

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002218-MR

DONALD C. LYNCH

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DANIEL J. VENTERS, JUDGE
ACTION NO. 99-CR-00152

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BARBER, GUIDUGLI, AND VANMETER, JUDGES.

VANMETER, JUDGE. Appellant Donald C. Lynch, appeals from an October 10, 2002, order of the Pulaski Circuit Court, which denied Lynch's RCr 11.42 motion to vacate his conviction and life sentence due to ineffective assistance of counsel at trial, and denied his motions for an evidentiary hearing and for appointment of counsel. For the reasons stated hereafter, we affirm.

In his RCr 11.42 motion, Lynch alleged that before and during his murder trial his trial attorney represented his ex-wife, Teresa Lynch (Teresa). Since Teresa testified against Lynch at trial, Lynch alleged that his trial attorney had a conflict of interest that adversely impacted his representation of Lynch. The circuit court concluded from the record that no conflict existed and denied Lynch's RCr 11.42 motion and his motions for evidentiary hearing and appointment of counsel. Finding that the circuit court did not err when it denied Lynch's motions, this court affirms.

The facts of Lynch's underlying conviction are set forth in detail at *Lynch v. Commonwealth*, Ky., 74 S.W.3d 711 (2002), and will not be set forth at length here. Basically, Lynch was convicted of the murder of Steven Dale Richmond, and that conviction was affirmed by the Kentucky Supreme Court.

In July of 2002, Lynch filed his RCr 11.42 motion with the Pulaski Circuit Court and alleged he received ineffective assistance of counsel. First, he argued that his trial attorney represented Teresa prior to and during his trial. According to Lynch, this caused a conflict of interest, which adversely affected him at trial, because his attorney continued to represent Teresa's interests and intentionally protected her during the trial to Lynch's detriment. Further, Lynch contended that Teresa paid his trial attorney \$10,000.00 to represent

Lynch at trial. According to Lynch, the conflict was exacerbated because Teresa also owed Lynch's attorney an additional \$5,000.00 which she refused to pay until the attorney secured Lynch's conviction. Lynch contended that this conflict of interest was the foundation of all the subsequent errors his counsel committed. The record, however, refutes Lynch's claim because the only time Teresa required representation was during her divorce from Lynch, when Lynch's criminal trial counsel represented him, and Teresa was represented by other counsel.

Second, Lynch contended that his attorney rejected Lynch's proposed defense that Teresa, not he, killed Richmond and chose to present false evidence at trial. Third, Lynch argued that his attorney failed to properly investigate Teresa's involvement in Richmond's murder. Fourth, he argued that his attorney failed to properly cross-examine Teresa regarding her motive for killing Richmond and failed to sufficiently impeach her regarding his alleged confession to her. Fifth, he argued that his attorney failed to properly cross-examine the Commonwealth's witnesses. Sixth, Lynch contended that his attorney purposely elicited damaging testimony. Seventh, Lynch argued that his counsel refused to let him examine the discovery material and withheld alleged exculpatory evidence. Eighth, Lynch argued that his attorney failed to object when the Commonwealth elicited testimony regarding the marijuana found at

Lynch's home and failed to object to the inclusion of a prior misdemeanor conviction in the presentence investigation report. Ninth, Lynch argued that his attorney failed to present mitigating evidence during the penalty phase. Tenth, Lynch argued that his trial attorney failed to call him to the stand to testify on his own behalf. Eleventh, Lynch argued that the previous ten allegations constituted cumulative error.

In an order entered on October 10, 2002, the Pulaski Circuit Court denied Lynch's 11.42 motion and denied his motion for an evidentiary hearing. The circuit court found that none of Lynch's allegations constituted ineffective assistance of counsel. Also, the circuit court noted:

The Defendant [Lynch] and his estranged wife, who was a witness at his trial, were involved in divorce proceedings. One of the trial attorneys represented him [Lynch] in his divorce, and his wife was represented by Hon. Melinda Gillum Dalton, who is married to Hon. David Dalton, an assistant commonwealth attorney. Prior to trial, the Defendant moved to have the Commonwealth Attorney's office disqualified on the grounds that the Defendant's wife was represented by an attorney married to an assistant commonwealth's attorney. The Court found no conflict of interest in that situation. The fact that the Defendant's trial attorney was also his attorney in his divorce case does not constitute a conflict of interest, and did not in any way render his trial counsel ineffective.

Lynch then appealed to this Court.

On appeal, Lynch cites *Lewis v. Commonwealth, Ky.*, 411 S.W.2d 321, 322 (1967), and argues that the standard for summary dismissal of an RCr 11.42 motion is "whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." Lynch argues that the trial court should look at the record not to see whether it supports the claims made but rather to see whether the record refutes those claims. *Hodge v. Commonwealth, Ky.*, 68 S.W.3d 338 (2001). Lynch cites *Fraser v. Commonwealth, Ky.*, 59 S.W.3d 448 (2001), and argues that an inmate who has filed an RCr 11.42 motion is entitled to both an evidentiary hearing and appointment of counsel if his motion raises any material issue of fact that can neither be proved nor disproved by the record. Lynch contends that the Pulaski Circuit Court failed to apply the above-mentioned case law to his postconviction motions. Lynch argues that he alleged that there was a specific conflict of interest (that his attorney was obligated to Teresa for his fee) that adversely affected his trial attorney's performance. He asserts that since the record did not refute this allegation, the trial court erred when it denied Lynch an evidentiary hearing and appointment of counsel.

Lynch also argues that even if there were no conflicts, his other allegations indicate ineffective assistance of counsel. We disagree.

As the Supreme Court of Kentucky stated:

The standards which measure ineffective assistance of counsel have been set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord *Gall v. Commonwealth*, Ky., 702 S.W.2d 37 (1985). In order to be ineffective, the performance of defense counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result. *Strickland, supra*. It must be demonstrated that, absent the errors by trial counsel, there is a reasonable probability that the jury would have reached a different result. *Hodge v. Commonwealth*, Ky., 116 S.W.3d 463, 468 (2003).

In his brief, Lynch argues that the conflict was created when Teresa allegedly paid his legal fees. However, in his RCr 11.42 motion, Lynch argued that the conflict was created because his trial attorney represented Teresa's interests and intentionally protected her during his murder trial at Lynch's expense. He alleged that this conflict was exacerbated by the fact that Teresa paid Lynch's legal fees. However, as the trial court notes, the record shows that Teresa was represented by the Hon. Melinda Gillum Dalton both before and during Lynch's trial. Thus, the record on its face refutes Lynch's allegation that a conflict existed because his trial attorney represented Teresa.

Furthermore, the record shows that at the time of the murder, Lynch had approximately \$40,000.00 in cash. In fact, in his RCr 11.42 motion, Lynch claimed that he possessed

approximately \$55,000.00 in cash at the time of the murder. The record suggests that Lynch had more than adequate resources to pay his own legal fees, but even if Teresa had paid Lynch's legal fees, this does not establish the existence of a conflict of interest. As the movant, Lynch had the burden of convincingly establishing that he was deprived of some substantial right that would justify the extraordinary relief of RCr 11.42. *Hodge v. Commonwealth, Ky.*, 116 S.W.3d 463, 468 (2003). However, Lynch failed to meet this burden. The circuit court was not required to hold an evidentiary hearing so Lynch could go on a fishing expedition in hopes of proving a nonexistent conflict. "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." *Sanders v. Commonwealth, Ky.*, 89 S.W.3d 380, 385 (2002), citing *Sanborn v. Commonwealth, Ky.*, 975 S.W.2d 905 (1998). Thus, this court finds that the circuit court did not err in denying Lynch's motions for either an evidentiary hearing or RCr 11.42 relief.

As for Lynch's other allegations, Lynch argued in his RCr 11.42 motion that the alleged conflict of interest was the foundation of all his subsequent allegations. The record shows that Lynch's trial attorney never represented Teresa; thus, it refutes Lynch's allegation of conflict. Absent this foundation,

Lynch's remaining allegations fail and need not be further addressed.

The Pulaski Circuit Court's order denying Lynch's postconviction motions is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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