

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001807-MR

CHRISTOPHER B. WINN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 06-CR-00111

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CAPERTON, MOORE, AND VANMETER, JUDGES.

MOORE, JUDGE: Christopher B. Winn, proceeding *pro se*, appeals the Fayette Circuit Court's order denying his motion to vacate, alter, or amend his sentence pursuant to RCr¹ 11.42. After a careful review of the record, we affirm because Winn did not receive the ineffective assistance of counsel and because his remaining claims should have been brought on direct appeal.

¹ Kentucky Rule of Criminal Procedure.

I. FACTUAL AND PROCEDURAL BACKGROUND

Following a jury trial, Winn was convicted of: (1) trafficking in a controlled substance, first degree; (2) trafficking in marijuana less than eight ounces; (3) possession of drug paraphernalia, first offense; and (4) being a persistent felony offender (PFO) in the first degree. Winn was sentenced to serve ten years of imprisonment for the first-degree trafficking in a controlled substance conviction, and that sentence was enhanced to fifteen years of imprisonment due to his PFO-1st conviction. Winn was also sentenced to serve six months for his trafficking in marijuana conviction and six months for his possession of drug paraphernalia conviction, and those sentences were ordered to run concurrently. Therefore, Winn's total sentence for these convictions was fifteen years of imprisonment, and this sentence was ordered to run consecutively with any prior felony sentence he had to serve.

Winn moved, pursuant to RCr 11.42, to vacate, alter, or amend his sentence. In his motion, Winn alleged, *inter alia*, that he had received the ineffective assistance of trial counsel during the plea process. The circuit court entered an order holding that Winn had properly been found to be an indigent person during the trial proceedings and that the court was not required to consider the financial circumstances of Winn's family in determining whether he was indigent, thus requiring the appointment of counsel. The circuit court also held that Winn's claim that the trial court denied him the right to be represented by counsel of his choosing when the court denied his motion for a continuance of his

trial was a claim that should have been brought on direct appeal rather than in his RCr 11.42 motion. The court then held an evidentiary hearing concerning Winn's ineffective assistance of counsel claim and subsequently entered an order denying his RCr 11.42 motion. In its order, the court reasoned as follows:

Based upon the testimony and the arguments of counsel, the Court finds there to be no credible evidence that [trial counsel] gave the Defendant bad advice regarding the law of Persistent Felony Offender First Degree. The Court also finds there to be no credible evidence that [trial counsel] was deficient in explaining the law so that the Defendant was confused.

Winn now appeals, contending as follows: (1) his trial counsel rendered ineffective assistance during the plea process; and (2) the trial court erred in denying his claim that he was not indigent when he had a paid and retained attorney to represent him and the court erred in denying his motion for a continuance to provide that attorney enough time to prepare for trial.

II. STANDARD OF REVIEW

In a motion brought under RCr 11.42, “[t]he 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.” *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151, 159 (Ky. 2009). An RCr 11.42 motion is “limited to issues that were not and could not be raised on direct appeal.” *Id.*

III. ANALYSIS

A. CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL

Winn first alleges that his trial counsel rendered ineffective assistance during the plea process. Specifically, Winn contends that counsel rendered ineffective assistance by mistakenly informing Winn that the PFO statute could not be used to enhance his trafficking in a controlled substance charge because his prior offenses included a first-degree possession of a controlled substance conviction, and the offenses had to be the same to apply the PFO statute. Winn argues that his trial counsel told him that because all of his prior felony convictions concerned the “Controlled Substances Act,” the persistent felony offender statute should be applied like a second or subsequent offense enhancement because the prior offense must be exactly the same or have a much more severe penalty than the current charge for the persistent felony offender statute to be used to enhance a current conviction.

To prove that he received the ineffective assistance of counsel, thus warranting a reversal of his conviction, Winn must show that: (1) counsel’s performance was deficient, in that it fell outside “the wide range of reasonable professional assistance”; and (2) this deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 689, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).

During the evidentiary hearing, Winn testified in accord with the claim he now raises on appeal, *i.e.*, that he rejected the plea offer because his trial

counsel told him that the persistent felony offender statute could not be used to enhance his trafficking conviction because his prior offense had merely involved possession. However, Winn admitted that based on his prior convictions, he could have been charged in this case with trafficking, second or subsequent offense, but in lieu of charging him with that, he was charged with trafficking and PFO-1st. He acknowledged that he understood he could not have been charged with both trafficking, second or subsequent offense, and PFO-1st, because to do so would require the same prior conviction to be used to enhance his current sentence both ways, *i.e.*, as a second or subsequent offense and as a PFO.

Winn's trial counsel testified at the evidentiary hearing that he remembered advising Winn, whom he said did not want to plead guilty, that if he went to trial, and he was convicted of trafficking, he could have received a sentence of ten to twenty years of imprisonment. Trial counsel attested that he told Winn he was eligible to receive a PFO-1st conviction. Counsel testified that, if the jury had convicted Winn of possession of a controlled substance rather than trafficking in a controlled substance, because he had been convicted of possession of a controlled substance previously, the prosecutor in the case at hand would then have had the choice of either seeking Winn's conviction as a second or subsequent offense, or as a PFO-1st conviction. Trial counsel also attested that he would have never told Winn that the prosecutor could not obtain a conviction for PFO-1st in the current case.

The circuit court denied Winn's RCr 11.42 motion, finding that there was "no credible evidence that [trial counsel] gave the Defendant bad advice regarding the law of Persistent Felony Offender First Degree." Additionally, the court found "there to be no credible evidence that [trial counsel] was deficient in explaining the law so that the Defendant was confused."

A reviewing court must "defer to the findings of fact and determinations of witness credibility made by the trial judge." *Commonwealth v. Bussell*, 226 S.W.3d 96, 99 (Ky. 2007). Upon reviewing the video tape of the evidentiary hearing, we do not find that the circuit court clearly erred in its findings of fact and credibility determinations. Winn's trial counsel, who had approximately twenty-five years of experience, testified that he told Winn he was eligible to receive a PFO-1st conviction. Therefore, because the testimony of Winn's counsel contradicted the ineffective assistance of counsel claim that Winn made, and because we cannot say that the trial court erred in finding counsel's testimony more credible than Winn's, Winn has failed to show that the circuit court erred in denying his RCr 11.42 motion based on this claim.

B. CLAIMS THAT CIRCUIT COURT ERRED IN DENYING WINN'S CLAIM REGARDING INDIGENCY AND HIS CLAIM REGARDING MOTION FOR A CONTINUANCE

Winn next contends that the trial court erred in denying his claim that he was not indigent when he had a paid and retained attorney to represent him and that the court erred in denying his motion for a continuance to provide that attorney enough time to prepare for trial. However, because these claims could have been

raised on direct appeal, we will not consider them in regard to an RCr 11.42 motion. *Simmons*, 191 S.W.3d at 561.

Accordingly, the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Christopher Winn
Pro se
Burgin, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky
Frankfort, Kentucky

Jason B. Moore
Assistant Attorney General
Frankfort, Kentucky