

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002096-MR

WILLIAM PETREY

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 08-CR-00586

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: D. LAMBERT, J. LAMBERT, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: William Petrey brings this *pro se* appeal from a September 13, 2012, order of the Kenton Circuit Court denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion without an evidentiary hearing. We affirm.

In July 2008, Petrey was indicted by a Kenton County Grand Jury upon four counts of first-degree sodomy, one count of first-degree sexual abuse,

and one count each of possession of marijuana and possession of drug paraphernalia. Following a jury trial in 2009, Petrey was found guilty upon all seven charges. By judgment entered August 26, 2009, Petrey was sentenced to a total of fifteen-years' imprisonment. Petrey's conviction was affirmed by this Court in Appeal No. 2009-CA-001592-MR, and discretionary review was subsequently denied by the Kentucky Supreme Court (2012-SC-0585-D).

On March 12, 2012, Petrey filed a *pro se* RCr 11.42 motion. By order entered September 12, 2012, the circuit court denied Petrey's RCr 11.42 motion without an evidentiary hearing. This appeal follows.

Petrey contends that the circuit court erred by denying his RCr 11.42 motion without an evidentiary hearing. Upon review of a trial court's denial of an RCr 11.42 motion without an evidentiary hearing, we must initially 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.* 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).

Petrey's first two contentions are that the trial court committed certain errors during trial. Specifically, Petrey contends "that the trial court abused its [sic] discretion upon failing to order a balancing test per [Kentucky Rules of Evidence] KRE 403 . . . for a determination of truthfulness/untruthfulness of the victim's false testimony." Petrey's Brief at 8. And, Petrey argues "that the trial court denied him the right to a unanimous verdict . . . when the jury fail[ed] to distinguish, differentiate which count of sodomy from the other" Petrey's Brief at 13.

An error allegedly made by the court during trial rather than by trial counsel must be raised on direct appeal and is not proper for consideration in an RCr 11.42 motion. *Leonard v. Com.*, 279 S.W.3d 151, 157 (Ky. 2009). As Petrey's first two contentions are related to errors made by the court, we will not consider the merits thereof in this collateral attack on the judgment.

Petrey next asserts trial counsel was ineffective for failing "to subject the prosecution to the meaningful adversarial testing . . . where both attorneys deficiently fail to utilize KRS 510.145(2) . . . [to] impeach [the victim's] credibility" Petrey's Brief at 9-10. However, KRS 510.145 was repealed effective July 1, 1992. Petrey's trial did not begin until June 23, 2009, well after the repeal of KRS 510.145. As KRS 510.145 was repealed at the time of Petrey's trial, trial counsel was not ineffective for failing to utilize same.

Petrey also asserts that trial counsel was ineffective for failing to challenge the victim's competency to testify. Petrey generally asserts that the victim lacked the capacity to tell the truth and was under the influence of drugs.

KRE 601 governs the competency of a witness to testify and provides:

- (a) General. Every person is competent to be a witness except as otherwise provided in these rules or by statute.
- (b) Minimal qualifications. A person is disqualified to testify as a witness if the trial court determines that he:
 - (1) Lacked the capacity to perceive accurately the matters about which he proposes to testify;
 - (2) Lacks the capacity to recollect facts;
 - (3) Lacks the capacity to express himself so as to be understood, either directly or through an interpreter; or
 - (4) Lacks the capacity to understand the obligation of a witness to tell the truth.

KRE 601 also establishes a presumption that a witness is competent to testify.

Swan v. Com., 384 S.W.3d 77 (Ky. 2012).

Petrey fails to provide any specific facts to demonstrate the victim's alleged incompetency to testify. Petrey does not allege how the drugs may have affected the victims' ability to testify; rather, Petrey merely makes general allegations that the victim was incompetent. Consequently, we do not believe Petrey's vague allegations provide sufficient specificity to demonstrate that trial counsel was ineffective for failing to challenge the victim's competency to testify at trial.

Petrey finally argues that trial counsel was ineffective for failing to retain an expert witness to testify that Petrey was mentally incompetent to stand trial. The record reveals that trial counsel did request that Petrey's mental competency be evaluated, and such evaluation was subsequently conducted at the Kentucky Correctional Psychiatric Center. In the evaluation, it was noted that Petrey did not agree with trial counsel's advice to seek a "psychological defense." Petrey's Brief at 15. The conclusion of the evaluation was that Petrey was competent to stand trial. Therefore, as Petrey was determined to be mentally competent, we do not believe trial counsel was ineffective for failing to have an expert to testify as to his alleged mental incompetence.

In sum, we hold that the circuit court properly denied Petrey's RCr 11.42 motion without an evidentiary hearing. *See Fraser*, 59 S.W.3d 448.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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