

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001411-MR

GEORGE B. COHEN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULZ GIBSON, JUDGE
ACTION NOS. 00-CR-002613 & 01-CR-000695

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: THOMPSON AND VANMETER, JUDGES; HENRY,¹ SENIOR JUDGE.

VANMETER, JUDGE: George B. Cohen appeals *pro se* from the Jefferson Circuit Court's denial of his motion for post-conviction relief pursuant to RCr²

11.42. We affirm.

¹ Senior Judge Michael L. Henry 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.

On September 21, 2001, a jury convicted Cohen of first-degree rape, sodomy, sexual abuse (two counts), robbery, and kidnapping. The next day he waived his right to a sentencing hearing in exchange for the Commonwealth's recommended sentences, enhanced to twenty years by virtue of his guilty plea to being a second-degree persistent felony offender (PFO II). The trial judge accepted the recommendation and Cohen was sentenced accordingly. According to the court's order, Cohen also "waived the right to appeal all issues."

Cohen filed a *pro se* RCr 11.42 motion to vacate the judgment on September 2, 2004, arguing that he received ineffective assistance of counsel. He claimed that trial counsel failed to advise him of his right to appeal as well as his right to have counsel appointed at public expense to assist him during the appeal process. Trial counsel was also accused of neglecting to inform Cohen of a plea offer of ten years' imprisonment. Cohen finally asserted that the trial court improperly allowed the Commonwealth to introduce certain evidence at trial, allegedly in violation of an agreement between the defense and the Commonwealth. The Jefferson Circuit Court denied Cohen's motion without conducting an evidentiary hearing. This appeal followed.

To succeed on a claim of ineffective assistance of counsel, a defendant must satisfy the two-prong test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and adopted by the Kentucky Supreme Court in *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985).

In short, a defendant must show that counsel's assistance was deficient and that such deficiency was so great as to prejudice the defendant. 466 U.S. at 687, 104 S.Ct. at 2064.

Cohen's claim that trial counsel did not advise him of his right to appeal and to have counsel appointed to assist during that process is entirely refuted by the record. More specifically, the video record of the 2001 plea and sentencing hearing shows that Cohen's counsel stated on the record that he had advised Cohen of his rights to appeal and to have counsel appointed on appeal, and that the right to appeal would be waived by Cohen's agreement to the Commonwealth's recommendation. Thus, the court did not err by denying this claim.

Next, Cohen alleges that he was afforded ineffective assistance because trial counsel failed to inform him of the Commonwealth's earlier offer to recommend a ten-year sentence in exchange for a guilty plea. He does not mention when such an offer was made, but the record provides evidence of only one plea offer prior to that which Cohen accepted. That offer provided for a sentence of ten years enhanced to twenty years by Cohen's guilty plea to PFO II. Regardless of whether counsel informed Cohen of the earlier offer, no prejudice occurred because twenty years' imprisonment was the end result of both the rejected and the accepted plea. Thus, he was not entitled to RCr 11.42 relief since, even if counsel's assistance could arguably be "determined to be deficient . . . it appears

the end result would have been the same[.]” *Brewster v. Commonwealth*, 723 S.W.2d 863, 864 (Ky.App. 1986).

Finally, Cohen claims that the trial court erred by allowing the Commonwealth to inform the jury that Cohen’s name was found in a sexual offenders’ data bank, even though defense counsel and the Commonwealth had agreed not to use the information if defense counsel did not challenge the credibility of the Commonwealth’s DNA analysts on cross-examination. The court allowed the introduction of the data bank evidence after determining that defense counsel had not honored the agreement.

This issue turns not on the effectiveness of counsel’s assistance but on the propriety of an evidentiary ruling, which should have been challenged, if at all, in a direct appeal. Post-conviction relief under RCr 11.42 “is limited to the issues that were not and could not be raised on direct appeal.” *Haight v. Commonwealth*, 41 S.W.3d 436, 441 (Ky. 2001). As noted above, Cohen waived his right to a direct appeal. Further, no error occurred when he was denied post-conviction relief relating to an evidentiary claim.

After the review of the record, we are not persuaded by Cohen’s claim that the court erred by failing to conduct an evidentiary hearing. Such a hearing was not required, as Cohen has raised no “issue[s] of fact which cannot be determined on the face of the record.” *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993).

For the foregoing reasons, the order of the Jefferson Circuit Court denying Cohen's request for post-conviction relief under RCr 11.42 is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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