saylor maintains his trial counsel failed to file a suppression motion with regard to an admission made by him. This issue was addressed in Saylor's direct Appeal No. 1998-CA-001606-MR. Therein, we held Saylor's statement was admissible and any failure to conduct an evidentiary hearing was harmless error under Moore v. Commonwealth, Ky., 634 S.W.2d 426 (1982). An RCr 11.42 motion cannot be used to relitigate issues decided on direct appeal. See Baze v. Commonwealth, Ky., 23 S.W.3d 619 (2000). We decline to revisit this issue.

Saylor next argues his trial counsel failed to challenge the chain of custody of a "toxicology report." The record indicates the toxicology report was not introduced into evidence. As such, we do not think trial counsel was ineffective for failure to challenge the report.

Saylor contends his trial counsel failed to challenge the search of a third party's residence. We must agree with the trial court that Saylor lacks standing to challenge the validity of the search of another's home. See Willoughby v. Commonwealth,

Ky., 231 S.W.2d 79 (1950). Consequently, we cannot conclude that trial counsel was ineffective in this respect.

Saylor faults trial counsel for informing the jury of requirements necessary for a persistent felony offender charge. Kentucky Revised Statutes 532.080. Saylor laments it was improper "for the defendant's own attorney to aide [sic] the prosecution by informing them of facts implicating that he met those requirements. . . ." Saylor does not inform us how such information "aided the prosecution" and was prejudicial to his defense. Thus, we perceive no error on part of trial counsel. RCr 11.42; Lucas, 467 S.W.2d 265.

Saylor maintains his trial attorney was ineffective in failing to strike two jurors who had been previously represented by the prosecutor. In this instance, we are compelled to conclude that trial counsel's jury selection was merely a matter of trial strategy. See Dupin v. Commonwealth, Ky., 408 S.W.2d 443 (1966).

Saylor contends the circuit court erred in effectively denying him counsel under RCr 11.42(5). The Hon. Edward Gafford was appointed to represent Saylor before the circuit court. Gafford entered an appearance September 1, 2000. Saylor's RCr 11.42 motion was denied September 26, 2000. On October 3, 2000, Gafford filed a motion pursuant to Ky. R. Civ. P. 59.05 to vacate the denial of Saylor's RCr 11.42 motion, and allow additional time to supplement Saylor's *pro se* motion. Said motion was denied. Saylor contends this effectively constituted a denial of counsel. As hereinbefore discussed, we are of opinion that

Saylor's allegations were refuted upon the face of the record; therefore, we must conclude that appointment of counsel was not necessary. See Hopewell v. Commonwealth, Ky. App., 687 S.W.2d 153 (1985).

Finally, Saylor argues the circuit court erred in denying him an evidentiary hearing. An evidentiary hearing is required only if there is an issue of fact that cannot be determined on the face of the record. See Stanford v. Commonwealth, Ky., 854 S.W.2d 742 (1993). Having concluded that the allegations in Saylor's RCr 11.42 motion were refuted upon the face of the record, we are of the opinion the circuit court properly denied Saylor's RCr 11.42 motion without an evidentiary hearing. Id.

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

ALL CONCUR.

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