

RENDERED: DECEMBER 7, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001387-MR

MICHAEL MOORE

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE ANTHONY W. FROHLICH, JUDGE
ACTION NO. 09-CR-00641

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION & ORDER
DISMISSING

** ** * * * * *

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

COMBS, JUDGE: Appellant, Michael Moore, appeals from an order denying his post-conviction request for DNA testing pursuant to KRS¹ 422.285. After our review we are compelled to dismiss this appeal.

¹ Kentucky Revised Statutes.

Moore v. Commonwealth, 2014-SC-000023-MR, 2015 WL 4972249,

at *1 (Ky. Aug. 20, 2015), in which our Supreme Court affirmed Moore's convictions, summarizes the underlying facts:

On . . . June 12, 2009, Appellant and his parents were arguing over Appellant's continued use of his mother's pills. His parents were also upset . . . because he had failed to attend mediation . . . concerning his pending divorce. Instead . . . [he] got high. The argument . . . led to a physical altercation between Appellant and his father. Appellant shot his mother and father in the head with his father's pistol. Appellant was also shot in his thigh.

Soon thereafter, Appellant . . . threw the murder weapon onto the roof. . . .Appellant informed the 911 operator that a masked intruder entered the Moore residence, shot him, shot his parents, and then left. Appellant continued to tell this narrative . . . in the years leading up to trial.

However, Appellant changed his trial theory to self-defense. Appellant testified that his father shot and killed his mother and then shot him in the leg and groin. Appellant stated that he shot his father twice in the head in an attempt to save his own life.

A Boone Circuit Court jury convicted Appellant of two counts of murder, one count of tampering with physical evidence, and one count of falsely reporting an incident. Presented with the option of imposing the death penalty, the jury recommended a sentence of life without the possibility of parole on each murder conviction, five years' imprisonment for the tampering conviction, and twelve months for the false reporting conviction. The trial court sentenced Appellant in accord with the jury's recommendation.

On August 23, 2016, Moore filed a motion pursuant to RCr² 11.42.

On July 10, 2017, he filed a request for DNA testing pursuant to KRS 422.285³ and sought to hold his pending RCr 11.42 motion in abeyance in relevant part:

Movant's Father shot and killed his Mother then his Father tried killing him. According to the Commonwealth's theory of the case, Movant killed his mother, shot his father then immediately shot himself. If this was the case, then Movant's blood would have covered his father's clothing especially considering the fact the stairwell where the father was shot and where movant allegedly shot himself was approximately 3 feet of space with a 260 pound man (father) and over 200 pound man (movant) occupying the same space at the same time. However, if this Court grants his request for testing the clothing of his father and other evidence, testing will prove that none of his blood is on his father's clothing, along with other existing evidence in the case which would disprove the Commonwealth's theory.

If this Court grants his request, and the testing proves the Movant's theory is correct, then that will lend even more credence to his claim of ineffective assistance of counsel because counsel failed to request testing of the clothing in a timely manner which led to this Court denying Counsel's

² Kentucky Rules of Criminal Procedure.

³ "A petition is authorized by the statute to procure only one type of post-conviction forensic testing; of course, that is testing and analysis of evidence for DNA. KRS 422.285(1)(a). Also, it must be 'accompanied by a supporting affidavit containing sufficient factual averments to support the request[.]' KRS 422.285(2)." *Owens v. Commonwealth*, 512 S.W.3d 1, 7 (Ky. App., 2017).

request because it would have required a postponement of trial.

Moore's request is unverified and unaccompanied by an affidavit as required by statute.

By order entered on July 21, 2017 the trial court denied Moore's request "because the Court does not believe that Defendant's request contains sufficient factual averments as required by KRS 422.285 to support his claims." Moore appealed from that order. By order entered on August 30, 2017, the court held Moore's RCr 11.42 motion in abeyance pending resolution of this appeal.

The July 21, 2017, order denying Moore's request for DNA testing is not final and appealable. It is indeed an integral -- if not the pivotal -- part of his pending RCr 11.42 proceeding. That proceeding has been placed in abeyance rather than having been adjudicated by a final and appealable order.

CR^[4] 54.01, applicable to criminal actions pursuant to RCr 13.04, defines a final or appealable judgment as "a final order adjudicating all the rights of all the parties in an action or proceeding." Thus, the fundamental rule is that for an order to be final and appealable, it must adjudicate all claims of the parties at the time the order was entered.

Commonwealth v. Taylor, 945 S.W.2d 420, 422 (Ky. 1997).

⁴ Kentucky Rules of Civil Procedure.

If we were to reach the merits, we would be compelled to affirm. Moore's failure to file a supporting affidavit as required by KRS 422.285(2) is sufficient basis for denial of his request.

The Court hereby ORDERS that the above-styled appeal is dismissed.

ALL CONCUR.

ENTERED: December 7, 2018

/s/ Sara Combs
HON. SARA WALTER COMBS
JUDGE, COURT OF APPEALS

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