

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001541-MR

DALE WILLIS

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 04-CR-00079

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; NICKELL, JUDGE; GRAVES,¹ SENIOR JUDGE.

GRAVES, SENIOR JUDGE: Dale Willis appeals from an order of the Bell Circuit Court denying his petition for post-conviction relief pursuant to RCr² 11.42. For the reasons stated below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

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 Kentucky Revised Statutes (KRS) 21.580.

² Kentucky Rules of Criminal Procedure.

At trial the victim, Willis's girlfriend, Belinda Hatfield, testified that after she refused to take Willis to the local bootlegger, he hit her in the back of the head with a tire iron, forced her into their car and drove her to the top of a mountain where he beat and raped her. Willis testified to the effect that Hatfield's injuries occurred as a result of his attempt to ward her off after she attacked him for failing to fix their car.

Willis was convicted of second-degree assault and being a second-degree persistent felony offender. He was sentenced to a total of 15 years to serve. The judgment was affirmed on direct appeal. *See Willis v. Commonwealth*, 2006 WL 2708507 (Ky. App. Jan. 18, 2007).

On June 25, 2007, Willis filed motions for post-conviction relief pursuant to RCr 11.42, for appointment of counsel, and for an evidentiary hearing. On July 6, 2007, the trial court entered an order denying the motions. This appeal followed. Our review of Willis's arguments is hindered because the record on appeal does not contain the trial record in the case but, rather, commences with his motion for an appeal bond following his conviction and sentence.

JURY INSTRUCTIONS

Willis contends that he is entitled to post-conviction relief because the trial court rejected his proffered jury instructions regarding the Commonwealth's burden of proof and his entitlement to a presumption of innocence. Thus, by his own framing of the argument, this issue was preserved for presentation in his direct appeal.

It is well established precedent that appellate courts will not address an issue which was raised on direct appeal or which should have been raised on direct appeal. *Brown v. Commonwealth*, 788 S.W.2d 500, 501 (Ky. 1990). RCr 11.42 actions do not permit a defendant to relitigate issues decided on direct appeal or to raise issues that could have been presented on direct appeal. *Baze v. Commonwealth*, 23 S.W.3d 619, 626 (Ky. 2000).

Because this issue could have been raised on direct appeal, it is not a proper issue for review in the present RCr 11.42 proceedings.

MISSING EVIDENCE I

After Willis's arrest for the attack on Belinda, the Bell County Sheriff called Gary Wagner, a towing service operator, to remove the vehicle in which the assault allegedly occurred from the trailer premises. It appears that after storage fees for the car went unpaid, Wagner contacted the Sheriff's office to see if he could dispose of it. Although Wagner testified that former Deputy Sam Johnson told him he could dispose of it, both Sheriff Bennett and Deputy Sheriff David Cornelius stated that they were unaware that the car had been destroyed until Cornelius contacted the garage to inform them that appellant's trial counsel would be coming to view it. Also after Willis's arrest and while Belinda was hospitalized from her injuries, the couple's trailer was destroyed by fire.

Willis contends that he received ineffective assistance of counsel on the basis that trial counsel failed to adequately pursue the issue of missing evidence; i.e., the vehicle and the trailer. More specifically, Willis alleges that trial

counsel's performance was deficient when he conceded "during trial that the defense had [no] intention of accusing the prosecution of tampering or taking a deliberate part in the missing evidence[.]"

In his direct appeal, one of the arguments raised by Willis was that "the trial court erred in denying his request for a missing evidence instruction." This Court's opinion in the direct appeal held that the trial court properly denied the instruction because Willis had failed to demonstrate bad faith on the part of the Commonwealth in the loss of the evidence.

An issue raised and rejected on direct appeal may not be relitigated in an RCr 11.42 proceeding by simply claiming that it amounts to ineffective assistance of counsel. *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006).

Missing evidence issues were raised and rejected in Willis's direct appeal. In the present proceeding, Willis simply recasts the same issue as ineffective assistance of counsel. Because this is impermissible, we reject Willis's claim that he received ineffective assistance of counsel on the basis that trial counsel failed to adequately pursue the issue of missing evidence.

FAILURE TO INVESTIGATE

This argument is somewhat vague; however, it appears that Willis is arguing that trial counsel failed to properly investigate the merits of a self-defense strategy. He states "Appellant assert[s] that he was in fear of his life and that he actually believed that he had to protect himself, that [the] victim named in this

action had planned [sic] [to] kill him and therefore, had to use the necessary [sic] action to defend himself.”

Counsel has a duty to conduct a reasonable investigation, including defenses to the charges. In evaluating whether counsel has discharged this duty to investigate, develop, and present such defenses, Kentucky has adopted a three-part analysis. *Hodge v. Commonwealth*, 68 S.W.3d 338, 344 (Ky. 2001). First, it must be determined whether a reasonable investigation should have uncovered the defense. *Id.* If so, then a determination must be made whether the failure to raise this defense was a tactical choice by trial counsel. *Id.* Counsel's tactical choice must be given a strong presumption of correctness, and the inquiry is generally at an end. *Id.* If the choice was not tactical and the performance was deficient, then it must be determined whether there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *Id.* See also *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

We first note that RCr 11.42 exists to provide the movant with an opportunity to air known grievances, not an opportunity to conduct a fishing expedition for possible grievances, and post-conviction discovery is not authorized under the rule. *Mills v. Commonwealth*, 170 S.W.3d 310, 325 (Ky. 2005) (footnotes omitted).

Here, Willis has failed to identify any particular witnesses who would have been helpful to his defense who were not interviewed by trial counsel, what information they may have had regarding the case, or what their testimony would

have been. Nor does he identify any other evidence trial counsel failed to obtain relating to his self-defense claim. Consequently, this allegation of ineffective assistance amounts to no more than a fishing expedition, and the claim is outside the scope of RCr 11.42. *Mills, supra*.

As a further basis for affirming upon this issue, we again note that the record of the trial proceedings is not contained in the record on appeal. It is an appellant's duty to see that the record is complete on appeal. *Commonwealth, Dept. of Highways v. Richardson*, 424 S.W.2d 601, 603 (Ky. 1968). When the complete record is not before the appellate court, we are bound to assume that the omitted record supports the decision of the trial court. *Id.*; *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985); *Burberry v. Bridges*, 427 S.W.2d 583, 585 (Ky. 1968). As noted by the Court in *Burberry*, “[i]t is also reasonable to place upon appellant the duty to designate and file a record sufficient to enable the court to pass on the alleged errors.” *Id.* at 585. Without the trial record, we are unable to assess trial counsel’s performance in pursuing a self-defense strategy.

MISSING EVIDENCE II

In his enumerated Argument VI., Willis, again referring to the missing vehicle and destroyed trailer, contends that he “was deprived of his fundamental rights to a fair trial when the trial court allowed the prosecutor to deliberately and intentionally destroy the evidence that would have proved appellant’s innocence.”

As previously noted, missing evidence issues were addressed on direct appeal, and it is accordingly not proper to relitigate those same issues in the present RCr 11.42 proceeding.

VALIDITY OF INDICTMENT

Willis contends that he received ineffective assistance because trial counsel failed to challenge the validity of his indictment. More specifically, it appears that Willis alleges that his indictment was defective because it refers to the use of a weapon when he (according to Willis) did not use a weapon, and because the indictment was not returned until more than 60 days after his arrest.

Again, the record on appeal does not contain the record of the trial proceedings. We do not have a copy of the indictment to review. As such, we are bound to assume that the omitted record supports the decision of the trial court. *Commonwealth v. Thompson, supra.*

EVIDENTIARY HEARING AND APPOINTMENT OF COUNSEL

Willis contends that he is entitled to an evidentiary hearing and appointment of counsel in connection with his RCr 11.42 motion.

A defendant is entitled to an evidentiary hearing on an RCr 11.42 motion only if the issues raised in the motion reasonably require such a hearing for determination. On the other hand, a hearing is not required if the motion, on its face, does not allege facts that would entitle the defendant to a new trial even if true or if the allegations are refuted by the record itself. *Maggard v. Commonwealth*, 394 S.W.2d 893, 894 (Ky. 1965). Moreover, if an evidentiary

hearing is not required, counsel need not be appointed. *Hemphill v.*

Commonwealth, 448 S.W.2d 60, 63 (Ky. 1968).

As discussed in the preceding sections of this opinion, the allegations of ineffective assistance raised by Willis are conclusively resolved from the record, and the trial court did not err by failing to conduct an evidentiary hearing. As no hearing was required, Willis was also not entitled to appointment of trial counsel.

CONCLUSION

For the foregoing reasons the judgment of the Bell Circuit Court is affirmed.

ALL CONCUR.

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