

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001347-MR

BILLY RAY CARROLL

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 02-CR-00780

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: LAMBERT, TAYLOR, AND WINE, JUDGES.

TAYLOR, JUDGE: Billy Ray Carroll brings this *pro se* appeal from a June 9, 2006, Order of the Kenton Circuit Court denying various motions, including a Ky. R. Crim. P. (RCr) 11.42 motion. We affirm.

Carroll was convicted of second-degree burglary and of being a first-degree persistent felony offender. He was ultimately sentenced to twenty-years' imprisonment. His judgment of conviction was affirmed upon direct appeal by the Kentucky Supreme Court in Appeal No. 2003-SC-566-MR. Relevant herein, Carroll then filed two *pro se*

motions in the Kenton Circuit Court – motion for copy of grand jury transcript and motion to vacate his judgment of conviction under RCr 11.42 and Ky. R. Civ. P. (CR) 60.02(f). On June 9, 2006, the motions were denied by the circuit court without a hearing, thus precipitating this appeal.

Carroll contends the circuit court erred by denying his motion for copy of the grand jury's transcript and motion to vacate under RCr 11.42/CR 60.02(f). We shall address Carroll's allegations of error as to each motion separately.

Carroll first contends the circuit court erred by denying his RCr 11.42 motion without an evidentiary hearing. Specifically, Carroll alleges that trial counsel rendered ineffective assistance; thus, his judgment of conviction should be vacated.

Upon review of a trial court's denial of an RCr 11.42 motion without an evidentiary hearing, we must initially determine whether appellant's allegations of error are refuted upon the face of the record. *Fraser v. Com.*, 59 S.W.3d 448 (Ky. 2001). If material issues of fact exist that could not be conclusively disproved upon the face of the record, an evidentiary hearing is required. *Id.* To prevail upon a claim for ineffective assistance of counsel, defendant must demonstrate that counsel's performance was deficient and that there exists a reasonable probability that the outcome would have been different but for counsel's performance. *Strickland v. Washington*, 466 U.S. 668 (1984). Thus, our review shall proceed accordingly.

Carroll specifically argues that trial counsel was ineffective for failing to “challenge” the charge of first-degree persistent felony offender (PFO). Carroll asserts

that he had not been properly indicted or arraigned on the PFO charge and that trial counsel was ineffective for not preventing the continued prosecution of that charge.

In the circuit court's June 9, 2006, order denying Carroll's motion, the court stated as follows:

[Carroll] claims that he was not indicted as a First[-]Degree Persistent Felony Offender and was not arraigned on that Indictment. The record of this case proves otherwise. On March 7, 2003, [Carroll] was indicted in Count II as a First[-] Degree Persistent Felony Offender. On March 10, 2003, [Carroll] appeared by way of closed circuit television and entered a not guilty plea and waived formal arraignment through Attorney Justin Durstock. This can be viewed at 2:07 p.m. on the tape of the court proceedings of Monday, March 10, 2003. The allegations in [Carroll's] Motions alleging that he was not indicted as a persistent felony offender and/or arraigned on that charge are frivolous and patently untrue.

A review of the record reveals that on March 7, 2003, Carroll was indicted upon the PFO charge and that on March 10, 2003, he entered a plea of not guilty and waived formal arraignment. Thus, Carroll's allegations of ineffective assistance of trial counsel are refuted upon the face of the record, and the trial court properly denied Carroll's RCr 11.42 motion without an evidentiary hearing.

Carroll also contends the circuit court erred by denying his motion for a copy of the grand jury proceeding. Specifically, Carroll asserts that he is entitled to a copy of the grand jury proceeding in which he was indicted upon the PFO charge.

It is well-established that a defendant is not entitled to discovery in a post-conviction proceeding. *Haight v. Commonwealth*, 41 S.W.3d 436 (Ky. 2001); *Sanders v.*

Commonwealth, 89 S.W.3d 380 (Ky. 2002). Thus, the trial court properly denied Carroll's motion for a copy of the grand jury proceeding.

For the foregoing reasons, the Order of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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