

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2001-CA-001843-MR  
AND  
NO. 2001-CA-002611-MR

JACK RANDALL KIRK

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT  
HONORABLE C. DAVID HAGERMAN, JUDGE  
ACTION NO. 97-CR-00033

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

\*\* \*\* \* \* \*

BEFORE: COMBS, CHIEF JUDGE; KNOPF, AND McANULTY, JUDGES.  
McANULTY, JUDGE. On September 8, 1978, Appellant was initially  
indicted by the Boyd County Grand Jury and charged with murder.  
That indictment was dismissed in 1979 due to Appellant's  
incompetence to stand trial. The present appeals, 2001-CA-  
001843-MR, to be heard with 2001-CA-002611-MR, are predicated  
upon a reindictment for the same offense on April 14, 1997.

After a two day jury trial, Appellant was convicted and sentenced to serve a life sentence.

On direct appeal, the Kentucky Supreme Court affirmed the judgment.<sup>1</sup>

Appellant filed a motion pursuant to RCr 11.42 to vacate the judgment of the Boyd Circuit Court. He also sought appointed counsel and an evidentiary hearing. The Commonwealth filed its response to the motion on August 15, 2001. On August 16, 2001, the trial court issued its order denying Appellant's motion to vacate judgment concluding that the issues raised in the motion were "defeated in the record as a matter of law." Appeal no. 2001-CA-001843-MR followed.

A few months after his reindictment, Appellant filed notice of intent to introduce evidence of mental illness or insanity at the time of the offense. Just before trial, on July 22, 1998, Appellant filed a notice that he was withdrawing his notice of an insanity defense. The notice was signed by both Appellant and his attorney, Mr. Curtis. At a hearing on that date regarding various pretrial matters, the following exchange occurred:

BY THE COURT: Now also, let me ask this of Mr. Kirk. During the break, Mr. Kirk, Mr. Curtis gave me a document which is signed by both you and him, that he asked me to file in the court file. And, it says that you're

---

<sup>1</sup> See Kirk v. Commonwealth, Ky., 6 S.W.3d 823 (1999).

withdrawing your notice of an insanity defense, and you're not going to rely on that. And Mr. Curtis says that you and him, in your all's private meetings, have discussed that, and that's what you want to do?

APPELLANT: Yes, sir.

BY THE COURT: All right, we'll file that of record. And, that - there'll be no proof necessary on no disease or defect.

On appeal Appellant argues that it was error for the trial court not to hold an evidentiary hearing to determine whether Appellant intelligently and voluntarily waived the insanity defense. Appellant asserts this issue could not be resolved by the bare record of proceedings below. He states that in the present case, the trial court's findings as to competence only addressed the broader issue of competence to stand trial. Appellant concedes that the issue of competency to conduct his defense at the time of his trial was not raised on direct appeal.

Appellant advises this Court that although a defendant generally has the right to direct the nature of the defense to be presented, the right is limited by the requirement that the defendant be competent to direct such defense. Appellant cites Jacobs v. Commonwealth, Ky., 870 S.W.2d 412 (1994), a case in which the Kentucky Supreme Court dealt with the issue of a defendant who objected to his counsel's decision to present an

insanity defense. The Court recognized that neither counsel nor the court has the power to contravene a defendant's voluntary and intelligent decision to forego an insanity defense. Id. at 418. To guarantee a defendant's right to a defense, counsel should bring to the attention of the trial court any conflict which exists after counsel has informed the defendant of the relevant considerations bearing on the decision to forego the insanity defense and seek a determination of whether the accused is capable of voluntarily and intelligently waiving the defense. Id. Even if a defendant is found competent to stand trial, he may not be capable of making an intelligent decision about his defense. Id. Where there is a conflict concerning the assertion of the defense of insanity or should there be a question of the defendant's mental capacity even though the defendant was found competent to stand trial, the trial court shall hold a hearing on the record on the ability of the defendant to voluntarily and intelligently understand and waive such a defense. Id.

Appellant points out that the record in the case at bar does not reveal whether there was pretrial disagreement between Appellant and defense counsel over raising an insanity defense at trial. Appellant also offers that he may not have been competent to waive the defense because of the drugs administered to him at the time of trial, because he may have

been suffering from a "delusional fixation," and because his trial counsel used "undue duress" on him. Appellant believes the absence of information in the record establishes that it was error for the trial court to rely solely on the written record in denying the RCr 11.42.

We conclude that Appellant is not entitled to post-conviction relief because this is an issue which had to have been raised on direct appeal. RCr 11.42 was intended to provide post-conviction relief to persons under sentence, on probation or parole who felt aggrieved by errors which led to their conviction that could not be reached by direct appeal.

Commonwealth v. Stamps, Ky., 672 S.W.2d 336, 338 (1984).

Constitutional grounds must form the basis for relief granted by collateral attack. Commonwealth v. Basnight, Ky. App., 770 S.W.2d 231, 237 (1989). Issues which could have been raised on direct appeal are not appropriate for RCr 11.42, Hoskins v. Commonwealth, Ky., 420 S.W.2d 560 (1967); Thacker v. Commonwealth, Ky., 476 S.W.2d 838 (1972).

This is a claim appropriate for direct appeal. Appellant's principal allegation is that the court erred in failing to determine whether he had the mental competency to direct his defense. Jacobs makes clear that it is the obligation of the court to investigate the defendant's competence once counsel informs the court of the decision to

forego a mental illness defense. In this case, counsel filed a notice with the court and brought up the decision to forego the defense during a pretrial hearing. The trial court should have done a more extensive colloquy to explore Appellant's competence and whether counsel agreed with Appellant's decision to forego the defense. Appellant raises no issue of ineffectiveness of counsel, which could have been raised by way of RCr 11.42, but uncovers a failing of the court. This should have been raised prior to Appellant's RCr 11.42 motion, and so we decline to review it. We affirm the order of the court denying Appellant's motion for relief.

Under appeal no. 2001-CA-002611-MR; Appellant is appealing, pro se, the Court's denial of his Motion for a copy of his Presentence Investigation Report (PSI), which he waived in writing. Appellant argues that he was not competent to waive the PSI. We conclude that the trial court correctly denied the motion because Appellant is not entitled to a copy of his PSI in any event. Bush v. Commonwealth, Ky., 740 S.W.2d 943 (1987). Furthermore, his claims that he was not competent or was too medicated to waive the report should have been raised in his direct appeal, and we find such matters unpreserved for review.

For the foregoing reasons we affirm the orders of the Boyd Circuit Court in this case.

KNOPF, JUDGE, CONCURS.

COMBS, CHIEF JUDGE, DISSENTS AND FILES SEPARATE  
OPINION.

COMBS, CHIEF JUDGE, DISSENTING: I respectfully dissent. While the majority opinion characterizes this claim as one that is appropriate only for direct appeal, I believe that it is equally appropriate for redress by way of RCr 11.42. The majority acknowledges the error of the failure of the trial court to conduct a competency hearing, stating as follows:

Appellant raises no issue of ineffectiveness of counsel, which could have been raised by way of RCr 11.42, **but uncovers a failing of the court.** This should have been raised prior to Appellant's RCr 11.42 motion, and so we decline to review it. (Emphasis added.)

I submit that the alleged failure of trial counsel to follow the dictates of Jacob, supra, clearly presents an issue of deficient performance resulting in serious prejudice to the defendant - thus satisfying both prongs of Strickland, supra.

Perhaps the claim pursuant to RCr 11.42 could have been more carefully crafted. However, the egregiousness of this error compels that it be addressed. Trial counsel's failure to apprise the court of its erroneous ruling on this serious issue calls for the very remedy that RCr 11.42 is designed to provide. Simply to deny this appeal because appellant has belatedly revealed an error of the court misses the point and compounds the error. Counsel had a duty to serve as adequate advocate in

urging the court to comply with its obligation to conduct a competency hearing. Since the court failed to comply with Jacobs in conducting a competency hearing, it should now provide an evidentiary hearing on the RCr 11.42 motion as the only remedy available for this due process violation.

Accordingly, I would vacate the judgment on this point and remand for an evidentiary hearing on the RCr 11.42 motion.

BRIEF FOR APPELLANT:

Christopher F. Polk  
Louisville, Kentucky

Jack Randall Kirk, Pro se  
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III  
Attorney General of Kentucky

Carlton S. Shier, IV  
Assistant Attorney General  
Frankfort, Kentucky