

RENDERED: OCTOBER 12, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000693-MR

MARC NICELEY

APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE MARTIN J. SHEEHAN, JUDGE
ACTION NO. 05-CR-00556

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, KELLER AND MAZE, JUDGES.

MAZE, JUDGE: Appellant, Marc Niceley, appeals from an order of the Kenton Circuit Court denying his motion under Rule 11.42 of the Kentucky Rules of Criminal Procedure (“RCr”) without first conducting an evidentiary hearing. After careful review of the record in this case, we affirm the trial court’s order.

On March 2, 2007, a jury convicted Marc Niceley of attempting to murder his wife, who was left severely injured and with no memory of the

incident. Niceley was sentenced to fourteen years' imprisonment. Niceley immediately appealed his conviction to this Court on several grounds: (1) that the trial court denied his right to a fair trial when it denied Niceley the opportunity to question his wife and limited certain medical testimony at a hearing to determine her competency as a witness; (2) that his wife was not competent to testify at trial; and (3) that the admission of a list of eleven prior incidences between Niceley and his wife was improper, as the list was not relevant and improperly refreshed the memory of Niceley's wife on the stand. This Court disagreed and affirmed his conviction. *See* 2008 WL 3164279. The Supreme Court of Kentucky declined to review the case.

On April 26, 2010, Niceley filed a *pro se* RCr 11.42 motion and a twenty-page memorandum in support of that motion. Niceley alleged ineffective assistance of counsel at trial, as well as prosecutorial and judicial misconduct. Niceley also took issue with, among many other things, what he deemed to be inaccurate testimony against him at trial and a "series of prejudicial errors" committed by the court. Niceley requested an evidentiary hearing based on his claims. On May 24, 2010, the trial court entered an order appointing Niceley counsel from the Kentucky Department of Public Advocacy. On December 13, 2010, Niceley's appointed counsel submitted notice to the court that she believed Niceley's original pleadings and memoranda sufficiently addressed the issues and would not be supplemented.

In an order entered March 30, 2011, the trial court overruled Niceley's RCr 11.42 motion without holding a hearing. As a basis for its denial of the motion, the court stated that Niceley's motion failed to "state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds," as RCr 11.42 requires. The court also found that at least one of Niceley's claims should have been, but was not, raised on direct appeal, therefore, it could not be raised under RCr 11.42. The court went on to hold that Niceley's remaining claims were clearly refuted by the trial record, allowing for the denial of Niceley's motion without the benefit of a hearing. This appeal followed.

On appeal, Niceley makes the following claims: (1) that he was denied a fair trial due to the conduct of the Commonwealth and police, who he claims "manufactured" the case against him; (2) that his appointed counsel was ineffective both at trial and during post-conviction proceedings; and (3) that the trial court abused its discretion by denying his motion without a hearing. We disagree with Niceley on all three points.

We briefly address Niceley's claim of prosecutorial and official misconduct by the Commonwealth and its witnesses at trial, as it is the easiest with which to dispose. "It is an established principle that this Court will not address an issue which has been raised in a direct appeal or which should have been raised in a direct appeal." *Brown v. Commonwealth*, 788 S.W.2d 500, 501 (Ky. 1990); *See*

also *Bowling v. Commonwealth*, 80 S.W.3d 405, 416 (Ky. 2002); *Baze v. Commonwealth*, 23 S.W.3d 619, 626 (Ky. 2000) *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). Further, “[i]t is not the purpose of RCr 11.42 to permit a convicted defendant to retry issues which could and should have been raised in the original proceeding, nor those that were raised in the trial court and upon an appeal considered by this court.” *Thacker v. Commonwealth*, 476 S.W.2d 838 (Ky. 1972). It is clear from the record of Niceley’s initial appeal to this Court that Niceley did not raise the issue of prosecutorial and official misconduct. Such an issue should have been raised at that time and cannot be retried now pursuant to RCr 11.42. Therefore, the trial court’s ruling as to Niceley’s claims of prosecutorial and official misconduct is affirmed without further consideration by this Court.

We now consider whether the trial court erred in denying Niceley’s RCr 11.42 motion without the benefit of an evidentiary hearing. RCr 11.42 sets out clear requirements for a motion filed under the rule. “The motion . . . 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.” RCr 11.42(2). The rule goes on to state, “[i]f [the motion] raises a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing . . .” RCr 11.42(3). The Supreme Court has interpreted this provision to mean “[a]n evidentiary hearing is necessary only when the record does not

conclusively refute the allegations in the motion. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). The issue upon review of the denial of a RCr 11.42 motion without a hearing is whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction. *Baze*, 23 S.W.3d at 622; *Lewis v. Commonwealth*, 411 S.W.2d 321 (Ky. 1967). Therefore, to resolve the greater issue of whether the trial court was required to grant Niceley a hearing on his claims, we must first analyze Niceley's claims of ineffective assistance of counsel and the facts surrounding them.

The Supreme Court has recently and emphatically held, “[ineffective assistance of counsel] claims are limited to counsel’s performance on direct appeal; there is no counterpart for counsel’s performance on RCr 11.42 motions or other requests for post-conviction relief.” *Sanders v. Commonwealth*, 339 S.W.3d 427, 435 (Ky. 2011)(citing *Hollon v. Commonwealth*, 334 S.W.3d 431 (Ky. 2010)). We therefore decline to consider Niceley’s claim of ineffective assistance by his post-conviction counsel appointed to assist him with his RCr 11.42 motion.

Niceley also claims that his trial counsel provided ineffective assistance for purposes of his Sixth Amendment right to counsel. In reviewing this issue, judicial scrutiny of counsel’s performance must be highly deferential. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel’s action is strongly presumed to have been within the wide range of reasonable, professional assistance. *Id.* “[T]he benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the

proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Id.* at 686. A defendant 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. The Kentucky Supreme Court has also held that “[c]ounsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won.” *Gilliam v. Commonwealth*, 652 S.W.2d 856, 858 (Ky. 1983)(citing *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992).

The record in this case shows nothing in the conduct of Niceley’s counsel at trial approaching the level of ineffectiveness the law requires for his motion to succeed. Niceley claims his trial counsel failed to adequately “challenge the prosecutor’s actual handling of this case,” including the testimony of Niceley’s wife and the expert testimony regarding her capacity to testify. Such general accusations are based solely in hindsight and could easily be held as lacking sufficient specificity under RCr 11.42. Nevertheless, as the trial court pointed out in its order, the record from trial clearly shows counsel’s continuous efforts to exclude evidence and testimony, including that of experts proffered by the Commonwealth regarding the competency of experts and Niceley’s wife. These efforts also included at least five Motions *in Limine* and a seven-page Motion for New Trial and Judgment of Acquittal.

Niceley also attacks the performance of his trial counsel on the grounds that they did not file a change of venue despite what he calls “a great deal

of press.” While it is true that Niceley’s counsel did not seek a change of venue, that fact alone is insufficient for a finding that he was ineffectively represented and could quite easily be explained away as part of counsel’s trial strategy. Niceley’s motion also fails to state a single specific instance which would have made obvious his counsel’s mistake in not requesting a change of venue. Therefore, Niceley’s motion lacks the required specificity under RCr 11.42 and more significantly, it fails to demonstrate that his counsel’s assistance was so unprofessional and prejudicial to his case as to be “ineffective” under *Strickland*’s very high standard.

Finally, the case against Niceley was substantial, with testimony from several individuals other than his wife, including a ballistics expert. Viewing the totality of the evidence in the case, it cannot be said that, but for his counsel’s alleged error, the result of the trial would have been different. Nor can it be said that counsel’s alleged error on any one issue lost him a case “he otherwise would probably have won.” *See Gilliam, supra*. The record simply reflects neither.

Accordingly, we find that the facts of the case as they existed in the record were sufficiently dispositive of the issues raised in Niceley’s RCr 11.42 motion. Even overlooking the motion’s general lack of specificity, the trial court correctly held that Niceley’s claims of ineffective assistance of counsel are easily refuted by the documented conduct of his counsel at trial, making an evidentiary hearing unnecessary under RCr 11.42(3). Therefore, the order is affirmed.

ALL CONCUR.

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