

RENDERED: OCTOBER 1, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000503-MR

VIRGIL BRUMFIELD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 99-CR-001456

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: KELLER AND THOMPSON, JUDGES; HARRIS,¹ SENIOR JUDGE.

HARRIS, SENIOR JUDGE: Virgil Brumfield appeals from the Jefferson Circuit Court's order denying his motion for post-conviction relief pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. After a careful review of the record and briefs, and for the reasons stated herein, we affirm.

¹ Senior Judge William R. Harris 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.

In June 1999, Brumfield was indicted for assault in the first degree, murder, and for being a persistent felony offender (“PFO”) in the second degree. After a jury trial, Brumfield was found guilty of first degree manslaughter and sentenced to 20 years incarceration. He was also found guilty of being a PFO in the second degree, and his sentence was enhanced to 30 years. Brumfield appealed his conviction to the Supreme Court of Kentucky, which affirmed the judgment and conviction of the trial court. *See Brumfield v. Commonwealth*, No. 2001-SC-0851-MR (Ky. Sept. 18, 2003).

Thereafter, Brumfield filed a *pro se* RCr 11.42 motion alleging ineffective assistance of counsel. Brumfield’s original *pro se* motion was subsequently supplemented by counsel with an additional memorandum in support of the motion. In this memorandum, Brumfield also requested an evidentiary hearing. The trial court denied the motion, as well as an evidentiary hearing, by an opinion and order entered on February 24, 2009. Brumfield’s appeal is from that order.

We first address whether Brumfield’s original motion met the requirements for a motion for RCr 11.42 relief. RCr 11.42(2) states that:

The motion shall be signed and verified by the movant and shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion.

Although Brumfield named the motion a “Motion For This Court’s Ruling Pursuant to CR 52.01,” it appears in the memorandum attached to the motion that Brumfield intended the motion to include his RCr 11.42 claims. For instance, he states;

Next, the Petitioner[’s] [sic] RCr 11.42 claims that are presently known will be stated below. However, if this Court finds that the below claims will serve, if true, as means to appoint this Petitioner with a Counsel from the “DPA’s” Office, then please feel free to do so.

He then proceeds to list “Known Claims of Counsel’s Ineffectiveness,” which explain the grounds on which he claims his counsel was ineffective and the facts on which he relied to support his claims. He also requested the opportunity to supplement those claims at a later date if the need arose. Therefore, we find the motion to be sufficient to meet the requirements under RCr 11.42(2).

The Commonwealth argues that the lack of verification of the motion rendered the trial court without jurisdiction to address the merits of the motion. Neither the original motion filed by Brumfield nor the supplemental memorandum of law filed by Brumfield’s subsequent counsel contained a verification by Brumfield.

Brumfield counters that because the trial court reached the merits of the motion in its order denying the motion, and because the Commonwealth failed to object to the lack of verification, the issue of verification was waived. Kentucky courts have stated that a motion filed pursuant to RCr 11.42 that is not verified “*may be summarily dismissed.*” *Fraser v. Commonwealth*, 59 S.W.3d 448, 452

(Ky. 2001) (citing *Odewahn v. Ropke*, 385 S.W.2d 163, 164 (Ky. 1964)). While we agree that verification is an important component of the rule, in this case we will not substitute our opinion for that of the trial court with regard to the dismissal of the motion for lack of verification, particularly in light of the language in *Fraser* that says the trial court “may” dismiss the case.

Therefore, we will review the appeal on the merits. The burden of proof for RCr 11.42 motions lies with the accused. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). To succeed on a claim of ineffective assistance of counsel, “petitioner must show that ‘counsel’s representation fell below an objective standard of reasonableness.’” *Strickland v. Washington*, 466 U.S. 668, 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Further, “petitioner must show that ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Id.* at 694.

Brumfield first argues that his trial counsel should have impeached Renee Griffin, the girlfriend of the man Brumfield was accused of killing. At trial, Griffin stated the following about the victim, Gilbert Stivers: “Gilbert wasn’t a violent person, as far as getting into fights, especially at home. He was in a good mood.” Brumfield claims that his trial counsel was ineffective because he failed to question Griffin about her knowledge of Stivers’ prior violent behavior to impeach her testimony indicating that the victim “wasn’t a violent person.”

It appears from the record, however, that Brumfield’s counsel sought to admit evidence of the victim’s prior conviction for second degree wanton

endangerment, but that the trial court excluded the evidence.² Without that evidence in the record, had Griffin denied knowledge of the victim's prior conviction, it is not unlikely that the jury would have viewed Brumfield's counsel as unnecessarily and unfairly attacking the deceased victim without sufficient evidence to maintain such an attack, thus arousing the jury's ire against Brumfield.

Moreover, in view of other testimony offered at trial, trial counsel's impeachment of Griffin was not needed. Griffin testified that she had witnessed the victim violently attack and beat her daughter on another occasion, which directly contradicted her previous testimony that Stivers was not a violent person. Trial counsel's decision not to ask the question of Griffin falls within the penumbra of trial strategy and was reasonable under the circumstances. *See Moore v. Commonwealth*, 983 S.W.2d 479, 483 (Ky. 1998). Consequently, Brumfield is not entitled to relief pursuant to this allegation of ineffective assistance of counsel.

Brumfield also contends his trial counsel was ineffective in failing to request a jury instruction for wanton assault in the fourth degree. The jury found Brumfield guilty of manslaughter in the first degree. This finding necessarily required the jury's determination that Brumfield intended to inflict serious physical injury on Stivers.³ Since the jury found Brumfield guilty of an intentional crime,

² Brumfield could not appeal this issue because he raised it on direct appeal. Motions pursuant to RCr 11.42 must be limited to issues that were not and could not be raised on direct appeal. *Haight v. Commonwealth*, 41 S.W.3d 436, 443 (Ky. 2001).

³ Pursuant to KRS 507.030, a person is guilty of manslaughter in the first degree when "(a) [w]ith intent to cause serious physical injury to another person, he causes the death of such person or of a third person" or "[w]ith intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in subsection (1)(a) of KRS 507.020." (Emphasis supplied).

trial counsel's performance was not deficient when he failed to request a wanton fourth degree assault instruction.⁴ Even if counsel's performance is deemed deficient, Brumfield cannot meet the prejudice prong of the *Strickland* test and is not entitled to relief based on counsel's failure to request the instruction.

Lastly, Brumfield argues that the trial court erred when it overruled his post-conviction motion without first conducting an evidentiary hearing. RCr 11.42 requires a hearing only "if the answer raised a material issue of fact that cannot be determined on the face of the record." *Wilson v. Commonwealth*, 975 S.W.2d 901, 904 (Ky. 1998). As discussed above, the issue of trial counsel's performance can be resolved on the face of the record, and the trial court did not err in denying Brumfield's request for an evidentiary hearing.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Jack Conway
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⁴ In *Hager v. Commonwealth*, 41 S.W.3d 828 (Ky. 2001), the Kentucky Supreme Court held that it is improper to give an instruction on fourth-degree assault as a lesser-included offense of homicide.

