

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001449-MR

ROBERT E. SHIRLEY

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HON. STEVE ALAN WILSON, JUDGE
ACTION NO. 04-CR-00247

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION AFFIRMING

** ** * ** * ** *

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

Robert E. Shirley brings this appeal from an Order overruling defendant's motion to vacate, set aside, or correct sentence entered by the Warren Circuit Court on August 19, 2015, denying his motion for post-conviction relief made pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 and RCr 10.02 and Kentucky Rules of Civil Procedure (CR) 60.02. For the reasons stated, we affirm.

BACKGROUND

On June 20, 2005, following a jury trial, Robert E. Shirley was found guilty and sentenced to twenty-years' imprisonment for wanton murder Kentucky Revised Statutes (KRS) 507.020(1)(b). The Kentucky Supreme Court affirmed Shirley's conviction on direct appeal in 2006, by an unpublished opinion in 2005-SC-0503-MR. In 2009, Shirley filed a motion to vacate sentence pursuant to RCr 11.42, asserting several allegations of ineffective assistance of counsel. The Warren Circuit Court denied the RCr 11.42 motion by order entered on July 6, 2009, holding that Shirley did not receive ineffective assistance of counsel. Shirley then appealed that ruling to this Court, which affirmed the circuit court by Opinion rendered January 28, 2011 (Appeal No. 2009-CA-002029-MR). The Kentucky Supreme Court denied discretionary review of that opinion on October 24, 2011 (2011-SC-00090).

On March 6, 2014, almost nine years after his conviction for murder, Shirley filed a motion to vacate, set aside or correct sentence pursuant to RCr 11.42, CR 60.02(f), RCr 10.02, and RCr 10.06, based upon a new allegation that he received ineffective assistance of counsel when his trial attorney failed to advise him of the spousal testimony privilege as set out in Kentucky Rules of Evidence (KRE) 504(a).¹ By order entered August 19, 2015, the Warren Circuit Court

¹ Kentucky Rules of Evidence 504 Husband-Wife Privilege (a) provides:
Spousal testimony. The spouse of a party has a privilege to refuse to testify against the party as to events occurring after the date of their marriage. A party has a privilege to prevent his or her spouse from testifying against the party as to events occurring after the date of their marriage.

overruled the motion on the basis that the motion was untimely, was not argued on direct appeal, nor was it raised in Shirley's original RCr 11.42 motion. This appeal follows.

ANALYSIS

The only issue raised in this appeal looks to Shirley's attorney allegedly being ineffective for failing to assert the spousal privilege under KRE 504 at Shirley's trial in 2005. There are no new facts alleged that were not known to Shirley at the time of his trial. Shirley cites this Court to "prejudicial statements" made by Jeanette Shirley at trial on p. 5 of his brief, yet fails to cite where in the record on appeal this evidence can be found. CR 76.12(4)(c) requires an appellant to identify in the record matters supporting the arguments being raised on appeal. Penalties for failing to comply include striking the appellant's brief. CR 76.12(8). Rather than strike the brief, we have reviewed earlier opinions regarding the trial proceeding in 2005. Based on our review of the earlier decisions rendered in this case, it is apparent that Jeanette Shirley's testimony was used by Shirley to bolster his defense at trial, that the shooting resulting in his conviction for murder was an accident. Shirley's attorney cross-examined Jeanette at trial as a material witness and at no time objected to her testimony. By failing to invoke or assert the spousal privilege at trial, Shirley waived the privilege as a matter of law. *St. Clair v. Com.*, 451 S.W.3d 597 (Ky. 2014).

As concerns whether the failure to assert the spousal privilege was ineffective assistance of counsel, the circuit court thoroughly analyzed the issue and applicable law. The court stated:

[Shirley's] motion is overruled because he failed to raise this issue on direct appeal and in his first RCr 11.42 motion. *See Shepherd v. Commonwealth*, 477 S.W.2d 798 (Ky. 1972). (“[T]he appellant then filed a fourth motion to vacate the judgment and in this motion alleged that he did not have effective assistance of counsel during his trial and was denied the right of direct appeal. These particular grounds of relief could have been raised in any of the three earlier motions to vacate.”)

Moreover, [Shirley's] motion is untimely and must be overruled. RCr 11.42(10) requires:

Any motion under this rule shall be filed within three years after the judgment becomes final, unless the motion alleges and the movant proves either:

(a) that the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence; or

(b) that the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

[Shirley] did not file this motion until nine years after the judgment became final. [Shirley] has not alleged any new facts that were unknown to the [Shirley] at the time of his conviction. [Shirley] argues that the new “fact” that he was unaware of previously was his privilege to forbid his spouse from testifying pursuant to KRE 504(a). Even if the Court agreed that this situation constituted an unknown “fact,” as contemplated by RCr 11.42, [Shirley] cannot claim this fact could not be

ascertained by the exercise of due diligence. [Shirley] already claimed multiple ineffective assistance of counsel claims in his 2009 motion. Due diligence at that time would have revealed the grounds for relief he now seeks.

[Shirley] also seeks relief from judgment pursuant to CR 60.02 and RCr 10.02. However, this Motion was filed nine years after final judgment was entered. The Motion is therefore beyond the one[-]year limitation of CR 60.02. Similarly, a Motion for New Trial under RCr 10.02 ordinarily must be brought within one year of entered the verdict unless good cause can be shown justifying delay. *St. Clair v. Commonwealth*, 451 S.W.3d 597, 616 n.8 (Ky. 2014). For the reasons above stated [Shirley] has failed to show good cause for extending the one[-]year period. Because [Shirley] failed to raise this particular claim of ineffective assistance of counsel in his previous Motion to Vacate Judgment, and because his new motion is untimely, [Shirley's] Motion to Vacate, Set Aside, or Correct Sentence is OVERRULED.

Order Overruling Defendant's Motion to Vacate, Set Aside, or Correct Sentence at 2-3.

We agree with the circuit court's analysis that Shirley's motion was untimely and otherwise without merit. Shirley has received two bites at the apple in this case and he will not receive a third on this untimely motion. Accordingly, the circuit court did not abuse its discretion in denying Shirley's motion.

For the foregoing reasons, the order of the Warren Circuit Court overruling Shirley's motion to vacate, set aside, or correct sentence is affirmed.

ALL CONCUR.

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