

Commonwealth Of Kentucky

Court of Appeals

NO. 2007-CA-001267-MR

LEE ROY BREWER

APPELLANT

v. APPEAL FROM OWEN CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
INDICTMENT NO. 04-CR-00016

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND CAPERTON, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.

ROSENBLUM, SENIOR JUDGE: Lee Roy Brewer appeals the May 25, 2007, Order of the Owen Circuit Court denying his RCr² 11.42 motion to vacate, set aside or correct his judgment of sentence from his criminal conviction. We affirm.

¹ Retired Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

² Kentucky Rules of Criminal Procedure.

The Kentucky Supreme Court, in considering appellant's case on direct appeal, summarized the underlying facts as follows:

[o]n April 24, 2004, acting on information received during an unrelated situation, the police visited the home of Scott and Beverly Sizemore. The police immediately recognized the strong odor of marijuana emanating from within the Sizemores' home. Despite this, Scott Sizemore invited the police inside where, after obtaining his consent to search, they discovered several bags of marijuana. Sizemore also told the police that Appellant, Appellant's wife (Rosalee), Jacqueline Sims, and Dale Masden were involved in a scheme to smuggle marijuana from Mexico. Sizemore also informed the police that Masden might have recently returned home from Mexico with a large shipment of marijuana.

When police later arrived at Masden's home, Sims, who was dating Masden, allowed them inside and gave them permission to search the residence. That search yielded several bags of marijuana and numerous marijuana plants. Sims cooperated with the police and told them that she and Masden kept quantities of marijuana for Appellant, who distributed and sold it.

Sims also agreed to wear a wire during a visit to Appellant's home. On April 25, 2004, Sims went to Appellant's home and disclosed that Beverly and Scott Sizemore had been arrested. Appellant and Rosalee suggested that Sims should get rid of the marijuana she had in her home. Sims did not disclose that police had already confiscated the marijuana in her home but did tell them the police had confiscated the plants and her own personal supply of marijuana. Appellant then gave Sims an ammunition box in which to bury the marijuana.

The police then arrested Appellant and his wife, Rosalee. After obtaining a search warrant for the Brewers' property and conducting an initial search, police found no marijuana or any evidence of alleged drug trafficking; although the police did seize Appellant's firearms. However, a subsequent search of Appellant's property

(and the area adjacent thereto) yielded \$8,100 in cash, as well as some marijuana.

Scott Sizemore; Sims; Masden; and another suspect, Deborah Gibbs, all entered into plea agreements whereby they agreed to testify against Appellant and Rosalee. That testimony revealed an elaborate marijuana trafficking operation in which Masden drove to Texas to meet Gibbs and another person identified as “Terry,” whereupon they would drive to Mexico to pick up the load of marijuana. The marijuana would then be placed in the gas tank of an Oldsmobile that had been modified so that the tank would hold at least four gallons of gas but keep the marijuana protected. Once the tank was filled with fifty to sixty pounds of marijuana, Gibbs would then drive through a Mexican checkpoint, with the assistance of a member of the Mexican Army. Eventually, Gibbs or Masden would then drive to Monterey, Kentucky, where the marijuana would be removed, weighed, and stored in a freezer in Masden's trailer.

According to testimony, the financiers of the operation were Appellant and Rosalee. Masden, who did not directly sell the marijuana, would receive a flat \$5,000 fee from Appellant for bringing the marijuana from Mexico to Owen County, Kentucky. Although Appellant and Rosalee did not directly sell the marijuana either, they apparently acted as wholesalers who “fronted” the marijuana to street-level dealers on credit. According to Sizemore, he and Beverly made about \$200-\$400 per pound of marijuana they sold for Appellant, with most of those sales occurring at their residence.

Appellant eventually was convicted of one count of engaging in organized crime, four counts of trafficking in marijuana (five or more pounds), and four counts of trafficking in marijuana (over eight ounces) and was sentenced to serve sixty years in prison. He now appeals his conviction and sentence, as well as the trial court's order of forfeiture.

Brewer v. Commonwealth, 206 S.W.3d 343, 345-6 (Ky. 2006) (footnotes omitted).

Brewer's convictions were affirmed by the Kentucky Supreme Court, but reversed on the issue of property forfeiture. *Id.* On April 25, 2007, Brewer filed an RCr 11.42 motion to vacate, set aside or correct judgment and sentence, to which the Commonwealth filed a response. On May 25, 2007, the trial court entered an order denying Brewer's motion. This appeal followed.

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.* (internal citations omitted).

On appeal, Brewer raises multiple arguments and alleges multiple errors of the trial court. They are: failure to appoint counsel and hold an evidentiary hearing on issues that could not be resolved from the record alone, failure to address the merits of the issues raised and presented and failure to issue findings of fact and conclusions of law in regard to the issues raised and presented, failure to appoint appellate counsel, ineffective assistance of trial counsel, witness bribery by the Commonwealth, lack of evidence to support his convictions, suffering multiple charges for the same offense, failure to allow mitigating

evidence in support of a reduced prison term, failure to allow evidence of actual innocence, and cumulative error.

Brewer's argument that the trial court erred in failing to appoint counsel is without merit. The trial court is not under an obligation to appoint counsel to a party making an RCr 11.42 motion unless an evidentiary hearing is required. *Fraser v. Commonwealth*, 59 S.W.3d 448, 453 (Ky. 2001). This canon of not requiring the appointment of counsel results from the large volume of frivolous or meritless RCr 11.42 motions that are filed. *Id.* Brewer further argues that the trial court further erred by failing to hold an evidentiary hearing. We do not agree.

An evidentiary hearing is not necessary to consider issues already refuted by the record in the trial court.
Conclusionary allegations which are not supported with specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of discovery.

Hodge v. Commonwealth, 116 S.W.3d 463, 468 (Ky. 2003) (citation omitted).

Brewer has failed to show that the allegations in his RCr 11.42 motion were not refuted by the trial court record. Accordingly, the trial court's failure to hold an evidentiary hearing and thus appoint counsel was not error.

Brewer additionally argues that he was denied due process and equal protection when the Department of Public Advocacy was allowed to withdraw as appellate counsel. While this appeal was pending, the Kentucky Department of Public Advocacy filed a motion to withdraw with this Court and that motion was

granted pursuant to KRS³ 31.110. Because the granting of that motion was an action of this Court, it would be appropriately appealed to the Kentucky Supreme Court pursuant to CR⁴ 76.36(7). Accordingly, we will not address it within this opinion.

Brewer next argues that the trial court erred by failing to address the merits of the issues raised and presented and by failing to issue findings of fact and conclusions of law in regard to the issues raised and presented. The requirement for findings by the trial court in an RCr 11.42 proceeding can be found in RCr 11.42(6), which reads:

At the conclusion of the hearing or hearings, the court shall make findings determinative of the material issues of fact and enter a final order accordingly. If it appears that the movant is entitled to relief, the court shall vacate the judgment and discharge, resentence, or grant him or her a new trial, or correct the sentence as may be appropriate. A final order shall not be reversed or remanded because of the failure of the court to make a finding of fact on an issue essential to the order unless such failure is brought to the attention of the court by a written request for a finding on that issue or by a motion pursuant to Civil Rule 52.02.

As we have already indicated, no evidentiary hearing was held on Brewer's RCr 11.42 motion. Therefore, since there was no hearing, findings of fact were not required. *See, e.g., Stanford v. Commonwealth*, 854 S.W.2d 742, 744 (Ky.1993), cert. denied 510 U.S. 1049, 114 S.Ct. 703, 126 L.Ed.2d 669 (1994). Accordingly,

³ Kentucky Revised Statutes.

⁴ Kentucky Rules of Civil Procedure.

we hold that the court did not err in failing to issue findings of fact and conclusions of law in relation to Brewer's RCr 11.42 motion.

Brewer's next argument addresses ineffective assistance of counsel.

Kentucky has adopted the two-prong test of establishing ineffectiveness of counsel as outlined in *Strickland v. Washington*, 466 U.S. 668 (1984). *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985).

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687. The burden is on the defendant to establish ineffective assistance. *Strickland*, 466 U.S. at 690. In measuring prejudice, the relevant inquiry is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would be different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "It is not enough for the defendant to show that error by counsel had some conceivable effect on the outcome of the proceeding." *Sanders v. Commonwealth*, 89 sw3d 380, 386 (Ky. 2002).

Brewer argues to this Court that his trial counsel was deficient by failing to bring attention to the conflicting testimony of two police officer witnesses, by failing to mention “plea agreements” with Sims, Sizemore, Masden and Gibbs, by failing to mention the activities of one of the other suspects, by “allowing” Brewer to be charged with certain offenses and by failure to call additional defense witnesses.

The presentation of ineffective assistance, which must not be based on a claim already presented on direct appeal, fixes the burden on [appellant] to plead sufficient facts to establish that the conduct of defense counsel was objectively unreasonable and that a reasonable performance by counsel would have created a reasonable probability of a favorable result. *Mere speculation as to how other counsel might have performed either better or differently without any indication of what favorable facts would have resulted is not sufficient. Conjecture that a different strategy might have proved beneficial is also not sufficient.* The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel.

Hodge v. Commonwealth, 116 S.W.3d 463, 470 (Ky. 2003) (emphasis added) (internal citations and quotations omitted). Brewer has failed to show the court how any of these alleged deficiencies prejudiced the defense or that as a result he was deprived a fair trial. More importantly, with respect to each of his claims of ineffective assistance of counsel, Brewer has failed to satisfy the second prong of *Strickland*, by showing that, but for his counsel’s alleged errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. Accordingly,

we must conclude that the trial court correctly concluded that Brewer had not established a showing of ineffective assistance of counsel.

Brewer's next argument is that the plea agreements entered into between the other suspects and the Commonwealth in exchange for their testimony against Brewer serve as witness bribery. KRS 524.020, the governing statute on witness bribery, states that such an act requires the bestowment of a pecuniary benefit upon the party being bribed. Brewer argues that the witnesses were given "payments" in the form of never being arrested and never having to forfeit property. We do not believe these alleged "payments" to be within the common definition of "pecuniary" as intended by KRS 524.020. Accordingly, Brewer's argument pertaining to witness bribery is without merit.

The next argument presented by Brewer is that there was insufficient evidence to support his convictions. In its order confirming Brewer's conviction, the Kentucky Supreme Court held that the evidence adduced by the Commonwealth was overwhelming. This is an issue raised and rejected on direct appeal and thus will not be re-litigated in this proceeding by claiming that it amounts to ineffective assistance of counsel. *See Simmons, supra*, 191 S.W.3d at 561.

In conjunction with his claim of ineffective assistance of counsel, Brewer also argues that the trial court erred in its failure to allow mitigating evidence in support of a reduced prison term. Specifically, Brewer argues that the following evidence should have been presented: the forfeiture of Brewer's

property, the plea agreements between the Commonwealth and its witnesses and the income and job status of the witnesses (Gibbs, Sims, Masden and Sizemore). Because the forfeiture issue was reversed and remanded by the Supreme Court, that issue is rendered moot. With respect to the arguments made in reference to the plea agreements and the economic status of witnesses, we do not see this as true mitigating evidence to be considered during the sentencing phase of Brewer's trial. Rather, this information would have been relevant, if at all, during the guilt/innocence phase of Brewer's trial. Brewer has failed to show this Court any evidence which should have been allowed as mitigating evidence during his sentencing phase. This Court cannot speculate as to what additional mitigating evidence Brewer would have been entitled and accordingly, that argument fails.

Brewer's final arguments are that he was improperly charged multiple times for the same offense, that the trial court erred by failing to allow evidence of his innocence, and cumulative error. This Court will not address issues that were or should have been raised on direct appeal and therefore we will not review his arguments pertaining to improper multiple charges and innocence evidence. *See Simmons, supra*, 191 S.W.3d 557. *See also* RCr 11.42. Brewer has also offered no evidence of cumulative error and therefore that argument fails.

For the foregoing reasons, the May 25, 2007, Order of the Owen Circuit Court is affirmed.

ALL CONCUR.

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