RENDERED: DECEMBER 19, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001676-MR

LINWOOD EARL BURGESS-SMITH APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL JUDGE
ACTION NO. 09-CR-01655

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; DIXON AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Linwood Earl Burgess-Smith brings this *pro se* appeal from an August 28, 2013, Opinion and Order of the Fayette Circuit Court denying his motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 to vacate his judgment and sentence of imprisonment without an evidentiary hearing. We affirm.

Appellant was indicted in November 2009 by a Fayette County Grand Jury upon myriad offenses related to events that occurred when police responded to a 911 hang-up call at a residence in Fayette County on August 29, 2009. A jury trial subsequently ensued, and appellant was found guilty of third-degree assault, two counts of second-degree fleeing or evading police, resisting arrest, third-degree escape and with being a persistent felony offender (PFO) in the first degree. By judgment entered November 19, 2010, appellant was sentenced to a total of fifteen-years' imprisonment.

In appellant's direct appeal of conviction, another panel of this Court affirmed the judgment of conviction and summarized the relevant facts as follows:

> On August 29, 2009, [Officer Brandon Muravchick] responded with other officers to a call at a residence where [appellant] was staying. The nature of the call was a 911-call hang-up. The officers responded within three minutes of the call. Officer Muravchick informed the other officers that he was familiar with the residence from a domestic violence call five days earlier, where the male suspect (who was not [appellant]), was known to carry a weapon and had absconded when the officers arrived at the scene. Thus, Officer Muravchick stated that he knew to be cautious when approaching the male suspect who had a warrant out for his arrest for fourth-degree assault. The officers approached the residence and could hear a male and a female in a loud argument. Officer Muravchick testified at that point he and another officer ran to the front of the residence to make sure everyone was okay and to find out what was occurring.
>
> Officer Muravchick testified that the front door of the residence was open and that the officers could see down the hall into the residence, but no people were visible at this time. Officer Muravchick knocked on the door and a female came over to speak with the police.

She stated that she was fine and that "he" was not there anymore. Officer Muravchick testified that, even though they were not given permission to search the entire residence, they performed a protective sweep of the residence to ensure the safety of themselves and the residents based on the exigent circumstances. These circumstances included the 911-call hang-up, the escalating fight with a male that they heard upon their approach, and the prior domestic violence call five days previously.

Officer Muravchick stated that he could not be sure whether the female who answered the door was under duress, and did not want someone in the back of the house to come out and attack the officers by surprise. Officer Muravchick testified that while he stayed at the front of the house, another officer located [appellant] in a bedroom and asked him to come to the front of the house for safety. Officer Muravchick testified that once he saw [appellant], he immediately recognized him from his patrol briefing earlier in the night and knew that [appellant] had an active warrant for first-degree robbery and was considered armed and dangerous.

Officer Muravchick then patted down [appellant] for safety because he was uncertain whether [appellant's] gym shorts concealed a weapon. Officer Muravchick asked [appellant] his name, which he confirmed was Linwood Burgess-Smith. Officer Muravchick then informed [appellant] that he was not under arrest but he would be detained while they investigated the situation. When Officer Muravchick took out his handcuffs in order to detain [appellant], [appellant] threw his elbow down, pushed Officer Muravchick into a wall, struggled with Officer Muravchick, and ran off.

Officer Maynard was outside when [appellant] came running out the front door. Officer Maynard chased [appellant] and tackled him. When the two fell, Officer Maynard lost his grip on [appellant] and he ran again. Officer Muravchick then tased [appellant], handcuffed him and placed him under arrest. While waiting for the ambulance to arrive, [appellant] jumped

> to his feet and ran again. Officer Muravchick attempted to tase [appellant] again. Officer Muravchick and other officers then chased [appellant] around the house where Officer Muravchick fell and sprained his ankle. [Appellant] was then tased again by another officer. On the way to the hospital, [appellant] was read his *Miranda* rights.

Burgess-Smith v. Commonwealth, Appeal No. 2010-CA-002284-MR (footnotes omitted).

In November 2012, appellant filed the instant motion pursuant to RCr 11.42 to vacate his judgment and sentence of imprisonment alleging ineffective assistance of trial counsel. The RCr 11.42 motion was denied by the circuit court without an evidentiary hearing. This appeal follows.

In order to prevail upon a claim for ineffective assistance of counsel, it must be demonstrated that (1) trial counsel's performance was so deficient it fell outside the range of professionally competent assistance, and (2) there exists a reasonable probability that the verdict would have been different but for counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Upon review of a trial court's denial of an RCr 11.42 motion without an evidentiary hearing, we must also determine whether there exists a "material issue of fact that cannot be conclusively resolved, i.e., conclusively proved or disproved, by an examination of the record." *Fraser v. Com.*, 59 S.W.3d 448, 452 (Ky. 2001). If a material issue of fact exists that cannot be conclusively resolved upon the face of the record, the circuit court must grant the motion for an evidentiary hearing. *Id.*

Initially, appellant contends trial counsel was ineffective for failing to challenge the Commonwealth's prosecution upon multiple charges arising from one incident or course of conduct (two counts of fleeing or evading police in the second degree and one count of escape in the third degree). Essentially, appellant asserts counsel should have argued that his convictions upon fleeing or evading police and escape were violative of the double jeopardy clauses of the Fifth Amendment to the United States Constitution and Section 13 of the Kentucky Constitution.

In the case *sub judice*, appellant's counsel filed a pretrial motion seeking to have the Commonwealth elect which offense it would proceed with against appellant. Trial counsel argued that all three counts (two counts of fleeing or evading police and one count of escape) arose from the same incident or course of conduct; counsel insisted the Commonwealth could not proceed on all three charges. The trial court denied counsel's motion by order entered July 27, 2010. Trial counsel also argued during his opening and closing statements to the jury that the Commonwealth should not have proceeded with all three counts. Therefore, appellant's claim that trial counsel was ineffective for not seeking to prevent the Commonwealth from proceeding against him with all three charges is refuted upon the face of the record. As such, we view appellant's argument to be without merit.

Appellant next asserts that trial counsel was ineffective for failing to demonstrate that the Commonwealth did not meet its burden of proof upon the charge of assault in the third degree. Appellant claims the Commonwealth failed

to introduce evidence that he caused physical injury to Officer Muravchick; thus, appellant asserts the Commonwealth did not meet its burden of proof upon the assault charge.

Assault in the third degree is defined in Kentucky Revised Statutes (KRS) 508.025(1)(a)(1) as follows:

> (1) A person is guilty of assault in the third degree when the actor:
>
> (a) Recklessly, with a deadly weapon or dangerous instrument, or intentionally causes or attempts to cause physical injury to:
>
> 1. A state, county, city, or federal peace officer[.]

KRS 508.025(1)(a)(1) does not require proof of physical injury for third-degree assault. Rather, it is merely required that the acts "attempts to cause physical injury." Trial counsel argued that there was no proof of physical injury to the officer in the motion for directed verdict of acquittal and during closing argument. As such, appellant's ineffective assistance of counsel claim upon this issue is refuted upon the face of the record and is without merit.

Appellant's final two contentions concern the misdemeanor charges upon which he was convicted. Specifically, appellant claims that trial counsel was ineffective for failing to request a jury instruction on a lesser included offense of criminal attempt to commit third-degree assault and that counsel failed to object to the instruction given. And, appellant argues that trial counsel was ineffective for

failing to object to the denial of his motion for directed verdict upon the charge of third-degree escape.

It is well-established that RCr 11.42 is a procedural remedy intended to provide "a convicted prisoner a direct right to attack the conviction *under which he is being held*." *Parrish v. Com.*, 283 S.W.3d 675, 677 (Ky. 2009) (quoting *Wilson v. Com.*, 403 S.W.2d 710, 712 (Ky. 1966)). RCr 11.42 provides a mechanism for a prisoner claiming a right to be released from his sentence of imprisonment. *Id.* Therefore, "[i]t is axiomatic that a person cannot be released from a sentence which has been completed." *Id.* at 677.

Appellant's final two arguments pertain to misdemeanor convictions for which he was sentenced to a total of twelve-months incarceration. As appellant's judgment and sentence of imprisonment were entered on November 19, 2010, appellant has served out the sentences on these misdemeanor convictions. Therefore, we believe these issues are not cognizable under RCr 11.42. *See Parrish*, 283 S.W.3d 675.

For the foregoing reasons, the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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