

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-002400-MR

BRIAN FRANXMAN

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 96-CR-00438

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; DIXON AND VANMETER, JUDGES.

VANMETER, JUDGE: Brian Franxman appeals *pro se* from the Kenton Circuit Court's denial of his RCr¹ 11.42 motion to vacate his 1997 conviction for Attempted First Degree Sodomy and First Degree Sexual Abuse. Having reviewed the available record, we affirm.

¹ Kentucky Rules of Criminal Procedure.

Franxman's 1997 convictions were affirmed on direct appeal by this court in an unpublished opinion. *Franxman v. Commonwealth*, 1997-CA-001142-MR (Ky.App. Oct. 9, 1998). The record discloses that on March 10, 2000, Franxman's then-counsel filed a Motion for Time to Investigate 11.42 Claim and Amend Pending Motion. This motion referred to the filing of an RCr 11.42 petition by Franxman. Additionally, the Kenton Circuit Clerk's index appears to confirm the filing of such a petition for relief by the following entry:

03/10/2000 **Motion Filed**
 MOTION TO VACATE
 ATTORNEY FOR DEFENDANT (CIVIL)
 SET ASIDE OR CORRECT SENTENCE

Unfortunately, no RCr 11.42 motion appears in the record on appeal. Instead, the next document in the record is the trial court's April 3, 2000 order granting Franxman's motion and giving his counsel 120 days to investigate Franxman's claims and to amend the "Petition" as needed. The order gave the Commonwealth 60 days "to respond to either the pending Petition or the Amended Petition, as the case may be," and provided that the court would then "set a status conference . . . at which the necessity of an evidentiary hearing may be argued and decided."

Next, the May 2000 motion of Franxman's counsel to withdraw was granted in July 2000. Five years passed without any additional filings in the record. In September 2005, Franxman filed *pro se* motions to Proceed In Forma Pauperis and for the Appointment of Counsel pursuant to RCr 11.42(5), accompanied by a Financial Statement/Affidavit of Indigence, and a Certification of Funds Deposited in Prisoner's

Institutional Account. On September 30, 2005, the trial court entered an order denying Franxman's RCr 11.42 motion, finding:

1. The record reveals Defendant was represented by counsel at all proceedings.
2. The record does not show and the Defendant has not presented any information that the record is incomplete, that defense counsel was not fully informed by Defendant of Defendant's defenses or that defense counsel did not adequately [represent] the Defendant through the proceedings.

A RCr 11.42 motion by Defendant would, **if filed**, be [at] least three (3) years later [than] the final judgment. In addition, the defendant's requests are not based on the requisite elements necessary pursuant to RCr 11.42 [(10)](a) or (b).

(Emphasis added.) Franxman appeals.

On appeal, Franxman asserts that trial counsel provided ineffective assistance by failing to interview and call witnesses who would have established Franxman's alibi; by failing to challenge Franxman's competency to stand trial due to a head injury; by being unprepared for the sentencing phase of the trial; by impeaching the credibility of Franxman's own witness; and by failing to permit Franxman to testify on his own behalf.

The problem with each of these allegations, as pointed out by the Commonwealth and alluded to by the trial court, is that no RCr 11.42 motion appears in the record, and Franxman has provided us with nothing that purports to be a copy of any such motion filed below. At best, the record on appeal is incomplete. It is axiomatic that a silent record is assumed to support the decision of the trial court. *Commonwealth v.*

Thompson, 697 S.W.2d 143, 145 (Ky. 1985); *Commonwealth, Dep't of Highways v. Richardson*, 424 S.W.2d 601, 604 (Ky. 1967). Certainly, the trial judge was in a much better position than an appellate court to review the circuit court clerk's records of this matter, and to ascertain whether, in fact, an RCr 11.42 motion was timely filed in the record within three years of a final judgment. RCr 11.42(10). After failing to find any such pleading, and noting the finality of the original judgment upon affirmation by this court in October 1998, the trial court correctly held that any RCr 11.42 motion filed in September 2005 would be untimely. RCr 11.42(10).

The Order of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Brian Franxman, *Pro se*
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BRIEF FOR APPELLEE:

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