

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000866-MR

ROCKY KING

APPELLANT

v. APPEAL FROM MCCREARY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NO. 06-CR-00005

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: ACREE, CLAYTON AND DIXON, JUDGES.

ACREE, JUDGE: Rocky King appeals the McCreary Circuit Court's rejection of the collateral attacks he mounted against his convictions for complicity to commit murder and first-degree robbery. We affirm.

King was indicted for complicity to commit capital murder following the robbery and death of Morris Ray King on December 15, 2005. Four co-defendants were indicted on various charges involving the same incident. Two of the suspects

proceeded to trial, while King and his remaining co-defendants entered guilty pleas. On July 20, 2007, King was sentenced to a total of twenty-five years' imprisonment in accordance with the Commonwealth's offer.

Several years later, King became displeased with the deal he had struck and on January 11, 2011, he filed a document entitled, "Motion for Leave to File RCr¹ 11.42 Late or, in the Alternative, Motion to File CR² 60.02(e)[,] (f)."

Accompanying this motion was a memorandum presenting King's argument that he was entitled to CR 60.02 relief. The circuit court denied King's request to submit an RCr 11.42 motion, presumably because more than three years had elapsed since his criminal conviction had become final, but considered his arguments with respect to CR 60.02(e), (f). King alleged his trial counsel had effectively coerced him into taking the plea deal. The motion was denied on its merits, and King appealed to this Court.³

King requests that we reverse the circuit court's denial of his CR 60.02 motion on two grounds: (1) that his allegation of ineffective assistance of counsel raised issues which could not be resolved from the record and therefore required a hearing; and (2) that his plea deal was not entered voluntarily because his trial counsel coerced him to accept a plea bargain he did not wish to enter.

¹ Kentucky Rule of Criminal Procedure.

² Kentucky Rule of Civil Procedure.

³ On appeal, King has not protested the circuit court's refusal to consider his RCr 11.42 motion.

In support of this collateral challenge to his conviction, King makes the following representations: his attorney conspired with the attorneys representing his co-defendants to concoct a series of stories he claims are all lies and inconsistent with one another. The conspiratorial plan was for the co-defendants to create such confusion with their stories that jury members would be unable to ascertain who was actually to blame for the victim's death. The goal of this plan was not to secure a verdict of not guilty for one or all of the co-defendants, but to give one co-defendant, Danny Bryant, a better chance of avoiding the death penalty. The plan required King to accept a guilty plea so as to "deflect attention away from Danny Bryant and save Bryant from the death penalty." (Appellant's brief, 6).

King claims he instructed his attorney to prepare a defense which included naming Bryant as the true and only perpetrator of the crimes which resulted in the victim's death. King alleges his attorney informed him that "the only way out of this case" was to participate in the jury confusion plan. (Appellant's brief, 7). This caused King to fear that his co-defendants would turn against him and his "[trial] counsel would abandon him" if he insisted upon proceeding to trial to proclaim his innocence.

King has made very serious allegations against his trial attorney, and we do not take matters such as these lightly. The Sixth Amendment to the United States Constitution protects a criminal defendant's right to a fair trial. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674 (1984).

“The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution” to which they are entitled.” *Id.* (citations and quotation marks omitted).

Despite the Sixth Amendment’s protections, however, a defendant’s ability to raise a collateral attack on his conviction is not unlimited. More precisely, a defendant cannot use CR 60.02 to raise matters which should have properly been brought under an RCr 11.42 motion and within the timeframe provided in that Rule.

[A] defendant is required to avail himself of RCr 11.42 while in custody under sentence or on probation, parole or conditional discharge, as to any ground of which he is aware, or should be aware, during the period when this remedy is available to him. Final disposition of that motion, or waiver of the opportunity to make it, shall conclude all issues that reasonably could have been presented in that proceeding. The language of RCr 11.42 forecloses the defendant from raising any questions under CR 60.02 which are “issues that could reasonably have been presented” by RCr 11.42 proceedings.

Gross v. Commonwealth, 648 S.W.2d 853, 857 (Ky. 1983).

Here, RCr 11.42 was the appropriate procedure for King’s collateral challenge, and all of the arguments presented in his CR 60.02 motion could have been raised in a timely RCr 11.42 motion. That rule imposes a three-year limitation on collateral attacks for reasons the defendant knew or should have known. RCr 11.42(10). King knew of the alleged coercion even before his sentencing because the scheme in which he accuses his trial attorney of

participating was complete upon entry of King's guilty plea. He was required, then, to raise these grounds of collateral attack in the three-year window provided by RCr 11.42. Because he did not, he cannot avail himself of CR 60.02 to raise those matters now.

For this reason, we affirm the McCreary Circuit Court's denial of King's request for CR 60.02 relief.

ALL CONCUR.

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