

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001809-MR
AND
NO. 2016-CA-000500-MR

ADRIAN BENTON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 06-CR-01043-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: MAZE, STUMBO, AND TAYLOR, JUDGES.

MAZE, JUDGE: Adrian Benton, *pro se*, brings this consolidated appeal from the Fayette Circuit Court's denial of his motions made pursuant to RCr¹ 11.42 and CR²

¹ Kentucky Rule of Criminal Procedure.

² Kentucky Rule of Civil Procedure.

60.02. He argues defense counsel was ineffective and requests an evidentiary hearing. Finding no such basis for relief, we affirm.

Background

The Supreme Court of Kentucky set out the facts of Benton's case in his direct appeal:

In the early morning hours of May 25, 2006, in Lexington, Kentucky, Appellant Adrian Benton requested marijuana from Le'mon Allen. After Allen explained that he had no marijuana, Benton shot his gun towards the floor next to Allen's leg. Benton then proceeded to chase Allen down the street while firing bullets in his direction.

Subsequently, Benton was involved in a second altercation. Benton, along with his co-defendant, Richard Wright, visited a residence located at 317 Wilson Street (hereinafter referred to as the "Mattingly residence"). John Mattingly and Will Mattingly, both residents of the home, along with Jeff Procter and Katie Mattingly, were present at the time. Benton and Wright knocked on the door, at which point Benton forcibly entered the Mattingly residence at gunpoint. Once inside, Benton robbed Will Mattingly and then proceeded to assault and rob Procter. At some point, John Mattingly called the police. During the call, Wright fatally shot John Mattingly in the head. As Wright and Benton fled the scene of the crime, Benton fired multiple shots towards individuals standing on the porch of the Mattingly residence.

On May 2, 2011, Benton was jointly tried with Wright in the Fayette Circuit Court on numerous charges, including aggravated murder. During the fourth day of trial, Wright entered a guilty plea to the murder of John Mattingly. Benton's trial proceeded with the death penalty being removed as a sentencing option.

The jury ultimately found Benton guilty of complicity to first-degree robbery, complicity to second-degree manslaughter, three counts of first-degree robbery, second-degree assault, first-degree wanton endangerment, second-degree wanton endangerment, and one count of being a persistent felony offender in the second degree.

The jury recommended that Benton serve all of his sentences concurrently for a total of twenty-seven (27) years imprisonment. The trial court, however, ordered portions of Benton's sentences to be served consecutively for a total of forty-four (44) years imprisonment.

Benton v. Commonwealth, 2011-SC-000411-MR, 2013 WL 1188006, at *1 (Ky. Mar. 21, 2013). The Court affirmed Benton's convictions. *Id.* at *8.

In a separate, subsequent jury trial, Benton was convicted of possession of a handgun by a convicted felon, arising out of the same incident. He was sentenced to ten years' imprisonment; the trial court ordered eight years of that sentence to be run concurrently with his forty-four-year sentence, and two years to be run consecutively to it. This Court affirmed his conviction. *Benton v. Commonwealth*, 2011-CA-001983-MR, 2014 WL 1004531, at *4 (Ky. App. 2014).

On July 8, 2013, Benton filed a *pro se* "Motion to Notice a RCr 11.42" concerning his convictions. The motion raised a number of alleged errors committed by trial counsel, including that his attorneys were inadequately prepared for trial because defense counsel suffered a heart attack after jury selection. He also alleged that, prior to that heart attack, his lead counsel suffered from mental health issues. Benton further alleged his attorneys "made a [c]ompromise" with the Commonwealth and that "certain [a]dministrative [p]rocedures" were not

followed. Finally, Benton argued his attorneys were ineffective for failing to make objections, do research, and file motions.

On August 28, 2013, Benton filed a *pro se* motion supplementing his previously filed motion. He argued essentially the same grounds for relief, but he clarified his attorneys were ineffective for failing to request a continuance due to his lead counsel's heart attack. The trial court appointed the Department of Public Advocacy (DPA) to assist. After the court granted two extensions of time to allow the DPA to review Benton's case, the DPA withdrew. Subsequently, the court entered an agreed order granting an additional extension of time to supplement. The court denied Benton's RCr 11.42 motion on March 23, 2016, without an evidentiary hearing. The trial court held Benton's attorneys had an adequate amount of time to prepare for trial and file suppression motions, the Commonwealth did not make any offers following the heart attack, and his evidentiary arguments constituted only broad and conclusory allegations.

On July 23, 2014, while Benton's RCr 11.42 motion was still pending, he filed a motion under CR 60.02. In it, he asserted a litany of issues surrounding his case, including alleged errors by the trial court and defense counsel. Directly relevant to this appeal, he alleged his attorneys were ineffective for proceeding to trial after his lead counsel suffered a heart attack. He further alleged his attorneys failed to impeach Katie Mattingly (Katie), whom he claimed was employed by the Commonwealth during his trial and had been at the Mattingly residence buying and using drugs. The court denied Benton's CR 60.02 motion, finding he had

failed to cite any reason of an extraordinary nature to justify relief. The court also held that Benton's motion was not filed within a reasonable time because he filed it three years after he was sentenced. Finally, the court held that his arguments concerning Katie were not proper under CR 60.02.

In his consolidated RCr 11.42 and CR 60.02 appeal before this Court, Benton raises multiple issues. With regard to the trial court's denial of his RCr 11.42 motion, Benton argues he is entitled to an evidentiary hearing for the following reasons: the trial court improperly denied his motion prior to the time he could file a supplement; his attorneys were ineffective for failing to request a continuance after defense counsel suffered a heart attack; his attorneys were ineffective for failing to challenge the Commonwealth's destruction of a firearm and shell casings involved in the robbery; and his attorneys were ineffective for failing to hire an expert to testify concerning the destruction of the firearm and shell casings. In his appeal from the denial of his CR 60.02 motion, Benton argues that his counsel was ineffective for failing to impeach Katie, whom he contends was a law clerk at the Commonwealth Attorney's office and was selling drugs at the Mattingly residence.

Analysis

I. RCr 11.42

In order to maintain an ineffective assistance of counsel claim, a movant must satisfy a two-part test showing that his counsel's performance was deficient and that the deficiency caused actual prejudice affecting the outcome of

the proceeding. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984); accord *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). The burden falls on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065; *Commonwealth v. Pelfrey*, 998 S.W.2d 460, 463 (Ky. 1999). An evidentiary hearing is necessary only where the record does not conclusively refute the allegations in the motion. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001).

Benton first argues that the trial court erred because it denied his RCr 11.42 motion before he could further supplement it, either through the DPA or through a prison legal aide. Benton asserts that his original RCr 11.42 motion was merely a notice that he intended to file a later RCr 11.42 motion and that his second RCr 11.42 motion was his actual motion. However, we note that the Supreme Court of Kentucky has declined to recognize the legal validity of pre-RCr 11.42 motions. *Bowling v. Commonwealth*, 926 S.W.2d 667, 669 (Ky. 1996).

Regardless, Benton had more than an adequate amount of time to file a supplement to the RCr 11.42 motion. In fact, Benton had *over three years* to supplement his RCr 11.42 motion from the time he filed his "Motion to Notice a RCr 11.42" until the court ruled on merits of his motion. Benton cannot require the trial court to forgo the disposition of a motion indefinitely. The trial court did not err by denying Benton's motion before he filed an additional supplement.

Second, Benton claims that his counsel was ineffective for failing to request a continuance after the lead counsel in his case suffered a heart attack. Leading up to trial, Benton was represented by two attorneys, Sornberger and Holland. On May 5, 2011, after the jury was selected and sworn, Sornberger suffered a heart attack. He withdrew from representation shortly thereafter and Holland took over as lead counsel. Benton alleges that Holland did not object when the trial court granted a three-day continuance or seek additional time to prepare for trial. Holland had served as co-counsel in the case for more than a year and was decidedly familiar with the case. The trial court also appointed an additional attorney, Barnes, who acted as co-counsel for Holland.

“[T]he reasonableness of a continuance depends upon the facts and circumstances of each individual case[.]” *Darcy v. Commonwealth*, 441 S.W.3d 77, 82 (Ky. 2014).

Factors the trial court is to consider in exercising its discretion are: length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay is purposeful or is caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice.

Snodgrass v. Commonwealth, 814 S.W.2d 579, 581 (Ky. 1994) (citing *Wilson v. Mintzes*, 761 F.2d 275, 281 (6th Cir. 1985)), *overruled on other grounds by Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001).

Contrary to Benton’s contention, the *Snodgrass* factors do not weigh in his favor. On May 9, 2011, the originally scheduled trial day, the trial court *did*

grant a one-week continuance, and Benton's attorneys had no objection to the amount of time provided by the trial court. Although Benton's lead counsel was forced to withdraw for health reasons, his remaining attorney had represented him for over a year. This refutes Benton's assertion that he was prejudiced because his attorneys were unfamiliar with his case. Furthermore, Benton received numerous continuances prior to trial. One week was sufficient for Benton's attorneys to make the necessary modifications to their case given the circumstances, and Benton has failed to overcome the strong presumption that his counsels' decision was reasonable.

Next, Benton argues that his counsel was ineffective for failing to challenge the Commonwealth's destruction of the gun and shell casings and for failing to hire an expert to testify concerning their destruction. As a preliminary matter, Benton's assertion that the Commonwealth destroyed the gun used in his case is simply incorrect. Although one firearm was recovered from Richard Wright's residence and introduced into evidence, the weapon used at both crime scenes was never recovered. The jury was made aware of this fact.

Additionally, Detective David Richardson of the Lexington Police Department testified that shell casings and a projectile were inadvertently destroyed prior to trial. Again, the jury was aware that these items were destroyed and was able to afford their destruction due weight. In fact, the Supreme Court of Kentucky determined in Benton's direct appeal that sufficient evidence of his guilt existed in the record to deny his motion for a directed verdict even in the absence

of the shell casings and projectile. *Benton*, 2011-SC-000411-MR, 2013 WL 1188006, at *6. Because the jury was aware of the destruction of the shell casings and projectile and sufficient evidence existed against Benton to convict him in their absence, he was not prejudiced by his counsels' failure to hire an expert to testify about these matters.

Furthermore, in order to demonstrate that the Commonwealth committed a due process violation, a defendant must show that the evidence was destroyed in bad faith. “[I]t must appear that the state *deliberately* sought to suppress material, potentially exculpatory evidence.” *Garland v. Commonwealth*, 458 S.W.3d 781, 786 (Ky. 2015) (emphasis added) (quoting *McPherson v. Commonwealth*, 360 S.W.3d 207, 217 (Ky. 2012)). The only evidence introduced at trial indicated that this evidence was destroyed inadvertently, not in bad faith. Therefore, Benton’s counsel was also not ineffective for failing to contest this issue because doing so would have been futile. “It is not ineffective assistance of counsel to fail to perform a futile act.” *Bowling v. Commonwealth*, 80 S.W.3d 405, 415 (Ky. 2002). Because Benton has failed to allege any claim under RCr 11.42 that is not refuted by the record, he was not entitled to an evidentiary hearing.

II. CR 60.02

“Given the high standard for granting a CR 60.02 motion, a trial court’s ruling on the motion receives great deference on appeal and will not be overturned except for an abuse of discretion.” *Barnett v. Commonwealth*, 979 S.W.2d 98, 102 (Ky. 1998) (citations omitted). To amount to an abuse of

discretion, the trial court's decision must be "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted). CR 60.02 is for relief that is not available on direct appeal and not available collaterally under RCr 11.42. *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983).

Under CR 60.02, Benton argues that his counsel was ineffective for failing to impeach Katie, a witness for the Commonwealth who observed the beginning of the altercation and identified Benton. Benton contends Katie was a law clerk at the Commonwealth Attorney's office and that she had been selling drugs at the Mattingly residence.³ These arguments are not appropriate under CR 60.02.⁴ CR 60.02 is not a "catch-all" provision, and a motion brought thereunder cannot be used as a basis to circumvent the duty to raise errors which should have been raised in an earlier proceeding. *Gross*, 648 S.W.2d at 857. Because we determine that Benton should have raised these issues in an earlier proceeding, we need not address the Commonwealth's arguments regarding specificity or timeliness.

Conclusion

³ On direct appeal, the Supreme Court of Kentucky concluded evidence of marijuana trafficking by John Mattingly and James Lee Mudd, another occupant of the Mattingly residence, was not relevant. *Benton*, 2011-SC-000411-MR, 2013 WL 1188006, at *4.

⁴ In his brief, Benton argues that his counsel was ineffective for failing to impeach Katie. However, Benton made his arguments concerning Katie in his CR 60.02 motion below, not in his RCr 11.42 motion.

In sum, we hold that the record definitively refutes Benton's allegations under RCr 11.42. Additionally, Benton has failed to provide sufficient basis for relief under CR 60.02.

Accordingly, the Fayette Circuit Court's orders denying Benton relief under RCr 11.42 motion and CR 60.02 are affirmed.

ALL CONCUR.

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