

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000289-MR

HARRY V. MOORE

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NO. 03-CR-00380

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: MOORE AND WINE, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

MOORE, JUDGE: Harry V. Moore appeals the Henderson Circuit Court's order denying his RCr² 11.42 motion to alter, amend, or vacate his sentence. After a careful review of the record, we affirm.

¹ Senior Judge David C. Buckingham, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² Kentucky Rule of Criminal Procedure.

I. FACTUAL AND PROCEDURAL BACKGROUND

Moore was indicted on charges of first-degree robbery and theft by unlawful taking, over \$300. Specifically, the indictment charged as follows:

Count 1

That on or about October 22, 2003, in Henderson County, Kentucky, the Defendant, Harry Vinson Moore, committed the offense of First Degree Robbery by pushing and kicking Brenda Sutton, spraying her with pepper spray, gagging her thereby causing her physical injury and threatening to kill her while in the course of committing a theft at the National Check Advance;

Count 2

That on or about October 22, 2003, in Henderson County, Kentucky, the Defendant committed the offense of Theft By Unlawful Taking Over \$300 by taking a Chevrolet Lumina van owned by Brenda Sutton with a value of over \$300.

Moore moved for a competency evaluation, and his motion was granted. An evaluation for competency and criminal responsibility was conducted by Dr. Robert Sivley, Jr., of the Kentucky Correctional Psychiatric Center (KCPC). Dr. Sivley reported that Moore had a significant mental health history, due to two suicide attempts. Dr. Sivley conducted tests on Moore. He ultimately concluded that Moore was mildly mentally retarded; suffered from “depression, anxiety, and/or psychosis.” Dr. Sivley reported that the severity of these conditions was difficult to determine because Moore had not been “truthful in reporting his symptoms.” According to Dr. Sivley, there was insufficient “evidence”³ to

³ Because “evidence” was the term that Dr. Sivley used in his report, we will use that term in this opinion.

conclude that at the time Moore committed the alleged crimes, he was unable to comprehend the illegality of his actions or to conform “his behavior to the requirements of the law.” As for Moore’s competency to stand trial, Dr. Sivley reported that: Moore “demonstrated a good understanding of litigation principles in general and the roles of the various principals involved in the litigation process”; he understood what a plea bargain was; he knew and understood the charges against him; and he had the “basic knowledge to comprehend legal decisions and to participate rationally in his own defense.” Dr. Sivley stated that Moore appeared to have some absence of motivation, but it was difficult to determine whether this “lack of motivation could reduce, if any, his ability to assist his attorney in his own defense.” However, Dr. Sivley opined that Moore had “the capability to participate rationally in his own defense.”

An abbreviated competency hearing was held, wherein Dr. Sivley’s competency evaluation report was reviewed. Moore’s attorney did not present any witnesses at the hearing, but he advised the circuit court that it may want to review the report more thoroughly. The circuit court found that Moore was competent, and Moore entered a guilty plea during that same proceeding. He was sentenced to serve fifteen years on count one of the indictment and, on count two, he was sentenced to serve five years, to run concurrently to his sentence for count one.

Moore filed his RCr 11.42 motion, alleging that he received the ineffective assistance of counsel for various reasons, and requesting an evidentiary hearing. The circuit court denied Moore’s request for an evidentiary hearing

because it determined it could resolve his RCr 11.42 claims on the record. As for Moore's RCr 11.42 motion, the circuit court denied the motion, reasoning that Moore's claims lacked merit.

Moore now appeals, claiming as follows: (1) he received the ineffective assistance of counsel due to counsel's failure to request a full competency hearing and question Dr. Sivley about his evaluation report; (2) he received the ineffective assistance of counsel due to counsel's failure to investigate Moore's mental health history further; (3) he received the ineffective assistance of counsel due to counsel's failure to "protect" him from double jeopardy when Moore was convicted of both robbery and theft; and (4) the circuit court should have held an evidentiary hearing on his RCr 11.42 motion.

II. STANDARD OF REVIEW

A motion brought under RCr 11.42 "is limited to issues that were not and could not be raised on direct appeal." *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006). "An issue raised and rejected on direct appeal may not be relitigated in this type of proceeding by simply claiming that it amounts to ineffective assistance of counsel." *Id.* "The movant has the burden of establishing convincingly that he or she was deprived of some substantial right which would justify the extraordinary relief provided by [a] post-conviction proceeding. . . . A reviewing court must always defer to the determination of facts and witness credibility made by the circuit judge." *Id.* (citations omitted).

III. ANALYSIS

A. CLAIM THAT COUNSEL WAS INEFFECTIVE DUE TO FAILURE TO REQUEST FULL COMPETENCY HEARING AND QUESTION DR. SIVLEY

Moore first alleges that he received the ineffective assistance of counsel due to counsel's failure to request a full competency hearing and to question Dr. Sivley about his evaluation report. To prove that he received the ineffective assistance of counsel, thus warranting a reversal of his conviction, Moore must show that: (1) counsel's performance was deficient, in that it fell outside "the wide range of reasonable professional assistance"; and (2) this deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Because an abbreviated competency hearing was conducted, in which the court thoroughly reviewed Dr. Sivley's competency evaluation report, and Dr. Sivley's report concluded that Moore was competent to stand trial, Moore cannot show that his counsel rendered ineffective assistance by failing to request a full competency hearing and by failing to question Dr. Sivley. *See id.* Therefore, this claim lacks merit.

B. CLAIM THAT COUNSEL RENDERED INEFFECTIVE ASSISTANCE DUE TO FAILURE TO INVESTIGATE MENTAL HEALTH HISTORY

Moore next asserts that his counsel rendered ineffective assistance when counsel failed to investigate Moore's mental health history. Moore contends that he did not have the mental capacity to commit the crime, so he was not culpable.

Although Dr. Sivley's report concluded that Moore suffered from "depression, anxiety, and/or psychosis," the severity of these conditions was difficult to determine because Moore had been dishonest in reporting his symptoms. Additionally, Dr. Sivley reported that there was insufficient evidence to conclude that at the time Moore committed the alleged crimes, he was unable to comprehend the illegality of his actions or to conform "his behavior to the requirements of the law."

Because Dr. Sivley's report provided that there was not enough evidence to show that Moore was unable to comprehend the illegality of his actions or to conform his behavior to the law, Moore cannot show that counsel rendered ineffective assistance by failing to further investigate his mental health history. This is because Moore has failed to demonstrate that counsel's performance was deficient by failing to conduct this investigation or that his defense was prejudiced to the extent that the result of the trial court's proceedings would have been different if counsel had conducted this investigation. *See id.* Therefore, this claim lacks merit.

C. CLAIM THAT COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO PROTECT MOORE FROM DOUBLE JEOPARDY

Moore next contends that his counsel rendered ineffective assistance due to counsel's failure to "protect" him from double jeopardy when Moore was convicted of both robbery and theft.⁴ The offense of robbery is a combination of

⁴ We note that this claim was not preserved for appeal. Nevertheless, we find that this claim lacks merit.

the offenses of theft and assault. *See Roark v. Commonwealth*, 90 S.W.3d 24, 38 (Ky. 2002). When a person is convicted of both robbery and theft, and the facts supporting the separate theft conviction are the same facts used to support the theft aspect of the robbery conviction, the person has been subjected to a double jeopardy violation. *See McKee v. Commonwealth*, 720 S.W.2d 343, 344 (Ky. App. 1986).

Moore asserts that, because he was convicted of robbery and theft, his right against double jeopardy has been violated. However, his argument is misplaced. The facts supporting Moore's robbery conviction, as charged in the indictment and alleged in the criminal complaint, were that Moore went into the National Check Advance's place of business, pushed and kicked an employee of the business, sprayed her with pepper spray, gagged her, and threatened to kill her, then he stole money from the business. Thus, the theft aspect of the robbery conviction was that Moore took money from the business.

Moore then left the business and stole the employee's van. According to the indictment, this was the act forming the basis for the separate theft charge against Moore. Therefore, the events supporting the theft aspect of the robbery conviction were not the same events as those used to support the separate theft conviction. The theft of the money from the National Check Advance and the theft of the van were two separate thefts, and there was no double jeopardy violation when Moore was convicted of both robbery and theft.

Alternatively, although the business's employee happened to be at the place of business, acting as the business's agent at the time of the robbery, the cash stolen at the business was not her personal money. However, the theft of her car was a crime against her personally, and it was a separate act of theft. Thus, the theft of the money supporting the robbery conviction and the theft of the van were separate crimes and double jeopardy does not attach.

Moreover, under the test set forth in *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L.Ed. 306 (1932), the question is “whether the act or transaction complained of constitutes a violation of two distinct statutes and, if it does, if each statute requires proof of a fact the other does not.” *Commonwealth v. Burge*, 947 S.W.2d 805, 811 (Ky. 1996). Moore's robbery conviction required proof that threats or force were used to obtain the money from the business. In turn, his conviction for theft by unlawful taking of property worth more than \$300 required proof that the vehicle stolen was valued at greater than \$300. Therefore, both the robbery and the theft convictions required proof of a fact that the other did not, and Moore's convictions for robbery and theft did not violate double jeopardy.

Consequently, this claim lacks merit, because Moore cannot prove that his counsel acted deficiently in failing to raise a meritless double jeopardy challenge.

D. CLAIM CONCERNING DENIAL OF EVIDENTIARY HEARING

Finally, Moore alleges that the circuit court should have granted his request for an evidentiary hearing concerning his RCr 11.42 claims. Pursuant to

RCr 11.42(5), if there is “a material issue of fact that cannot be determined on the face of the record [,] the court shall grant a prompt hearing. . . .” In the present case, because the circuit court determined that Moore’s claims could be resolved by examining the record, the court denied his request for an evidentiary hearing.

On appeal, after “the trial court denies a motion for an evidentiary hearing on the merits of allegations raised in a motion pursuant to RCr 11.42, our review is limited to whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction.” *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986) (internal quotation marks and citation omitted).

In the present case, all of Moore’s claims were conclusively refuted by the record. Thus, the circuit court did not err in denying his request for an evidentiary hearing.

IV. CONCLUSION

Accordingly, the order of the Henderson Circuit Court is affirmed.

WINE, JUDGE, CONCURS.

BUCKINGHAM, SENIOR JUDGE, CONCURS AND FILES
SEPARATE OPINION.

BUCKINGHAM, SENIOR JUDGE, CONCURRING. I concur with the majority opinion, but I respectfully disagree with its analysis of the double jeopardy issue.

Moore claims that he was denied the effective assistance of counsel because his attorney allowed him to plead guilty to both robbery and theft in violation of double jeopardy principles. He concedes that the issue was not raised before the trial court, but he contends that double jeopardy claims are not waived even though they weren't raised at the trial level. *See Baker v. Commonwealth*, 922 S.W.2d 371, 374 (Ky. 1996).

Moore's argument, however, is not that the trial court erred in violating double jeopardy principles. Rather, his claim is that he received the ineffective assistance of counsel. I conclude that the *Baker* case is not applicable and that the argument raised here was waived due to Moore's failure to raise it before the trial court. Thus, I agree with the majority that the issue was not properly before us. I would affirm for that reason.

However, I disagree with the majority on the issue of whether Moore's robbery and theft convictions in this case violate double jeopardy principles. I believe that *Jordan v. Commonwealth*, 703 S.W.2d 870, 873 (Ky. 1985), is on point. In my view, the facts in *Jordan* are practically identical to those herein. Had Moore properly raised the issue to the trial court, I believe he would have been entitled to an evidentiary hearing on the issue of whether there was ineffective assistance of counsel because Moore pleaded guilty to both robbery and theft, which, in my view, violates double jeopardy principles.

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