

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001244-MR

KHALID BRYANT

APPELLANT

v. APPEAL FROM LYON CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL, III, JUDGE
ACTION NO. 07-CR-00003

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS AND DIXON, JUDGES; ISAAC,¹ SENIOR JUDGE.

ISAAC, SENIOR JUDGE: Khalid Bryant appeals from a June 17, 2009, order of the Lyon Circuit Court which denied his motion for relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Bryant argues that he was denied his right to effective assistance of counsel when he entered a plea of guilty to an

¹ Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

assault charge. Because Bryant failed to raise this issue in the motion that was denied by the trial court, and because the trial court correctly held that Bryant had not complied with the requirements of RCr 11.42(2), we affirm.

Bryant, who is an inmate at the Kentucky State Penitentiary, was indicted for first-degree assault against a fellow inmate. He entered a plea of guilty to assault under extreme emotional disturbance pursuant to an agreement with the Commonwealth. Under the terms of the agreement, which Bryant and his attorney both signed, the Commonwealth offered to amend the charge to assault under extreme emotional disturbance and to recommend a sentence of two and a half years “consecutive to any sentence the defendant is now serving.” Bryant also signed a motion to enter a plea of guilty, in which he acknowledged that he understood the rights he was waiving by entering the plea, that the plea was “freely, knowingly, intelligently and voluntarily made,” that he had been represented by competent counsel, and that he understood the nature of the proceeding and all matters contained in the document. On March 7, 2008, the circuit court entered a final judgment and sentence in accordance with the terms of the plea agreement.

On May 11, 2009, Bryant filed a form styled “Motion to Amend Sentence” requesting the court to run his two and a half year sentence on the assault charge concurrently with the five-year sentence he was already serving for receiving

stolen property and fleeing and evading police. As grounds for the request, he pointed out that prior to the assault charge, he had been a non-violent offender. Since the charge, he contended that he had reformed, and had been moved to a larger housing unit which allowed him to interact and be social with his peers. He also stated that he held down jobs in prison as a janitor and librarian and had completed several Bible study classes.

On May 11, 2009, Bryant filed an RCr 11.42 motion to vacate his conviction and sentence for assault under extreme emotional disturbance. The motion was also submitted on a preprinted form, but Bryant did not fill out the section which asked him to state why the court should vacate his conviction and sentence.

On June 17, 2009, the circuit court entered two orders denying the motions. The first order addressed Bryant's motion to amend sentence, which it treated as a motion made pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. The court stated that insufficient grounds existed to modify the sentence and denied that motion. In its other order, the court denied RCr 11.42 relief for failure to comply with section (2) of the rule, which provides for summary dismissal if the movant fails to state specifically the grounds and supporting facts on which the sentence is being challenged.

Bryant mailed a notice of appeal dated June 23, 2009, to the Lyon Circuit Clerk stating that he was appealing from the trial court's order of June 17, 2009, that dismissed with prejudice his RCr 11.42 motion for relief. The notice was filed by the Lyon Circuit Court Clerk on July 1, 2009.

On June 25, 2009, Bryant filed a second, handwritten RCr 11.42 motion requesting the court to alter, amend or vacate the two orders it had entered on June 17, 2009. For the first time, Bryant argued that he was deprived of effective assistance of counsel in entering his guilty plea. He contended that his counsel was ineffective for failing to discuss a defense of insanity or extreme emotional distress and for failing to investigate his case and interview witnesses to obtain statements on Bryant's behalf. On August 5, 2009, the circuit court denied this second RCr 11.42 motion. The record on appeal does not contain a notice of appeal from this order.

Bryant then filed an appellate brief which raised his claims of ineffective assistance of counsel, and also argued that the trial court had erred in failing to hold an evidentiary hearing on the RCr 11.42 motion.

We are unable to review Bryant's claims of ineffective assistance of counsel because the order from which he appealed denied a motion which did not raise these issues. "The function of the Court of Appeals is to review possible errors made by the trial court, but if the trial court had no opportunity to rule on the question, there is no alleged error for this court to review." *Kaplon v. Chase*, 690 S.W.2d 761, 763 (Ky.App. 1985). At the time the trial court entered the June 17, 2009, order from which Bryant appeals, Bryant had not yet submitted his second RCr 11.42 motion setting forth his claims of ineffective assistance of counsel.

The trial court's reason for denying the first motion was Bryant's failure to comply with the requirements of RCr 11.42(2), which provides that

[t]he 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.

The trial court's denial of the motion was fully in compliance with this statutory provision. "The RCr 11.42 motion must set forth all facts necessary to establish the existence of a constitutional violation. The court will not presume that facts omitted from the motion establish the existence of such a violation." *Hodge v. Commonwealth*, 116 S.W.3d 463, 468 (Ky. 2003), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). No evidentiary hearing was required because the motion failed to raise any issues of fact "that cannot be determined on the face of the record." *Stanford v. Commonwealth*, Ky., 854 S.W.2d 742, 744 (1993), *aff'd*, *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989).

The June 17, 2009, order denying Bryant's RCr 11.42 motion is therefore affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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