

RENDERED: OCTOBER 28, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001734-MR

BENJAMIN JENKINS

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE ANTHONY W. FROHLICH, JUDGE
ACTION NO. 10-CR-00477

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

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

THOMPSON, JUDGE: Benjamin Jenkins, pro se, appeals from an order of the Boone Circuit Court summarily denying his motion for Kentucky Rules of Criminal Procedure (RCr) 11.42 relief. He alleges: (1) the indictment dated September 7, 2010, is void because it was returned when the circuit court was not in session; (2) he was prejudiced because he was not aware of the indictment for

persistent felony offender in the first degree (PFO I) returned on November 16, 2010; (3) the indictment was improperly amended from persistent felony offender, second degree (PFO II) to persistent felony offender, first degree (PFO I); (4) his trial counsel and the Commonwealth withheld discovery; and (5) he was convicted by only eleven jurors.¹ We agree with the circuit court that Jenkins's claims are refuted by the record and affirm.

On September 7, 2010, Jenkins was indicted by the Boone County grand jury and charged with theft by unlawful taking and PFO II after a theft from a Walmart store. Jenkins was permitted to proceed as co-counsel and later referred to the Kentucky Correctional Psychiatric Center (KCPC) for a competency evaluation and found competent to stand trial.

Prior to trial, the Commonwealth discovered Jenkins should have been indicted on the charge of PFO I instead of PFO II and, on November 16, 2010, Jenkins was indicted on PFO I. The PFO II charge was dismissed on March 7, 2011.

On March 1, 2011, Jenkins was found guilty of theft by unlawful taking, \$500 or more but less than \$10,000, and PFO I. He appealed to this Court, which affirmed. *Jenkins v. Commonwealth*, No. 2011-CA-000891-MR, 2013 WL 139363 (Ky.App. 2013). In addition to his direct appeal, prior to filing his RCr 11.42 motion, Jenkins filed two pro se state habeas petitions and a pro se petition seeking

¹ Jenkins presented additional issues to the circuit court not raised on appeal. Therefore, those additional issues are not discussed.

a writ of habeas corpus in the United States District Court. The petitions and writ were denied.

On October 1, 2013, Jenkins filed his first pro se RCr 11.42 motion and subsequently filed two additional RCr 11.42 motions. The Department of Public Advocacy (DPA) filed a motion to withdraw as counsel pursuant to Kentucky Revised Statutes (KRS) 31.110(2)(c) stating the action was not one that a reasonable person would be willing to bring at his or her own expense. DPA's motion was granted. Jenkins's request for RCr 11.42 relief was denied without an evidentiary hearing.

RCr 11.42 is not a substitute for appeal. *Harris v. Commonwealth*, 441 S.W.2d 143, 144 (Ky. 1969). "The purpose of RCr 11.42 is to provide defendants with a means to obtain relief for errors that rise to the level of a constitutional deprivation of due process." *Johnson v. Commonwealth*, 180 S.W.3d 494, 498 (Ky. App. 2005) (quoting *Commonwealth v. Basnight*, 770 S.W.2d 231, 237 (Ky.App. 1989)). An evidentiary hearing is required only if after an answer is filed, the trial judge determines that the allegations in the motion cannot be resolved on the face of the record. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001).

Jenkins alleges various defects in the indictments. All should have been raised in his direct appeal and are not properly before this Court. *Waddle v. Commonwealth*, 391 S.W.2d 687, 688 (Ky. 1965). However, in the interest of complete justice, we address each allegation.

Jenkins alleges that the original indictment is void because when it was returned on September 7, 2010, the circuit court was not in session. He further alleges that he was unaware of the PFO I indictment returned on November 16, 2010 and that the September 7, 2010 indictment was not properly amended.

Jenkins's allegations are factually incorrect. The record shows that the original counts were presented to the grand jury on September 7, 2010, and the indictment was returned and entered by the clerk on that date. As found by the circuit court, Jenkins appeared with counsel and entered a not guilty plea to PFO I. The record also refutes that Jenkins was not aware of the PFO I indictment. Finally, there is no issue regarding an amendment of the original indictment. The Commonwealth sought and obtained an indictment on the proper charge, PFO I, and later dismissed the PFO II charge.

Jenkins argues the Commonwealth did not provide adequate discovery and his counsel failed to provide him with discovery. Jenkins was permitted to proceed as co-counsel and provided with a copy of his case file. He was also permitted to receive the grand jury recording and preliminary hearing recordings and permitted to review surveillance footage from Walmart. The record further reveals that the Commonwealth agreed to provide discovery and inspection pursuant to RCr 7.24 and 7.26.

Finally, Jenkins contends he was convicted by only eleven jurors. The record demonstrates that thirteen jurors were called to sit after voir dire and the jurors were informed that one of them would be dismissed as the alternate

juror. Before deliberations, the trial court dismissed the alternate juror leaving twelve jurors to render the verdict.

“[W]e do not impose on [pro se prisoners] the same standards as those applied to legal counsel.” *Commonwealth v. Miller*, 416 S.W.2d 358, 360 (Ky. 1967). However, before granting a hearing in an RCr 11.42 hearing, the motion must state a sufficient factual basis for a claim to be found plausible on its face and one that is not refuted by the record. The record refutes each of Jenkins’s allegations and he is not entitled to relief under RCr 11. 42.

Based on the foregoing, the order of the Boone Circuit Court is affirmed.

ALL CONCUR

BRIEF FOR APPELLANT:

Benjamin Jenkins, *pro se*
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BRIEF FOR APPELLEE:

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