

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-002026-MR

PERCY L. GOOSBY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE, AUDRA J. ECKERLE JUDGE
ACTION NOS. 10-CR-002866 & 11-CR-002881

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION AFFIRMING

** ** * ** * ** *

BEFORE: KRAMER, CHIEF JUDGE; DIXON AND TAYLOR, JUDGES.

Percy L. Goosby, *pro se*, appeals from an Opinion and Order of the Jefferson Circuit Court entered November 18, 2014, denying his motion for post-conviction relief made pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Goosby contends that he received ineffective assistance of counsel due to his counsel laboring under an actual conflict of interest. For the reasons stated below, we affirm.

BACKGROUND

In September 2010, Goosby, along with three other co-defendants, was arrested for possession of cocaine and marijuana by Louisville Metro Police. All four defendants were subsequently indicted for complicity to traffic in a controlled substance in the first degree. Goosby was also charged with being a persistent felony offender in the first degree.

Additionally, all four defendants were represented by the Louisville Public Defender's Office and each executed a waiver of dual or multiple representation pursuant to RCr 8.30(1). The defendants were explained the conflict possibilities by the circuit judge as required. A jury trial was scheduled for September 2011. Shortly before trial, two of the defendants entered guilty pleas in exchange for their testimony against Goosby and the other remaining defendant. They were also given twelve-month sentences that were conditionally discharged.

The jury trial concluded on September 29, 2011, and Goosby was convicted of complicity to traffic in a controlled substance in the first degree. In lieu of being sentenced by a jury, Goosby entered into an agreement with the Commonwealth, pleading guilty to being a first-degree persistent felony offender in exchange for a recommended sentence of twelve years. Goosby further agreed to waive his right to appeal. Thereafter, the trial judge sentenced Goosby according to the Commonwealth's recommendation and Goosby did not appeal.

On July 29, 2013, Goosby, *pro se*, filed a motion for post-conviction relief in the Jefferson Circuit Court pursuant to RCr 11.42. In his motion, Goosby

asserted several grounds of ineffective assistance of trial counsel. The trial court appointed the Department of Public Advocacy (DPA) to represent Goosby; however, the DPA was allowed to withdraw because it did not believe that Goosby's motion was a proceeding that a reasonable person with adequate means would be willing to bring at his or her own expense. By Opinion and Order entered November 18, 2014, the circuit court summarily denied Goosby's RCr 11.42 motion without an evidentiary hearing. This appeal followed.

On appeal, Goosby has abandoned all but one of the issues that he presented to the circuit court. Goosby continues to maintain that he received ineffective assistance of counsel due to his trial counsel laboring under an actual conflict of interest during his representation of Goosby. He essentially argues that a new conflict arose when his co-defendants entered into a plea bargain before trial. We agree with the Commonwealth that Goosby's argument on this issue is totally without merit.

ANALYSIS

In Kentucky, RCr 8.30(1) provides for a defendant's right to conflict free counsel by prohibiting dual representation of persons charged with the same offense unless:

(a) the judge of the court in which the proceeding is being held explains to the defendant or defendants the possibility of a conflict of interests on the part of the attorney in that what may be or seem to be in the best interests of one client may not be in the best interests of another, and

(b) each defendant in the proceeding executes and causes to be entered in the record a statement that the possibility of a conflict of interests on the part of the attorney has been explained to the defendant by the court and that the defendant nevertheless desires to be represented by the same attorney.

RCr 8.30 further protects defendant's right to conflict free counsel when an actual conflict arises. RCr 8.30(3) requires that:

Upon receipt of any information reasonably suggesting that what is best for one client may not be best for another, counsel shall explain its significance to the defendant and disclose it to the court, and shall withdraw as counsel for one client or the other unless:

(a) each such client who is a defendant in the proceeding executes a written waiver setting forth the circumstances and reiterating the client's desire for continued representation by the same counsel and

(b) such waiver is entered in the record of the proceeding.

In this case, neither Goosby nor his attorney objected to or raised the purported conflict of interest before or during trial, even when his co-defendants testified against him. To establish ineffective assistance based on a conflict of interest on the part of trial counsel, "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S. Ct. 1708, 64 L.Ed.2d 333 (1980); accord *Kirkland v. Com.*, 53 S.W.3d 71 (Ky. 2001) (footnote omitted).

The circuit court thoroughly examined the conflict of interest issue and the applicable law. The circuit court stated:

A defendant also has a right to counsel that is free from conflict of interest. *Wood v. Georgia*, 450 U.S. 261 (1981). Defendants charged with certain offenses in the same case must have separate counsel. RCr 8.30. But a defendant may waive this requirement if a Trial Judge explains the possibility of conflicts of interest to him and he signs a written waiver. *Id.* Thereafter, attorneys should alert the Court of any actual conflict of interest, and either secure another waiver or withdrawal. Failure to comply with this rule “is not presumptively prejudicial and does not warrant automatic reversal.” *Kirkland v. Commonwealth*, 53 S.W.3d 71, 75 (Ky. 2001). “A defendant must show a real conflict of interest in order to obtain reversal.” *Id.*

....

Goosby also failed to show a real conflict of interest. The record revealed that Goosby signed a complaint waiver to allow different attorneys from the same office to represent him and his co-Defendants. *See* RCr 8.30. The waiver stated that Goosby understood and abjured any possibility of a conflict of interest. (See Waiver of Dual or Multiple Representation, signed on Mar. 29, 2011). The record also indicated that the Court apprised him of a potential conflict of interest during pretrial proceedings. Significantly, the record shows that Goosby never raised a claim of conflict of interest before or during the trial. (Citation omitted.)

Opinion and Order at 3-5.

We totally agree with the circuit court’s analysis and incorporate the same as part of our Opinion in this appeal. Goosby failed to establish a violation of RCr 8.30 nor has alleged any facts on how he was prejudiced thereby. *See Brewer v. Com.*, 206 S.W.3d 313 (Ky. 2006).

Additionally, Goosby was not entitled to an evidentiary hearing on his RCr 11.42 motion before the circuit court. “Conclusionary allegations which are

not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of a discovery deposition.” *Sanborn v. Com.*, 975 S.W.2d 905, 909 (Ky. 1998) (overruled on other grounds by *Leonard v. Com.*, 279 S.W.3d 151 (Ky. 2009)). Goosby failed to state any specific facts supporting the alleged conflict of interest nor how he was prejudiced as a result of the conflict.

For the forgoing reasons, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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