

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001578-MR

MICHAEL P. BRIZENDINE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC J. COWAN, JUDGE
ACTION NO. 96-CR-001551

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: LAMBERT AND NICKELL, JUDGES; HENRY,¹ SENIOR JUDGE.

HENRY, SENIOR JUDGE: Michael P. Brizendine appeals from an order of the Jefferson Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. For the reasons stated below, 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 KRS 21.580.

FACTUAL AND PROCEDURAL BACKGROUND

On July 3, 1996, Brizendine and his co-defendant, George Hobbs, killed Jeffrey Wilson and Johnny Nash in the course of a drug transaction. On July 11, 1996, an indictment was returned against Brizendine charging him with two counts of murder; two counts of first-degree robbery; one-count of first degree burglary; and with being a second-degree persistent felony offender.

On February 9, 1998, the jury returned a verdict finding the appellant guilty of all charges. The jury recommended a total sentence, upon consideration of concurrent sentencing, of life without the possibility of parole for 25 years. On March 3, 1998, the trial court entered final judgment and sentencing consistent with the jury's verdict and sentencing recommendation. On November 16, 2000, the Supreme Court rendered an unpublished opinion affirming his conviction and sentence. *See* Case No. 1998-SC-0298-MR.

On August 31, 2001, the appellant filed a *pro se* motion for post-conviction relief pursuant to RCr 11.42. The motion generally alleged grounds for relief based upon ineffective assistance of counsel; and violations of the appellant's right to a fair trial, impartial jury, and due process of law because of perjured testimony and prosecutorial misconduct. The motion contained no factual basis whatsoever for the foregoing claims. At the same time the appellant filed a motion to hold his RCr 11.42 motion in abeyance "so that he may factually, accurately, and completely present his assertions and evidence to the Court." He also filed a motion for appointment of post-conviction counsel.

On September 20, 2001, the trial court entered an order granting the appellant's motion for appointment of counsel, and assigned him an attorney from the Department of Public Advocacy (DPA).² The order further stated "Defendant's attorney has 90 days to supplement." The DPA did not file a supplement within the prescribed time, and, indeed, the case thereafter remained dormant until June 27, 2006 – almost five years - when the appellant, by counsel, filed a "Motion to Submit on the Pleadings." The motion stated, in part, as follows:

Following appointment to the case herein, counsel met with the movant, reviewed the record with the assistance of staff and made an investigation of the movant's *pro se* allegations. After a review counsel has found no additional facts or issues for supplementation and therefore submits this action based upon the *pro se* pleadings.

In its response, the Commonwealth argued for summary dismissal of the appellant's post-conviction motion on the basis that it failed to specifically set forth the factual basis for his claims as required by RCr 11.42(2). On December 22, 2006, the Commonwealth filed an AOC Form 280 submitting the matter for final adjudication.

On January 8, 2007, the appellant, by counsel, filed a "Motion to Open the Record for Submission of Movant's *Pro se* Memorandum in Support of Relief." Appellant's 22-page *pro se* memorandum was attached to the motion and raised various grounds for post-conviction relief, including grounds beyond those

² Brian Thomas Ruff of the Department of Public Advocacy subsequently entered an appearance as the appellant's counsel in the cause.

stated in his original motion. The appellant requested that “in the interest of justice” the court allow submission of the *pro se* memorandum in support of relief. The Commonwealth responded, arguing that the filing was untimely. The appellant then filed a *pro se* reply to the Commonwealth’s filing asking that his Memorandum in Support of Relief be accepted, and that the trial court’s decision be delayed pending the appointment of private counsel to supplement the filing even further. In support of his request for appointment of private counsel the appellant argued that DPA counsel had deceived him, and that a conflict of interest had arisen between himself and the DPA that foreclosed a continuing relationship.

On February 23, 2007, the trial court entered an order denying the appellant’s motion for post-conviction relief; the order also denied the appellant’s motion to supplement the record with his *pro se* Memorandum in Support of Relief, along with the other pending motions. The trial court principally determined that the appellant’s supplemental memorandum was not timely, and that his original motion failed to set forth grounds for relief with sufficient specificity. This appeal followed.

DISCUSSION

As noted, the trial court denied the appellant’s post-convictions motion upon the principal grounds that his supplemental memorandum was not timely, and that his original motion failed to set forth grounds for relief with sufficient specificity. We accordingly structure our review consistent with these determinations.

TIMELINESS OF PRO SE MEMORANDUM

As previously noted, the jury returned its verdict and sentencing recommendation of February 9, 1998. The trial court entered final judgment and sentencing on March 3, 1998. The Supreme Court rendered its opinion affirming the convictions and sentence on November 16, 2000. The appellant filed his original pro se RCr 11.42 motion on August 31, 2001. The petition contained only conclusory allegations for relief without factual support. On September 20, 2001, the trial court appointed post-conviction counsel and allowed 90 days for the DPA attorney to supplement the original motion. A timely supplement was not filed, and the case lay dormant until June 27, 2006 – almost five years. It then came to light that the DPA could ascertain no legitimate issues upon which to supplement, and the appellant did not file his *pro se* Memorandum in Support of Relief until January 8, 2007. The trial court cogently described the appellant's *pro se* Memorandum in support of relief as follows:

A review of Brizendine's Pro se Memorandum reveals that his current counsel was correct in stating that there are "no additional facts or issues for supplementation" of the original pro se petition Brizendine filed in 2001. *See*, Motion to Submit on the Pleading filed June 27, 2006. In scattergun fashion, the memorandum rehashes those issues already rejected on appeal, raises issues without providing factual support or raises issues refuted by the record. For instance, Brizendine claims his counsel erred in not demanding a self-defense instruction; however, his defense at trial (and the one he clings to now) was that he was never at the crime scene and killed no one.³ In a

³ Aside from the obvious inconsistency these defenses present, his defense counsel argued on motion for directed verdict that the most the prosecution's evidence showed was that Brizendine used force to avoid becoming the victim of a robbery and, therefore, lacked the mens rea to

similar vein, he claims he had an alibi witness that defense counsel failed to call, and had prepared several pretrial motions that counsel refused to file; however, he neither identifies the witness nor describes the motions. He complains that the Commonwealth maintained at trial that he and his co-defendant stole victim Johnny Nash's wallet when, in fact, the wallet was collected as evidence at the trial [sic] scene; however, there is nothing on the evidence log he tenders that indicates the wallet did not belong to the other murder victim Jeffery Wilson.⁴ Finally, he complains that the instructions given the jury were defective, but the Supreme Court upheld them all, even though some were not properly preserved for appeal.

In summary, the appellant's supplemental memorandum was not particularly compelling in any event.

In denying the appellant's motion to supplement the record with his pro se memorandum into the record, the trial court stated as follows:

Most troubling to the Court, however, is the fact that Brizendine waited over six years from the date his conviction became final to provide any factual basis for his claims. He blames the delay on his court-appointed attorney, of course, but offers no explanation for his own lack of diligence. In Kentucky, the rule has always been that representation by counsel does not excuse a litigant from giving his case personal attention. *Hoskins v. Bloomer*, 201 S.W.2d 716, 716 (Ky. 1947); *Carter v. Miller*, 95 S.W.2d 29, 30 (Ky. 1936); and *Douthitt v. Guardian Life Ins. Co. of America*, 31 S.W.2d 377, 380 (Ky. 1930). A party must exercise "due foresight and

commit robbery. The trial court and the Supreme Court rejected this argument, in part, because there was ample evidence to prove Brizendine and his accomplice robbed their victims. Therefore, asking for the instruction would probably have been futile, and this Court would not second guess counsel's obvious choice of trial strategy.

⁴ Moreover, even had the wallet been Nash's, as noted in n. [4] the Supreme Court found there was other ample evidence to convict Brizendine of robbery.

diligence” and be “personally active” in preparing his case. *Hoskins* at 716; *Douthitt* at 380. Here, while Brizendine may be, as he repeatedly claims, “uneducated in the complicated science of the law,” he has proved himself quite capable of reading legal documents and corresponding with the outside world. He received a copy of the Court’s order of September 26, 2001 that granted his motion for a court-appointed attorney and gave him ninety days to supplement his pro se motion. Despite knowledge of this deadline that passed over five years ago, he now fails to describe the efforts he made, if any, to ascertain the status of his motion. Further, he offers no explanation as to why he failed to contact the Court years ago – as he has so often in the last month – to complain about the lack of progress. In his Motion Requesting Private Counsel, Brizendine now claims this delay “has reach[ed] the point where all parties involved could be prejudiced by faded memories [and] misplaced” documents. This plea falls on deaf ears in light of the fact his own inaction contributed to the delay.

Under *Bowling, supra.*, a motion to supplement the pleadings must be judged under CR 15.01, and leave “shall be freely given when justice so requires.”

However, when time for supplementing the pleadings has expired, CR 6.02(b) allows enlargement upon a showing of “excusable neglect” on the movant’s part. *See Hawes v. Cumberland Contracting Co.*, 422 S.W.2d 713, 715 (Ky. 1968). In Brizendine’s case, the time for supplementing his original pro se motion expired, at the earliest, ninety-one days after the Court granted his motion for court-appointed counsel. At the latest, in this Court’s opinion, the time to supplement expired on November 17, 2003, three years and one day after his conviction became final. *See* RCr 1.42(10) and (2). In either case, Brizendine must now make a showing of excusable neglect to supplement his original pleading and he has failed to do so. Therefore, his motion to supplement must be denied. (Emphasis added).

“Excusable neglect is ordinarily understood to have been the act of a reasonably prudent person under the same circumstances.” *Conlan v. Conlan*, 293

S.W.2d 710, 712 (Ky. 1956). For the reasons stated by the trial court, the appellant failed to make a showing of excusable neglect for failing to supplement his petition for over five years following being given 90 days to do so. It follows that the trial court did not abuse its discretion in finding the supplemental memorandum untimely, and denying appellant's motion to supplement the record therewith.

DENIAL OF RELIEF

The admission of the appellant's pro se Memorandum in Support of Relief having been denied, only the grounds for relief as stated in his original August 31, 2001, motion remain for our consideration. Those grounds were stated in the appellant's motion as follows:

In support of [his motion to vacate] movant states as follows:

. . . .

2. That Movant was denied his Constitutional Right to Counsel, Due Process of Law, and a Fair Trial, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, and Sections Seven, Eleven, and Fourteen of the Kentucky Constitution, by his trial counsel's rendering of Ineffective Assistance;

3. That Movant was denied his Constitutional Right to a Fair Trial, Impartial Jury, and Due Process of Law, in violation of the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, and the Seventh, Eleventh, and Twelfth Amendments to the Kentucky Constitution, through the Commonwealth's use of Perjured Testimony;

6. That Movant was denied his Constitutional Right to a Fair trial, Impartial Jury, and Due Process of Law in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and the Second,

Eleventh, and Twelfth Amendments of the Kentucky Constitution, through Prosecutorial [sic] Misconduct;

An examination of the above discloses that the appellant has provided no facts whatsoever in support of his grounds for relief.

In order to prevail in an RCr 11.42 proceeding, the movant must first allege in the motion specific facts that if true would entitle him to relief. RCr 11.42(2). The movant in an 11.42 motion must allege the grounds for relief with particularity. He must “state specifically the grounds on which his sentence is being challenged and the facts on which [he] relies.” RCr 11.42(2); *Stanford v. Commonwealth*, 854 S.W.2d 742, 748 (Ky. 1993). The appellant having failed to allege the facts upon which he relies with particularity, the trial court did not err in denying his motion for relief.

CONCLUSION

For the foregoing reasons the judgment of the Jefferson County is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Michael P. Brizendine, *pro se*
Eddyville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

David W. Barr
Assistant Attorney General
Frankfort, Kentucky