

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000787-MR

COURTNEY TROWELL

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
ACTION NO. 04-CR-002358

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: CLAYTON, NICKELL, AND VANMETER, JUDGES.

VANMETER, JUDGE: Courtney Trowell appeals the Jefferson Circuit Court's denial of his second RCr¹ 11.42 motion which raised issues alleging he had an unfair trial and ineffective assistance of post-conviction counsel. For the following reasons, we affirm.

¹ Kentucky Rules of Criminal Procedure.

Trowell is currently serving a fifty-year sentence after being convicted of murder in 2005.² Trowell, represented by counsel, timely filed his first RCr 11.42 motion alleging errors of trial counsel that prevented a fair trial; the trial court's denial of this motion was affirmed by this court in *Trowell v. Commonwealth*, 2008-CA-001787-MR, 2010 WL 3515706 (Ky., Sept. 10, 2010). Trowell then filed his second RCr 11.42, making seven total arguments alleging similar and additional reasons why his trial was unfair and also claiming ineffective assistance of post-conviction counsel.³ The Jefferson Circuit Court again denied his motion without conducting an evidentiary hearing because a similar RCr 11.42 had been made and the new claims were untimely. This appeal follows.

Trowell's first arguments raise issues that caused his trial to be unfair, such as error in allowing the prosecutor's closing statement that implied the murder was gang-related, error in striking black panelists from venire which impaired his right to an impartial jury after he was convicted by an all white jury, error by trial counsel in failing to obtain an interview with the Commonwealth's key witness, and ineffective trial counsel due to conflicts of interest.

RCr 11.42(10) requires all claims to be raised within three years of the judgment's finality. Trowell's second motion, filed six years after his conviction became final, is outside the statute of limitations. Two exceptions allow a motion to proceed *after* the three year period has lapsed: issues of fact that arise which

² The Kentucky Supreme Court affirmed Trowell's conviction on direct appeal in 2007. *Trowell v. Commonwealth*, 2005-SC-000516-MR, 2007 WL 188997 (Ky., Jan. 25, 2007).

³ This second RCr 11.42 motion was made as a *pro se* defendant.

were unknown and could not have been asserted prior to finality, and newly-found constitutional rights. *See* RCr 11.42(10)(a-b). Between the record and Trowell's first RCr 11.42 motion, the unfair trial claims are predicated upon facts which were known or could have been known through the exercise of due diligence at the time he filed his original motion, disqualifying him for the 11.42(10)(a) exception. As for the second exception, none of the case law Trowell cites is recent enough to qualify for a newly established constitutional right pursuant to 11.42(10)(b). Therefore, all of the arguments regarding an unfair trial are untimely.

Furthermore, Trowell's second motion is barred procedurally under the successive motions principle. Post-conviction relief from criminal convictions is organized and complete. *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). Under RCr 11.42, a defendant in his initial motion must assert all errors of which he is aware or should be aware. *Id.* at 857. The court held that "[f]inal disposition of that motion, or waiver of the opportunity to make it, shall conclude all issues that reasonably could have been presented," foreclosing the defendant from making repeat RCr 11.42 motions. *Id.* Trowell had an attorney complete his first RCr 11.42 motion, that motion was denied, and he has since filed another. Such successive motions for post-conviction relief are not warranted. *See* RCr 11.42(3); *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001); *Caudill v. Commonwealth*, 408 S.W.2d 182 (Ky. 1996).—

Trowell argues that his second RCr 11.42 motion is timely because counsel that filed his first RCr 11.42 motion failed to raise all of the pertinent issues that

Trowell now raises in his second motion. His claim however is without merit and this court need not address the effectiveness of counsel under the *Strickland* and *Gall* standards because the Supreme Court has held that “[t]here is no constitutional right to an attorney in state post-conviction proceedings.

Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.” *Harper v. Commonwealth*, 978 S.W.2d 311, 318 (Ky. 1998) (quoting *Coleman v. Thompson*, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566, 115 L. Ed. 2d 640 (1991)); *see also Moore v. Commonwealth*, 199 S.W.3d 132, 140 (Ky. 2006) (holding that, where allegations in a defendant’s motion could be determined on the face of the record without an evidentiary hearing, no constitutional right to counsel or effective assistance of counsel exists in prosecuting an RCr 11.42 motion or in appealing the denial thereof).

The voir dire claim is also untimely and without merit. This court has held “[c]oncerns about the makeup of the jury are trial issues which should be raised on direct appeal and which are therefore not the proper basis of a collateral attack.” *Knuckles v. Commonwealth*, 421 S.W.3d 399, 402 (Ky. App. 2014); *see also Leonard v. Commonwealth*, 279 S.W.3d 151, 156 (Ky. 2009) (voir dire issues must be raised on direct appeal and are barred in RCr 11.42 motions).

Because his motion is successive and raises issues that are untimely or without merit, we affirm the Jefferson Circuit Court’s order denying Trowell’s second motion for post-conviction relief under RCr 11.42.

ALL CONCUR.

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