

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001593-MR
AND
NO. 2014-CA-000912-MR

WILLIAM KELLY CLARK

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 04-CR-00450

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, NICKELL AND STUMBO, JUDGES.

STUMBO, JUDGE: William Kelly Clark appeals from Findings of Fact and Conclusions of Law denying his Motion to Vacate Judgment pursuant to RCr 11.42. Clark contends that the Warren Circuit Court improperly failed to conclude that his trial and appellate counsels were ineffective. He also argues that he was denied due process when the court improperly adopted the Commonwealth's

tendered findings denying Clark's Motion to Vacate. We find no error, and AFFIRM the Judgment on appeal.

On June 8, 2004, Roy Johnson visited the home of his school friend Nick Richmond in Bowling Green, Kentucky. Both were minors. While the boys were sitting on a deck at the rear of the house, William Kelly Clark and Tammy Adkins (Roy Johnson's mother) secretly entered the front door of the house and removed items including guns, knives and jewelry.

A neighbor, Debbie Simmons, would later testify that she observed a man and woman enter the Richmond residence and remove various items. Adkins would also later acknowledge that she and Clark entered the home and removed guns from the residence, and Johnson would testify that he observed guns and a jewelry box in the back seat of Clark's car. Clark and Adkins sold the guns at a car dealership.

The following day, the homeowner and father of Nick Richmond, Robert Richmond, noticed that some handguns, a rifle, jewelry and other items were missing. A police investigation ensued, which soon focused on Clark and Adkins.

On June 30, 2004, the Warren County grand jury indicted Clark on one count of burglary in the first degree, three counts of theft by unlawful taking less than \$300, one count of theft by unlawful taking over \$300, and with being a persistent felony offender in the second degree. Adkins was charged by way of a separate indictment. The matter proceeded to a jury trial whereupon Clark was

found guilty of all charges on or around December 14, 2004. He unsuccessfully moved for a new trial on December 30, 2004. On February 2, 2005, the Warren Circuit Court sentenced Clark to 70 years in prison.

Clark's December 30, 2004 motion for a new trial was based on the claim of newly discovered evidence that Adkins perjured herself. Clark also raised a claim of Double Jeopardy. The motion was denied. Thereafter, the Judgment was appealed to the Kentucky Supreme Court, which affirmed in part and reversed in part. That Court determined that three of the four theft charges were violative of the prohibition against Double Jeopardy, and amended the sentence on remand to 48 years.

An extensive procedural history ensued over the following decade. First, Clark filed a *pro se* RCr 11.42 motion, later supplemented by counsel, alleging that he received ineffective assistance of counsel at both the trial and appellate levels. After a hearing, the circuit court denied the RCr 11.42 motion on July 28, 2009.

Clark then appealed that denial to a panel of this Court. On May 13, 2011, that panel rendered an Order holding the appeal in abeyance until the circuit court addressed the claim of ineffective assistance of appellate counsel, and the matter was remanded to the circuit court.

A hearing on remand was conducted on September 30, 2013, to address Clark's claim of ineffective assistance of appellate counsel. On May 12,

2014, the court denied the claim, and in so doing adopted the Commonwealth's tendered Findings of Fact and Conclusions of Law.

On May 16, 2014, Clark moved to vacate the May 12, 2014 Order denying his motion for RCr 11.42 relief. That motion was denied by way of an Order rendered on May 23, 2014.

This consolidated appeal then ensued. Now before us is the 2009 appeal held in abeyance, styled 2009-CA-001593, wherein Clark argues that 1) the trial court improperly found that there was no "deal" eliciting Adkins' testimony, 2) the failure of counsel to object at trial was properly raised via RCr 11.42, and 3) that trial counsel was ineffective in failing to uncover that Adkins perjured herself at trial when testifying that there was no deal eliciting her testimony. He also argues that the trial court erred in failing to enter a Finding on Clark's claim of ineffective assistance of appellate counsel.

Also before us is the second appeal, styled 2014-CA-000912, in which Clark, through counsel, argues that he was denied Due Process when the trial court adopted the Commonwealth's tendered Findings of Fact and Conclusions of law which resulted in the May 12, 2014 Order denying RCr 11.42 relief as to Clark's appellate counsel in the preceding appeal. Clark also argues in 2014-CA-000912 that appellate counsel was ineffective in failing to appeal the denial of Clark's motions for a new trial and directed verdict.

We will consider these issues in chronological order. The first issue arises from Clark's contention that a "deal" existed between Adkins and the

Commonwealth to elicit her testimony, that the Commonwealth failed to reveal this deal, and that the circuit court improperly concluded that there was no "reasonable probability" that the result of the trial would have been different if the jury knew of the purported deal. Adkins was charged via a separate action arising from the same June 8, 2004 burglary at issue. At trial, Adkins denied the existence of a deal. When it was allegedly determined that a deal existed, the Warren Circuit Court concluded that the result of the trial would not have been different had the jury known about the deal. Clark now argues that the Commonwealth engaged in deliberate deception to such a degree that he did not receive the fair trial to which he was entitled, and that his 14th Amendment due process rights were violated.

An evidentiary hearing was conducted on this matter on December 12, 2008, after which the trial judge ruled that Clark had failed to prove that there was a deal between the Commonwealth and Clark. Absent an abuse of discretion, we must accept this finding as true. *Mitchell v. Commonwealth*, 908 S.W.2d 100 (Ky. 1995), *overruled in part on other grounds by Fugate v. Commonwealth*, 993 S.W.2d 931 (Ky. 1999). The record supports this finding, as both the Commonwealth's Attorney and Detective Martin Scott - who transported Adkins from Missouri to Kentucky - testified that no deal was made in exchange for Adkins' testimony. *Arguendo*, even if such a deal had been made, the circuit court properly concluded that based on all of the evidence tendered at trial, there was no reasonable probability that the outcome of the proceedings would have been different if the jury had known of the purported deal. The record supports the

finding that there was no deal, and even if there was a deal, the record was nevertheless sufficient to support the jury's verdict. We find no error.

Clark next appears to argue that the circuit court improperly ruled that a claim of ineffective assistance arising from a failure to object is not properly raised under RCr 11.42. In this instance, the alleged improper failure to object arose from the Commonwealth's purportedly vouching for Adkins' credibility during the closing argument. In ruling on this matter, the court determined that the question of whether the Commonwealth improperly vouched for Adkins' credibility during the closing argument was a matter which should have been raised, if at all, on direct appeal rather than via RCr 11.42. We find no error. The trial court ruled that the Commonwealth's comment regarding Adkins' testimony was a proper inference from the evidence. Clark has offered us no basis for concluding otherwise. Thus, there was nothing meriting a defense objection and thus no basis for RCr 11.42 relief. The circuit court properly so found.

Clark's third argument is that he received ineffective assistance when counsel "failed to make a single phone call" which would have revealed that Adkins perjured herself at trial - to wit, when Adkins allegedly lied about having not communicated with her son prior to trial. Clark points to jail phone records indicating that Adkins allegedly called Roy Johnson several times from jail.

At a hearing, Clark's co-counsel Jeremiah W. Harston testified that he made a strategic decision not to use the phone records because he determined that it was not necessary to attack Adkins' credibility. He further stated that the phone

records, by themselves, did not definitively prove who received the phone calls.

Based on Harston's testimony, we conclude that this decision constitutes legitimate trial strategy which is insufficient to sustain a claim of ineffective assistance, and the circuit court properly so found. *See generally, Hibbs v. Commonwealth*, 570 S.W.2d 642 (Ky. App. 1978); RCr 11.42.¹

The first issue raised in appeal No. 2014-CA-000912 is Clark's argument that he was denied Due Process when the Warren Circuit Court adopted the Commonwealth's tendered Findings regarding the claim of ineffective assistance of appellate counsel. Clark also contends that the court improperly adopted these Findings without providing him with notice of its intent to do so nor an opportunity to respond. Clark goes on to argue that the court improperly contacted the Commonwealth *ex parte* on this issue. Clark has not demonstrated if this issue is preserved for appellate review nor, if so, in what manner. CR 76.12. He has directed our attention to no case law or statutory law prohibiting the court from adopting tendered Findings, and we take judicial notice that the practice is common within the trial and appellate courts of the Commonwealth as it promotes judicial economy. Additionally, Clark does not reveal the basis of his claim that the circuit court engaged in improper *ex parte* communications with the Commonwealth on this issue or any issue. We find no error.

¹ Clark goes on to argue in appeal No. 2009-CA-001593 that the circuit court erred in failing to enter Findings on his claim of ineffective assistance of appellate counsel. A panel of this Court agreed with Clark's contention resulting in a remand on this issue. The Warren Circuit Court re-examined the issue and rendered Findings on May 12, 2014.

Clark's final argument is that he was entitled to RCr 11.42 relief based on the failure of his appellate counsel to provide effective assistance in the direct appeal to the Kentucky Supreme Court. Clark contends that his appellate counsel improperly failed to appeal the denial of his motions for a New Trial and Directed Verdict. Specifically, he contends that his appellate counsel improperly failed to raise the issue on direct appeal that the trial judge should have granted a new trial based on newly discovered evidence of Adkins' alleged perjury, failed to raise the issue of insufficiency of the evidence, and failed to appeal the denial of Clark's motion for a directed verdict of acquittal. At the final sentencing hearing, Clark's counsel moved for a new trial based on alleged newly discovered evidence that Adkins had perjured herself at trial. Specifically, and as noted above, Adkins testified that she had not spoken to her son Roy Johnson subsequent to the burglary, yet phone records allegedly showed that she had been in contact with him. The motion was denied.

Citing *Roach v. Commonwealth*, 384 S.W.3d 131 (Ky. 2012), the Commonwealth asserts that Clark did not raise the claim of ineffective assistance of appellate counsel on the new trial issue until after the three-year time limitation set out in RCr 11.42(10), and that amendments or supplements to RCr 11.42 motions do not relate back to the time of the original RCr 11.42 filing.

We need not address the timing of the supplemental arguments, however, because even if timely filed, they do not form a basis for RCr 11.42 relief as to appellate counsel's performance. On the issue of the alleged newly

discovered evidence that Adkins perjured herself by stating that she had not been in contact with her son prior to trial, such evidence must be of such decisive value that it would, with reasonable certainty, have changed the verdict. *Jennings v. Commonwealth*, 380 S.W.2d 284 (Ky. 1964). In the matter at bar, assuming, *arguendo*, that Adkins did speak with her son prior to trial, it would have had no impact on the verdict given the totality of the evidence against Clark.

Similarly on Clark's remaining arguments, which go to the sufficiency of the proof, we find no basis for concluding that appellate counsel failed to provide effective assistance by not appealing the denial of Clark's motions for a new trial and a directed verdict. Again, Adkins testified that Clark entered the house and took the guns, and that she saw Clark place the guns in the car. If under the evidence as a whole it would not be clearly unreasonable for a jury to find guilt, the defendant is not entitled to a directed verdict of acquittal. *Trowel v. Commonwealth*, 550 S.W.2d 530 (Ky. 1977). As it was not clearly unreasonable for the jury to conclude that Clark committed the criminal acts with which he was charged, we cannot conclude that appellate counsel failed to provide effective assistance by not raising this issue on direct appeal. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). We find no error.

For the foregoing reasons, we AFFIRM the Findings of Fact and Conclusions of Law of the Warren Circuit Court.

ALL CONCUR.

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