

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001167-MR

KENNETH LEE GODFREY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 98-CR-00302

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: BUCKINGHAM, DYCHE AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Kenneth Lee Godfrey, pro se, has appealed an order entered by the Fayette Circuit Court on May 8, 2001, that denied his RCr¹ 11.42 motion to set aside his judgment of conviction. Having concluded that the trial court did not err by denying Godfrey RCr 11.42 relief, we affirm.

On January 13, 1998, Godfrey was an inmate at the Fayette County Detention Center when he was allowed to participate in the work release program. On the morning of Saturday, January 17, 1998, Godfrey left the jail for work and

¹Kentucky Rules of Criminal Procedure.

failed to return to the jail at the scheduled time. Godfrey claimed that he became so intoxicated while working that he was in a "drunken stupor" at a friend's house for the remainder of the weekend. On Monday, January 19, 1998, Godfrey was arrested at a local grocery store. He has claimed that he was preparing to turn himself in to the police when he was arrested.

On March 19, 1998, a Fayette County grand jury returned a two count indictment against Godfrey for the offenses of escape in the second degree² and persistent felony offender in the first degree (PFO I).³ On April 24, 1998, Godfrey entered a conditional guilty plea to both counts.⁴ Godfrey preserved for appellate review the issue of whether the trial court erred by ruling that if he went to trial on the charges of escape in the second degree and PFO I that he would not be entitled to a jury instruction on the lesser-included offense of escape in the third degree.⁵ On May 22, 1998, the trial court entered its final judgment and sentenced Godfrey to prison for a period of ten years.

Godfrey filed a direct appeal on May 27, 1998, and sought review of the trial court's ruling concerning him not being entitled to a jury instruction on escape in the third

²Kentucky Revised Statutes (KRS) 520.030.

³KRS 532.080(3).

⁴RCr 8.09.

⁵KRS 520.040.

degree.⁶ On September 18, 1998, Godfrey, by counsel, filed a motion to dismiss appeal which was supported by his signed waiver of right to appeal. This Court dismissed Godfrey's direct appeal in an order entered on December 2, 1998.⁷

On March 21, 2001, Godfrey filed a pro se RCr 11.42 motion. On May 8, 2001, the circuit court without holding an evidentiary hearing denied Godfrey's motion on the grounds that the issue should have been addressed in Godfrey's direct appeal. This appeal followed.

Godfrey claims that the Fayette Circuit Court erred by denying his RCr 11.42 motion without addressing the merits of the motion. In his RCr 11.42 motion Godfrey claimed that his guilty plea to escape in the second degree and PFO I was improper because the trial court committed palpable error when it ruled that he would not be entitled to a jury instruction on the lesser-included offense of escape in the third degree if he went to trial on the charges of escape in the second degree and PFO I. The trial court denied his RCr 11.42 motion and stated:

[T]he Court is of the opinion that the law does not permit the Defendant to raise in this proceeding those matters which could and/or should have been raised in the original appeal.

⁶Case number 1998-CA-001317.

⁷The reason for the dismissal is unclear from the record. In reference to the dismissal, Godfrey makes the following perplexing statement in his brief: "On May 27, 1998, a Notice of Appeal was filed on behalf of the Appellant, but for some reason that is not entirely clear the appeal was dismissed by the Appellant in December 1998."

The Defendant admittedly filed a Notice of Appeal and subsequently asked the Court of Appeals to dismiss that appeal from his conditional plea, raising the substantive issues raised in this proceeding. This Court has no knowledge as to why Mr. Godfrey dismissed his appeal, but he did so and, therefore, any attempt to modify those matters which he should have previously raised on appeal is not properly before this Court. See Brown v. Commonwealth, [Ky.,] 788 S.W.2d 500 (1990), and Thacker v. Commonwealth, [Ky.,] 476 S.W.2d 838 (1972).

Post-conviction relief was addressed by our Supreme Court in Gross v. Commonwealth,⁸ as follows:

The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete. That structure is set out in the rules related to direct appeals, in RCr 11.42, and thereafter in CR 60.02 [emphasis original].

. . .

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.

In Brown, the Supreme Court of Kentucky adopted an opinion by the Court of Appeals and stated: "It is an established principle that this Court [Court of Appeals] will not address an issue which was raised in a direct appeal or which should have been raised in a direct appeal."⁹ The Court, quoting Thacker, then stated:

⁸Ky., 648 S.W.2d 853, 856 (1983).

⁹Brown, *supra* at 501. See also Howard v. Commonwealth, Ky., 364 S.W.2d 809 (1963).

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.¹⁰

It is well accepted in this Commonwealth that errors occurring before the trial court should be raised during a direct appeal. In Commonwealth v. Basnight,¹¹ this Court stated:

It is clear from our caselaw that the RCr 11.42 procedure is not designed to give a convicted defendant an additional appeal or a review of trial errors that should have been addressed upon the direct appeal. A trial error asserted in an RCr 11.42 motion must rise to the level of a constitutional deprivation of due process.

Godfrey claims that since he was participating in the work release program his confinement was not at a detention facility and that he should have been entitled to a jury instruction on escape in the third degree. KRS 520.010(5) defines "escape" as "departure from custody or the detention facility in which a person is held or detained with knowledge that the departure is unpermitted, or failure to return to custody or detention following a temporary leave granted for a specific purpose or for a limited period[.]" KRS 520.010(4) defines "detention facility" as "any building and its premises used for the confinement of a person: (a) Charged with or convicted of an offense[.]" KRS 520.030 provides that a person

¹⁰Thacker, supra at 839.

¹¹Ky.App., 770 S.W.2d 231, 237 (1989); see also Tipton v. Commonwealth, Ky., 376 S.W.2d 290 (1963); and Clay v. Commonwealth, Ky., 454 S.W.2d 109 (1970).

is guilty of escape in the second degree "when he escapes from a detention facility or, being charged with or convicted of a felony, he escapes from custody."¹² KRS 520.040 provides that a person is guilty of escape in the third degree "when he escapes from custody."¹³ It is clear from the statutes that Godfrey escaped from a detention facility and not merely from custody; and this Court so held in Commonwealth v. Johnson,¹⁴ which probably explains why Godfrey's direct appeal was voluntarily dismissed.

Notwithstanding the weakness of Godfrey's arguments on the merits of his claim, the trial court correctly refused to address the merits since Godfrey's RCr 11.42 motion was procedurally barred. Accordingly, the opinion and order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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¹²Escape in the second degree is a Class D felony.

¹³Escape in the third degree is a Class B misdemeanor.

¹⁴Ky.App., 615 S.W.2d 1 (1981) (An inmate who has been released from a detention facility on work release and fails to return to the detention facility is guilty of escape in the second degree and escape in the third degree does not apply).