

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001969-MR

JAMES HUGHES

APPELLANT

v. APPEAL FROM FULTON CIRCUIT COURT
HONORABLE WILLIAM LEWIS SHADOAN, JUDGE
ACTION NO. 04-CR-00059

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, LAMBERT, AND WINE, JUDGES.

WINE, JUDGE: On July 22, 2004, a Fulton County grand jury returned an indictment charging James Hughes with one count each of first-degree sodomy, first-degree burglary, first-degree robbery, and first-degree wanton endangerment. The matter proceeded to a trial in December, 2004, which resulted in a mistrial. Thereafter, Hughes accepted the Commonwealth's offer to plead guilty to the

sodomy and robbery counts. The other counts were dismissed as merged. In exchange for the guilty plea, the Commonwealth recommended a total sentence of twenty-two and one-half years, which the trial court imposed.

On May 25, 2007, Hughes filed a motion to vacate the conviction pursuant to Kentucky Rules of Criminal Procedure (“RCr”) 11.42, alleging that he received ineffective assistance from his trial counsel. Hughes also filed motions requesting appointment of counsel and an evidentiary hearing on his RCr 11.42 motion. After considering the Commonwealth’s response, the trial court denied the motions without an evidentiary hearing. This appeal followed.

As a preliminary matter, the Commonwealth moves to dismiss the appeal as untimely, or in the alternative for an express declaration that this Court has jurisdiction to hear the appeal. The Commonwealth correctly points out that Hughes’ notice of appeal was filed more than thirty days after the trial court’s order denying the motion. Nevertheless, the untimely filing is not automatically grounds for dismissal of the appeal.

In *Robertson v. Commonwealth*, 177 S.W.3d 789 (Ky. 2005), the Kentucky Supreme Court addressed the issue of when a prisoner's *pro se* RCr 11.42 action will be deemed to have been filed. The Court declined to adopt the “prison mailbox rule,” set out in *Houston v. Lack*, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988), which deems a notice of appeal to be “filed” when the prisoner deposited it with prison authorities for mailing. *Id.* at 270-71, 108 S.Ct. at 2382. However, the Court recognized that prisoners' control over the filing process

is circumscribed by prison rules and procedures. Consequently, the Court held that if the *pro se* petitioner has otherwise complied with all of the requisites for filing a petition, the deadline for such filing is tolled on the date the prisoner delivers the correctly addressed petition to the proper prison authorities for mailing.

Robertson, 177 S.W.3d at 791, citing *State ex rel. Nichols v. Litscher*, 247 Wis.2d 1013, 635 N.W.2d 292, 298-99 (2001).

We conclude that the circumstances of this case warrant tolling of the time for filing an appeal. The trial court denied Hughes' RCr 11.42 by order dated July 20, 2007, but not entered until July 31, 2007. The docket sheet does not indicate that the clerk served the order on the parties. But in his notice of appeal, Hughes states that a copy of the order was mailed to him on August 21, 2007, and that he received the order on August 24, 2007. The certificate of service on Hughes' notice of appeal states that he mailed it on August 31, 2007. Hughes also mailed motions to proceed *in forma pauperis* and for appointment of counsel on August 31. But while the clerk filed the motions on September 6, the notice of appeal was not filed with the clerk until September 26, 2007.

In addition, the trial court signed a second order denying Hughes' RCr 11.42 motion on August 31, 2007, and entered it on September 10, 2007. The latter order specified that the "material issues raised by Defendant can be resolved from the face of the record." Hughes filed a notice of appeal dated September 26, and filed with the clerk on October 1, 2007.

We are concerned by the obvious delays in entry of the trial court's orders, as well as the delays in serving the orders on Hughes. Moreover, Hughes has established that he took prompt action to file a notice of appeal upon receiving notice of the trial court's orders. Therefore, we conclude that the deadline for filing the notice of appeal was tolled within thirty days from the entry of the trial court's first order. Consequently, this Court has jurisdiction to consider the merits of Hughes' appeal.

Hughes primarily argues that he received ineffective assistance from his trial counsel. In order to maintain an ineffective assistance of counsel claim, a movant must satisfy a two-part test showing that his counsel's performance was deficient and that the deficiency caused actual prejudice affecting the outcome of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). The burden falls on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; *Commonwealth v. Pelphrey*, 998 S.W.2d 460, 463 (Ky. 1999). In cases involving a guilty plea, the movant must prove that his counsel's deficient performance so seriously affected the outcome of the plea process that, but for counsel's errors, there is a reasonable probability that the movant would not have pleaded guilty but would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985); *Phon v. Commonwealth*, 51 S.W.3d 456, 459-60 (Ky. App. 2001).

In particular, Hughes contends that his trial counsel failed to adequately investigate exculpatory evidence. Had he known of this evidence, Hughes maintains that he would not have pleaded guilty. However, an evidentiary hearing is necessary only where the record does not conclusively refute the allegations in the motion. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). We agree with the trial court that the record clearly refutes Hughes' claims.

Hughes alleges that, prior to the second trial, his counsel told him that the Commonwealth had DNA evidence connecting him with the sexual assault on the victim. He notes that one of the tests performed prior to the first trial failed to connect him conclusively with the attack on the victim. However, the Commonwealth presented other forensic tests at the first trial connecting him with the assault. Furthermore, the Commonwealth had Hughes' t-shirt retested after the first trial, and that test revealed the presence of both Hughes' and the victim's DNA. Under the circumstances, Hughes has failed to show that he would not have pleaded guilty had he known of the ambiguous result on the first test.

Hughes also contends that his trial counsel failed to interview and secure exculpatory witnesses who would have provided an explanation for the blood splatters on his clothes. But Hughes presents no evidence that such witnesses existed or were available. Therefore, Hughes cannot show that his decision to plead guilty was affected by his trial counsel's failure to pursue this line of inquiry.

Accordingly, the order of the Fulton Circuit Court denying Hughes'

RCr 11.42 motion is affirmed.

ALL CONCUR.

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