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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000537-MR

JAMES LEE QUISENBERRY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 07-CR-002791

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

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

CLAYTON, JUDGE: James Lee Quisenberry appeals the Jefferson Circuit Court's denial of his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion, which was granted without an evidentiary hearing. After careful consideration, we affirm.

In 2009, Quisenberry and his co-defendant were tried for robbery and the murder of Earon Harper as well as the shooting of Harper's two-year-old daughter, Erica. At the conclusion of a two-week trial, the defendants were found guilty of multiple crimes. Quisenberry, in particular, was found guilty of robbery and second-degree manslaughter. He was sentenced to 45 years on April 17, 2009. The conviction was affirmed on direct appeal in *Quisenberry v. Commonwealth*, 336 S.W.3d 19 (Ky. 2011).

On March 7, 2012, Quisenberry, *pro se*, filed an RCr 11.42 motion seeking a new trial. The trial court appointed a public defender to amend or supplement Quisenberry's filings, if necessary, and gave the public defender additional time to perform the work. In 2014, the public defender, without filing any additional papers, submitted an Administrative Office of the Courts (AOC) Form 280 stating that the matter was ready for a ruling. On May 4, 2014, the trial court entered an opinion and order denying both Quisenberry's RCr 11.42 motion and also the motion for an evidentiary hearing. Quisenberry now appeals this opinion and order.

On May 13, 2014, the Department of Public Advocacy (hereinafter "DPA") filed a motion with the Court of Appeals, pursuant to Kentucky Revised Statutes (KRS) 31.110(2)(c), asking for permission to withdraw as counsel for Quisenberry since a "post-conviction proceeding . . .is not a proceeding that a reasonable person with adequate means would be willing to bring at his or her own expense;" and therefore, Quisenberry has "no further right to be represented" under

KRS 31.110(2)(c). The DPA further requested that, under Section 115 of the Kentucky Constitution, our Court allow Quisenberry the opportunity to file his own brief. The motion was granted.

On appeal, Quisenberry makes the following arguments: the trial court erred by not granting him an evidentiary hearing; and, the trial court erred by failing to grant the RCr 11.42 motion since, according to him, trial counsel rendered ineffective assistance by failing to seek the dismissal of an allegedly biased juror during *voir dire*, failing to interview two possible witnesses, and failing to adequately consult him about whether he should testify. Additionally, Quisenberry maintains that he and his co-defendant should have been tried separately and that defense counsel should have hired a mitigation expert to assist during the penalty phase of the trial. Finally, Quisenberry claims that the appointed post-conviction counsel did nothing to assist him in the RCr 11.42 process. The Commonwealth counters each claim in its appellate brief.

We begin with Quisenberry's claim of error regarding the trial court's failure to conduct an evidentiary hearing. Not every claim of ineffective assistance merits an evidentiary hearing. Nor is an RCr 11.42 movant automatically entitled to one. *See Stanford v. Commonwealth*, 854 S.W.2d 742, 743 (Ky. 1993). The law on this issue is clear: the trial court need only conduct an evidentiary hearing if (i) the movant establishes that the error, if true, entitles him or her to relief under RCr 11.42; and (ii) the motion raises an issue of fact that "cannot be determined on the face of the record." *Parrish v. Commonwealth*, 272 S.W.3d 161, 166 (Ky. 2008)

(citation omitted). In other words, an evidentiary hearing is not necessary if issues are refuted by the record. *Stanford*, 854 S.W.2d at 743-744.

Thus, we begin our analysis with the consideration of whether Quisenberry established error, which entitled him to relief under RCr 11.42. Generally, in order to establish a claim for ineffective assistance of counsel, a movant must meet the requirements of a two-prong test by proving that: 1) counsel's performance was deficient and 2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *accord Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985), *cert. denied*, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). To prevail on an RCr 11.42 motion, the movant must convincingly demonstrate that he or she was deprived of some substantial right justifying the extraordinary relief afforded by post-conviction proceedings. *Bratcher v. Commonwealth*, 406 S.W.3d 865, 869 (Ky. App. 2012)(citation omitted).

We begin with Quisenberry's assertion of trial court error because a biased juror was included on the panel. Here, the trial court held that pursuant to *McDaniel v. Commonwealth*, 341 S.W.3d 89 (Ky. 2011), failure to strike a juror for cause is only constitutionally problematic when a defendant must use his or her peremptory challenge. That is irrelevant because as pointed out by the Commonwealth, the particular juror, who Quisenberry claims was biased, informed the trial court about his potentially relevant information after jury selection was completed. Further, the juror was dismissed before deliberations and

was not on the jury that found Quisenberry guilty. We concur with the trial court's rejection of this post-conviction argument and note that it was resolved on the basis of the trial record.

Next, we address the failure-to-interview claim. Quisenberry maintains that trial counsel used discovery rather than independently collected evidence. Specifically, he alleges that counsel should have interviewed two witnesses – Turner and Liggons – before trial. Quisenberry suggests that their statements would have corroborated that he had nothing to do with the shooting and robbery. As observed by the trial court, in fact, it was the testimony of these two individuals that the Kentucky Supreme Court relied on in determining that sufficient evidence existed to support Quisenberry's convictions. In addition, these witnesses testified at the trial, and hence, his defense counsel had an opportunity to question them.

Furthermore, Quisenberry's allegation that failure to interview these two witnesses by his trial counsel resulted in him being inadequately prepared, and thus, unable to decide whether he should testify is not supported by any proof. First, any defendant can make such a charge after a trial since this is not an evidentiary issue but merely musings after trial. Hindsight is always twenty-twenty. Second, it is simply insignificant since Quisenberry provides no evidence under the second prong of *Strickland*, that is, he was prejudiced by the failure to interview. Again, this claim was conclusively resolved by the trial record, and an evidentiary hearing is unnecessary.

Continuing with his RCr 11.42 arguments, Quisenberry proffers that he and his co-defendant should have been tried separately. This issue was addressed by the Kentucky Supreme Court in the direct appeal and rejected. *See Quisenberry,* 336 S.W.3d at 25 – 30. It is well-established that a motion under RCr 11.42 is limited to issues that were not and could not be raised on direct appeal. *Hodge v. Commonwealth*, 116 S.W.3d 463, 467-68 (Ky. 2003)(*overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)). In fact, Quisenberry did not object on direct appeal to the joint trial. Instead, it was his co-defendant who appealed on this issue. Therefore, since he did not object on direct appeal when he had the opportunity, he cannot now do so. *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983).

Quisenberry also declares that he is entitled to RCr 11.42 relief because during the penalty phase, his trial counsel failed to hire a mitigation specialist to assist in the presentation of mitigation proof. Quisenberry's claim to the Court of Appeals is quite different than the one made to the trial court. Therein, he argued in his RCr 11.42 motion that a mitigation specialist should have observed him to determine whether he had a mental health condition.

As explained by the trial court in its opinion and order, Quisenberry was evaluated for competency during the original trial. These health care providers could have been called during the penalty phase if their evaluations had any bearing on his conduct. Further, the trial court noted the similarity of

Quisenberry's assertion to the one made in *Hodge v. Commonwealth*, 17 S.W.3d 824 (Ky. 2000), wherein the Kentucky Supreme Court held that a mitigation expert was not an essential witness since other trial witnesses could have testified about the pertinent issue during the penalty phase.

Clearly, such witnesses could have also testified for Quisenberry during the penalty phase; however, such testimony would have been redundant and cumulative. Moreover, Quisenberry cannot present one line of reasoning to the trial court regarding ineffective assistance of counsel and then provide a novel take on this same argument on appeal. *See Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976).

Further, Quisenberry has not established that hiring a mitigation specialist would have revealed additional facts that would have persuaded jurors to reach a different sentence. There is no showing of either deficient performance or substantial prejudice which is required to present an ineffectiveness of counsel argument. Accordingly, we find no error.

Finally, this same line of reasoning applies to Quisenberry's attack on his post conviction attorney. This argument was not presented to the trial court, and thus, is not preserved for our review.

Lastly, returning to Quisenberry's claim of error for the failure to hold an evidentiary hearing on his RCr 11.42 motion, the grounds of his motion were conclusively refuted by the record, and thus, no error was committed by not

holding an evidentiary hearing. For the aforementioned reasons, we affirm the decision of the Jefferson Circuit Court.

ALL CONCUR.

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