

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000423-MR

MARK A. SHANNON

APPELLANT

v. APPEAL FROM SIMPSON CIRCUIT COURT
HONORABLE WILLIAM R. HARRIS, JUDGE
ACTION NO. 98-CR-00128

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BAKER, GUIDUGLI AND KNOPF, JUDGES.

GUIDUGLI, JUDGE. Mark A. Shannon ("Shannon") appeals from an order of the Simpson Circuit Court denying his motion for RCr 11.42 relief. We affirm.

On July 22, 1999, Shannon was tried by jury in Simpson Circuit Court on charges of first degree trafficking in a controlled substance and first degree persistent felony offender ("PFO"). He was found guilty on both counts and received a sentence of 20 years in prison.

Shannon appealed the conviction to the Kentucky Supreme Court, which affirmed. On June 1, 2001, he filed a pro se motion seeking RCr 11.42 relief. The motion raised numerous claims of error, many of which either were raised or should have been raised on direct appeal. Upon considering the motion, the trial court rendered an order denying his motion on January 30, 2002. This appeal followed.

Shannon now argues that the trial court committed reversible error in summarily denying his motion for RCr 11.42 relief without a hearing. He first maintains that he was entitled to an evidentiary hearing on his assertion that two jurors had knowledge of the facts of the case and/or personal bias. He goes on to argue that he was also entitled to a hearing on his claim that his trial counsel failed to interview or call witnesses to the transaction in controversy. In sum, he seeks to have the order of dismissal reversed and the matter remanded for an evidentiary hearing on his motion for relief.

On Shannon's first claim, to wit, that he was entitled to an evidentiary hearing on his claim that two jurors concealed their personal knowledge of the case, the trial court correctly opined that this issue should have been raised on direct appeal. As the parties are well aware, a defendant may not use RCr 11.42 to raise issues which either were raised or should have been raised on direct appeal. Baze v. Commonwealth, Ky., 23 S.W.3d

619 (2000). Furthermore, a claim of juror knowledge or bias is a matter for direct appeal and may not be prosecuted via RCr 11.42. Cole v. Commonwealth, Ky., 441 S.W.2d 160 (1969).

In the matter at bar, Shannon does not contend that his trial counsel failed to provide effective assistance. His claim of error fails squarely within Baze and Cole, supra, and accordingly we find no error on this issue.

Shannon's second and final argument is that he was entitled to an evidentiary hearing on his claim that his trial counsel failed to interview or call two witnesses to the drug transaction which formed the basis for the charge against him. He maintains that this failure constituted ineffective assistance of counsel and that he was entitled to a hearing on the matter.

We find no error on this issue. A trial counsel's decision not to offer mitigating evidence or witnesses at trial carries a "strong presumption of correctness" as part of an overall trial strategy. Hodge v. Commonwealth, Ky., 68 S.W.3d 338 (2002). And even if it is determined that the failure to offer said evidence was malfeasance, it must be shown that there is a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different. Id. See also, Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).

In the matter at bar, the record contains nothing upon which we may conclude that trial counsel's decision not to call the two witnesses constituted deficient performance, nor that the outcome of the proceeding would have been any different had counsel called the witnesses. As to the claim that he was entitled to a hearing on the issue, conclusory allegations which are not supported by specific facts do not justify an evidentiary hearing under RCr 11.42. Sanders v. Commonwealth, Ky., 89 S.W.3d 380 (2002). Such a hearing would be tantamount to a discovery deposition. Id. Accordingly, we find no error.

For the foregoing reasons, we affirm the opinion of the Simpson Circuit Court denying Shannon's motion for RCr 11.42 relief.

ALL CONCUR.

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