RENDERED: JULY 6, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001232-MR

BRAD DENNY — APPELLANT

v.

APPEAL FROM MCCREARY CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 01-CR-00048

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE, STUMBO, AND VANMETER, JUDGES.

MOORE, JUDGE: Brad Denny[1] appeals the McCreary Circuit Court's order denying his CR[2] 60.02 motion for relief from the court's judgment convicting him

[1] We note that at times in the record, Denny's last name is spelled "Denney." However, because he spelled it "Denny" in his notice of appeal filed in the present appeal, we will use that spelling in this opinion.

[2] Kentucky Rule of Civil Procedure.

of murder. After a careful review of the record, we affirm because Denny's claims could have been brought in a prior motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Denny was indicted on charges of murder and first degree robbery. He ultimately entered a guilty plea to the murder charge and, in exchange for his plea, the Commonwealth dismissed the robbery charge. Denny was sentenced to life imprisonment, as specified in his plea agreement.

Denny moved to vacate his sentence pursuant to RCr[3] 11.42. The circuit court denied his motion without holding an evidentiary hearing. However, on appeal, this Court reversed and remanded, ordering the circuit court to hold an evidentiary hearing on the matter. *See Denney v. Commonwealth*, No. 2004-CA-000571-MR, 2005 WL 991195, *1 (Ky. App. Apr. 29, 2005) (unpublished). The circuit court held the hearing and again entered an order denying Denny's RCr 11.42 motion. On appeal, this Court affirmed. *See Denney v. Commonwealth*, No. 2007-CA-001384-MR, 2008 WL 2941140, *1 (Ky. App. Aug. 1, 2008) (unpublished). The Kentucky Supreme Court subsequently denied discretionary review. *See Denney v. Commonwealth*, No. 2008-SC-000614-D (Ky. 2009) (unpublished).

Denny filed his first CR 60.02 motion in April 2009, contending that he "did not qualify for murder but for manslaughter because of extreme emotional disturbance." The Commonwealth states in its appellate brief that a hearing was

[3] Kentucky Rule of Criminal Procedure.

held on the motion and that the circuit court denied the motion. The Commonwealth cites to the video recording of the hearing as evidence that the court denied the motion. Upon review of the written record, it does not appear that a written order was entered denying the CR 60.02 motion. This Court has frequently held that the court speaks only by its written record. *Holland v. Holland*, 290 S.W.3d 671, 675 (Ky. App. 2009). Therefore, because no written order was entered denying the motion, the alleged oral denial of Denny's CR 60.02 motion in May 2009 is a nullity.

Denny filed a second CR 60.02 motion in October 2010, again asserting that his murder conviction should have been a manslaughter conviction due to his extreme emotional disturbance. He also alleged that he received the ineffective assistance of trial counsel when counsel: (a) failed to advise him of a viable trial defense of extreme emotional disturbance; (b) advised him to enter a guilty plea after failing to ensure that Denny's witnesses would appear in court to testify at trial; and (c) failed to advise him of the defense of voluntary intoxication. Denny contended that the defenses of extreme emotional disturbance and voluntary intoxication would have permitted the jury to consider the lesser-included-offense of first-degree manslaughter as an alternative to a murder conviction.

The circuit court denied Denny's CR 60.02 motion. The court held that Denny's claims should have been raised in his RCr 11.42 motion and, therefore, they were not appropriately brought in his CR 60.02 motion.

Denny now appeals, contending that he received the ineffective assistance of post-conviction counsel during his RCr 11.42 proceedings because his ineffective assistance of trial counsel claims should have been presented in his RCr 11.42 motion. Denny also asks this court to recognize a claim of ineffective assistance of post-conviction counsel.

II. ANALYSIS

Denny's claim fails. We first note that Denny did not raise his claim of the ineffective assistance of post-conviction counsel in the circuit court. Denny cannot "feed one can of worms to the trial judge and another to the appellate court." *See Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976). Therefore, because he did not raise this claim below, it is not reviewable on appeal, unless Denny can demonstrate palpable error affecting his rights. *See Bowling v. Commonwealth*, 981 S.W.2d 545, 552 (Ky. 1998).

In *Bowling*, the Kentucky Supreme Court addressed a claim of the ineffective assistance of post-conviction counsel. The Court held that because "'there is no constitutional right to an attorney in state post-conviction proceedings[, . . .] a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.'" *Bowling*, 981 S.W.2d at 552 (quoting *Coleman v. Thompson*, 501 U.S. 722, 752, 111 S.Ct. 2546, 2566, 115 L.Ed.2d 640 (1991)).

Recently, in *Martinez v. Ryan*, 132 S.Ct. 1309, 1315 (2012), the United States Supreme Court modified its holding in *Coleman* "by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral

proceedings may establish cause [in a federal habeas corpus proceeding to excuse] a prisoner's procedural default of a claim of ineffective assistance at trial." *Martinez*, 132 S.Ct. at 1315. The Court held that

> when a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.

Martinez, 132 S.Ct. at 1318.

Denny filed his RCr 11.42 post-conviction motion *pro se*. Therefore, he did not have the assistance of counsel in his initial-review collateral proceedings. In *Martinez*, the United States Supreme Court reasoned that

> [w]here . . . the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim. This is because the state habeas court looks to the merits of the claim of ineffective assistance, no other court has addressed the claim, and defendants pursuing first-tier review . . . are generally ill[-]equipped to represent themselves because they do not have a brief from counsel

> or an opinion of the court addressing their claim of error. . . .
>
> As *Coleman* recognized, an attorney's errors during an appeal on direct review may provide cause to excuse a procedural default; for if the attorney appointed by the State to pursue the direct appeal is ineffective, the prisoner has been denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims. . . . Without the help of an adequate attorney, a prisoner will have similar difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim. Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy. . . .
>
> The same would be true if the State did not appoint an attorney to assist the prisoner in the initial-review collateral proceeding. The prisoner, unlearned in the law, may not comply with the State's procedural rules or may misapprehend the substantive details of federal constitutional law. . . . While confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record.

Martinez, 132 S.Ct. at 1317 (internal quotation marks omitted).

We agree with this logic, *i.e.*, that the initial RCr 11.42 proceeding in this action should have effectively operated as the direct appeal for Denny's ineffective assistance of trial counsel claims. Denny contends in this appeal that he received the ineffective assistance of post-conviction counsel because he proceeded *pro se* in his RCr 11.42 proceedings and because he did not raise his present claims of the ineffective assistance of trial counsel in his RCr 11.42 motion. Although we find the logic quoted above from the United States Supreme Court's decision in *Martinez* persuasive, the Kentucky Supreme Court has

specified that there is no right to the effective assistance of counsel in post-conviction proceedings in Kentucky, and we are bound by that decision. *See Hollon v. Commonwealth*, 334 S.W.3d 431, 437 (Ky. 2010); *Bowling*, 981 S.W.2d at 552; *see also Special Fund v. Francis*, 708 S.W.2d 641, 642 (Ky. 1986). Consequently, there was no palpable error affecting Denny's rights because, pursuant to Kentucky law, he had no right to the assistance of post-conviction counsel.

To the extent that Denny appeals the denial of the ineffective assistance of trial counsel claims that he asserted in his CR 60.02 motion, we review the denial of a CR 60.02 motion for an abuse of discretion. The Kentucky Supreme Court has held that "Civil Rule 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could reasonably have been presented by direct appeal or RCr 11.42 proceedings." *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997) (internal quotation marks omitted). Civil Rule 60.02 "is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings." *Id*. Because Denny's ineffective assistance of trial counsel claims could have been asserted in his RCr 11.42 motion, the law in Kentucky states that his CR 60.02 motion fails.[4] *See id*.

[4] We note that, in his reply brief, Denny states: "trial counsel, post-conviction counsel, and the [circuit] court itself refuse[] to supply Appellant with his case file and work product." However, if this is intended as a claim on appeal, Denny did not raise this claim in his opening appellate brief. "Reply briefs shall be confined to points raised in the briefs to which they are addressed. . . ." CR 76.12(4)(e). Thus, because new issues may not be raised in a reply brief, *see Milby v. Mears*, 580 S.W.2d 724, 728 (Ky. App. 1979), we will not consider Denny's

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

VANMETER, JUDGE, CONCURS.

STUMBO, JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

STUMBO, JUDGE, DISSENTING: Respectfully, I must dissent. I have long believed that the Courts of the Commonwealth erred in refusing a constitutional right to counsel in post-conviction relief actions and that ineffective appellate counsel should be grounds for relief. Unfortunately, we have been bound by decisions of both the United States Supreme Court and the Kentucky Supreme Court which have made it impossible for those grounds to be successfully asserted. Now, as noted by the majority, an avenue to assert those rights has been set forth in *Martinez v. Ryan*, *supra*. I would reverse and remand for appointment of counsel so that the trial court can determine whether Appellant can demonstrate "that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez*, 132 S.Ct. at 1318.

assertion.

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