

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-000221-MR

ROBERT DAVID MARSCH

APPELLANT

APPEAL FROM BUTLER CIRCUIT COURT  
v. HONORABLE HENRY W. GRIFFIN, III, SPECIAL JUDGE  
ACTION NO. 88-CR-00024

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION

### AFFIRMING

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BEFORE: GUIDUGLI, McANULTY AND MINTON, JUDGES.

GUIDUGLI, JUDGE. Robert Marsch (hereinafter "Marsch") appeals from an order of the Butler Circuit Court<sup>1</sup> denying him leave to file a successive RCr 11.42 motion. We affirm.

On March 4, 1985, Marsh was indicted on charges of murder and arson. Following a trial by jury, he was convicted of both charges and sentenced to sixty-five years in prison. On

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<sup>1</sup> We note that Marsch was convicted in Butler County. However, Judge Griffin signed the order denying the RCr 11.42 motion as a Daviess Circuit Judge. We believe Judge Griffin was acting as a Special Judge for the Butler Circuit Court.

direct appeal to the Kentucky Supreme Court his convictions were reversed based upon errors in jury selection.<sup>2</sup> On remand, the Court granted the Commonwealth's motion and transferred the case from Hancock County to Butler County. Marsch was again convicted of murder and arson and received a life sentence on the murder charge and twenty years on the arson charge. The sentences were ordered to run consecutively. His conviction and sentence was affirmed by the Kentucky Supreme Court.<sup>3</sup>

In April 1997, Marsch filed his initial RCr 11.42 motion. On September 22, 1997, the trial court denied his RCr 11.42 motion. On appeal, this Court issued an opinion affirming in part, vacating in part, and remanding.<sup>4</sup> That opinion affirmed the order denying Marsch's RCr 11.42 motion but vacated the trial court's order running the sentences consecutively. See KRS 532.110(1)(c); Bedell v. Commonwealth, Ky., 870 S.W.2d 779 (1994). Marsch's motion for discretionary review to the Kentucky Supreme Court was denied.

Thereafter, Marsch sought relief in the federal court system, via a Petition for Writ of Habeas Corpus. After the Federal District Court denied his petition, Marsch appealed to the United States Court of Appeals for the Sixth Circuit. Although the Sixth Circuit affirmed the order denying his Rule

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<sup>2</sup> Marsch v. Commonwealth, Ky., 743 S.W.2d 830 (1987).

<sup>3</sup> No. 88-SC-587-MR, a not-to-be-published opinion rendered August 3, 1989.

<sup>4</sup> 1997-CA-002549-MR, a not-to-be-published opinion rendered December 30, 1998.

59(e) motion, it did so for reasons other than those set forth in the Kentucky Court of Appeals opinion and the Federal Court Magistrate Judge's recommendation. Specifically, on the issue that evidence was lost or destroyed between the first and second jury trials, the Federal Appellate Court, on page four of its opinion, held:

Concerning all of Marsch's claims except for the preservation of exculpatory evidence issue, the district court properly found that the state court's disposition of Marsch's grounds for relief represented a reasonable application of constitutional law as set forth by the Supreme Court. Regarding the exculpatory evidence issue, we affirm the district court's decision on other grounds. See City Mgmt. Corp. v. U.S. Chem. Co., 43 F.3d 244, 251 (6<sup>th</sup> Cir. 1994). The district Court adopted the magistrate judge's recommendation that the exculpatory evidence claim was procedurally barred because the issue had been previously raised and decided on appeal in the state courts. An examination of the record reveals that the issue was not raised before and was not decided by the Kentucky Supreme Court. However, because this claim could have been decided on appeal, it is still subject to the state procedural bar rule. See Bronston v. Commonwealth, 481 S.W.2d 666, 667 (Ky. Ct. App. 1972). Marsch has not shown cause and prejudice to excuse this procedural default, so he is not entitled to relief on this claim. See Coleman v. Thompson, 501 U.S. 722, 750 (1991).<sup>5</sup>

Empowered by the fact that the Sixth Circuit order stated that the exculpatory evidence claim had not been raised

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<sup>5</sup> Marsch v. Seabold, U.S. Court of Appeals for the Sixth Circuit, No. 00-658815696, order filed October 31, 2001.

or decided by the Kentucky Supreme Court in its 1989 memorandum opinion (88-SC-587-MR), Marsch filed his latest RCr 11.42 motion on July 19, 2002. While acknowledging that this is a successive RCr 11.42 motion, Marsch contends that since the first Court of Appeals opinion did not address the issue raised as to missing evidence that the court should now review his arguments. In the December 30, 1998, Court of Appeals opinion (No. 1997-CA-002549-MR), this Court stated at page four:

Marsch's next argument is that he is entitled to a reversal as a result of the Commonwealth's failure to preserve evidence. This argument was raised on appeal to the Supreme Court and rejected. Thus, we need not discuss it further.

The apparent problem arose in this case because Marsch filed motions relating to preservation of the following evidence: the rifle used in the shooting; bullet fragments removed from the victim; and x-rays of the victim, his injuries and the path of the bullet. Although all three issues were raised at trial, the Kentucky Supreme Court opinion affirming Marsch's conviction addressed only the missing rifle. In its opinion, our Supreme Court stated:

The trial judge did not commit reversible error in allowing the Commonwealth to display a rifle similar to one found in the defendant's home. The actual rifle seized from Marsch was stolen from the courthouse prior to trial. The trial court suggested that the example rifle not be admitted as an exhibit but refused a

motion by the defense that the prosecution be required to keep the sample rifle out of the view of the jury. Thus, error, if any, is harmless. RCr 9.22

(88-SC-587-MR, pp. 3-4). It appears that both the Kentucky Court of Appeals and the Sixth Circuit Court of Appeals were partially correct in their review of this matter. Our Supreme Court did address one aspect of Marsch's argument as to missing evidence but not all three. Not addressed were the issues concerning bullet fragments and x-rays. Nothing in the record before this Court indicates that the issue of bullet fragments and x-rays was raised on direct appeal by Marsch. The Supreme Court opinion does not list these two evidentiary matters as issues on appeal and this Court's review of the first RCr 11.42 motion did not indicate that those matters had been raised in Marsch's first RCr 11.42 motion. This Court's opinion stated that the issue presented as to the missing rifle was addressed on direct appeal and as such, not properly before the Court on a RCr 11.42 motion. In addition, in Marsch's initial RCr 11.42 motion, he does not argue that he had raised these issues and the Supreme Court simply ignored them. Rather, he sets them forth in great detail as if presented for the first time. In either case, whether first presented in his initial RCr 11.42 motion or not addressed in the Supreme Court's opinion following his direct appeal following his second trial, the result is the

same. As the Sixth Circuit held: these were issues that could have been and should have been raised in his direct appeal. Failure to do so or failure by Marsch to notify the Court of its failure to address a substantial direct appeal issue (if this occurred and we do not believe it did) is fatal to a collateral attack through a RCr 11.42 motion. See generally, Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983); McQueen v. Commonwealth, Ky., 949 S.W.2d 70 (1997). Despite Marsch's arguments to the contrary, these issues were previously addressed by trial counsel during the second trial. As such, they needed to be addressed in his direct appeal following his conviction and sentence. One of the three issues now raised by Marsch relative to missing evidence was the rifle. The Kentucky Supreme Court addressed that issue in its opinion and found no error. The remaining issues as to the bullet fragments and x-rays should have been raised on direct appeal. They were not and as such cannot be raised at this late date. Having reviewed the entire record, we believe that even if these issues could be raised at this time, Marsch would fail in his arguments. The evidence as to his guilt was overwhelming, his trial counsel was not ineffective and the trial court did not err in permitting the Commonwealth's witnesses to testify as to their knowledge of the bullet fragments and x-rays.

For the foregoing reasons, we affirm the order of the Butler Circuit Court denying Marsch's successive RCr 11.42 motions.

ALL CONCUR.

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