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Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-001439-MR

STACY PARTIN

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
INDICTMENT NO. 02-CR-00176

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** * ** * ** *

BEFORE: STUMBO AND VANMETER, JUDGES; GRAVES,¹ SENIOR JUDGE.

GRAVES, SENIOR JUDGE: Stacy Partin appeals from an order of the McCracken Circuit Court denying his Kentucky Rule of Criminal Procedure (RCr) 11.42 motion to vacate his sentence. Following a jury trial, Partin was convicted of kidnapping, two counts of unlawful imprisonment in the first degree, wanton endangerment in the first

¹ Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

degree, wanton endangerment in the second degree, and assault in the fourth degree; and was found to be a persistent felony offender in the second degree. He was sentenced to life in prison. We affirm.

The charges stemmed from an incident on April 28, 2002, wherein Partin and his wife, Vicki, were visiting with Vicki's twenty-year-old son, Bobby Knight, inside the home where Partin and Vicki resided. Partin became enraged when he noticed a “caller ID” number on their telephone that he believed to be the phone number of Vicki's ex-boyfriend. When Partin began choking Vicki, Bobby intervened and suggested that he and Vicki go to Bobby's residence. Partin then brandished a .25 caliber pistol, “put [it] to both [their] heads [and] said the only way [they] were leaving was in a body bag.” When Vicki grabbed Partin, Bobby escaped through the front door, ran to a nearby residence, and told the occupants to call the police. Partin then grabbed Vicki by the hair, forced her into her car, and drove her to the home of a friend, Ronnie Rudd. Partin forced his way into Rudd's residence and held Rudd and others at gunpoint until police surrounded the residence and convinced him to surrender.

On April 17, 2006, Partin filed a RCr 11.42 motion to vacate the judgment, alleging ineffective assistance of counsel, prosecutor misconduct, and abuse of discretion by the trial court. Partin also filed a motion for the appointment of an attorney and an evidentiary hearing. On June 22, 2006, the court entered an order denying the RCr 11.42 motion without an evidentiary hearing and without appointment of counsel. This appeal followed.

Partin argues that the trial court erred when it denied his motion without conducting an evidentiary hearing, that his counsel rendered ineffective assistance, that the prosecutor engaged in misconduct, and that the trial court abused its discretion. We disagree.

An evidentiary hearing on a defendant's RCr 11.42 motion is required only when the motion raises “an issue of fact that cannot be determined on the face of the record.” *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993). Here, Partin failed to raise any issue of fact that could not be resolved on the face of the record. Accordingly, the trial court did not err when it denied Partin's motion without an evidentiary hearing.

Partin also contends the court erred by not appointing counsel to help prepare his pro se RCr 11.42 motion. It is well-established that there is not a constitutional right to counsel in state post-conviction proceedings. *Bowling v. Commonwealth*, 981 S.W.2d 545 (Ky. 1998). Furthermore, if an evidentiary hearing is not required, it is unnecessary to appoint counsel. *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001). As we have concluded that an evidentiary hearing is not required, we believe Partin's contention that he was entitled to counsel to help prepare his RCr 11.42 motion to be without merit.

Partin argues that his counsel rendered ineffective assistance based upon fourteen enumerated allegations, including failing to properly investigate the case; failing to move to strike the indictment; failing to observe attorney/client confidentiality; failing

to make various objections at trial; failing to observe reciprocal discovery; failing to properly question witnesses (including himself) at trial; failing to object to the trial court's denial of various motions; failing to supply him with discovery in a timely manner; failing to move the court to issue a direct finding with regard to his limited waiver of counsel; failing to offer any mitigating argument; failing to make him aware of various rules of evidence, objections, and rights during the penalty phase; failing to prepare his witnesses prior to trial; and, failing to object to the introduction of certain letters written by him. Upon review of the record, we conclude, as did the trial court, that Partin's allegations were refuted by the record.

“Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won.” *Haight v. Commonwealth*, 41 S.W.3d 436, 441 (Ky. 2001), *quoting from United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992). As the *Haight* court further stated, the critical issue is not whether counsel made errors but whether such errors caused “defeat [to be] snatched from the hands of probable victory.” *Id.* Such was not the case here.

The overwhelming amount of evidence against Partin was staggering, to say the least. None of the numerous errors alleged by Partin can reasonably be said to have caused defeat to have been snatched from the hands of his probable victory. Contrary to Partin's assertions otherwise, the record establishes that his counsel properly investigated the case, including attempting to interview Partin's alleged four witnesses.

Additionally, the record establishes that counsel had sufficient time to advise and be briefed by Partin prior to trial. Also, the record discloses that Partin's counsel did not engage in any misconduct regarding the attorney/client privilege nor did counsel fail to properly execute his discovery obligations.

Partin's remaining arguments concerning alleged ineffective assistance of counsel, prosecutorial misconduct, and abuse of discretion by the trial court are all issues that should have been raised on direct appeal. As such, Partin has raised these issues too late in his RCr 11.42 motion. *See Brown v. Commonwealth*, 788 S.W.2d 500, 501 (Ky. 1990) (appellate court “will not address an issue which was raised in a direct appeal or which should have been raised in a direct appeal”); *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006). To the extent that several of Partin's arguments were already considered on direct appeal,² they cannot now be re-litigated under RCr 11.42. *See Sanders v. Commonwealth*, 89 S.W.3d 380, 385 (Ky. 2002).

In short, Partin received reasonably effective assistance of counsel. Any alleged ineffectiveness was not so serious as to deprive him of a fair trial and there is no reasonable probability that a different result could have been achieved. A thorough review of the record in this case indicates that defense counsel was not ineffective and that Partin received a fundamentally fair trial and reliable sentence.

The order of the McCracken Circuit Court is affirmed.

ALL CONCUR.

² *See Partin v. Commonwealth*, 168 S.W.3d 23 (Ky. 2005).

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