

RENDERED: MARCH 29, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000443-MR

ROMOCCO LAWARREN MALONE

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 12-CR-01398

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

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

THOMPSON, K., JUDGE: Romocco Lawarren Malone, *pro se*, appeals from the denial of his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion. Malone argues the circuit court erred or abused its discretion by: (1) allowing the Department of Public Advocacy (DPA) to withdraw; (2) failing to rule on Malone's motion to amend before ruling on his RCr 11.42 motion; (3) denying

Malone's motion to amend; and (4) failing to grant Malone an evidentiary hearing on his ineffective assistance of counsel claim.

In 2011, Malone began living with Jessica Cruz. In 2011 and 2012, Malone repeatedly threatened Cruz and others, and assaulted her. Two incidents were reported to police, and one resulted in Malone's serving time in jail; however, the couple continued to have a relationship, and additional incidents were not reported to the police. Although Malone eventually moved out, a final incident in 2012 resulted in police involvement:

On or about September 13, Malone went to Cruz's place of work, took her cell phone, and threatened her. The police were called as a result of this incident, but Malone was not arrested. Throughout the evening and early morning of September 14-15, Malone and Cruz exchanged a number of text messages and phone calls. According to Cruz, Malone continued to harass her because he believed she was having a sexual relationship with another man. According to Malone, Cruz kept contacting him and Cruz's new boyfriend threatened him. At some point, the police were called and, while they were present in Cruz's apartment, Malone called. While speaking with the officers, Malone threatened to kill Cruz and the officers, and he said he would wait for the police at a nearby BP gas station. Two officers left to search for Malone, leaving one officer, Officer Dearing, outside of Cruz's apartment building. When the officers could not find Malone, they left. As Officer Dearing was leaving, a cab driver flagged him down and reported that a passenger, who [sic] he had dropped off near Cruz's apartment, had not paid his fare. Officer Dearing believed the passenger was Malone and returned to Cruz's apartment. When he entered the apartment, Officer Dearing noticed that the door had been

damaged and he heard Cruz screaming. Officer Dearing then went to a bedroom, where he saw Malone lying on top of Cruz stabbing her. Officer Dearing yelled to Malone to stop and threatened to shoot Malone. However, because of Malone's proximity to Cruz, officer Dearing could not shoot him. Another officer then arrived, tazed Malone twice, and the officers arrested Malone and took him to jail.

Malone v. Commonwealth, No. 2014-SC-000690-MR, 2015 WL 9243877, 2 (Ky. 2015) (unpublished).

After a jury trial, Malone was convicted of one count each of second-degree assault, first-degree burglary, second-degree stalking, and second-degree wanton endangerment; four counts of third-degree terroristic threatening; and of being a persistent felony offender in the first-degree. He was sentenced to a total of seventy-years' imprisonment. Malone filed a direct appeal to the Kentucky Supreme Court.

One of Malone's claimed errors during his direct appeal involved recovered text messages he sent to Cruz which were retrieved from her phone (the police were not able to recover any text messages that Cruz sent to Malone).

During the trial, the trial court did not permit Malone to introduce into evidence his text messages to Cruz, explaining that introducing only Malone's text messages would have presented a skewed picture to the jury and there was no evidence as to how those messages were retrieved. When Malone requested the opportunity to use the texts to refresh his memory, the trial court permitted Malone

to testify about what he remembered texting to Cruz but prohibited him from reading the messages verbatim into evidence.

On appeal, Malone argued that the trial court erred by “refus[ing] to let him review the text messages to refresh his memory, thus impeding his ability to present a complete defense.” *Id.* at 9.

The Kentucky Supreme Court rejected Malone’s argument, stating: “Malone has not shown how his reviewing the text messages would have altered the jury’s findings, and we discern no error in the trial court’s ruling.” *Id.* Of relevance to Malone’s present argument, that he received ineffective assistance of counsel because counsel did not get the text messages admitted at trial, the Kentucky Supreme Court noted: (1) Malone stated during his testimony that he remembered what he had texted to Cruz and testified about the content of his messages to her; (2) Malone did not dispute the actions underlying the charges: that he went to Cruz’s apartment, broke down her door, struck Cruz, thereby breaking her nose, and stabbed Cruz; and (3) the text messages could not assist Malone in proving his defense of extreme emotional distress, which he testified was triggered by his conversation with Cruz’s boyfriend and not from text messages from Cruz. *Id.*

Malone’s convictions were affirmed on all counts except for three counts of terroristic threatening, which were reversed on the basis that, as the

Commonwealth agreed, the instructions did not set forth sufficient facts to differentiate each count. *Id.* at 5. Malone’s total sentence remained the same. *Id.* at 9.

Malone filed a timely RCr 11.42 motion based upon ineffective assistance of counsel and a motion for appointment of counsel. Malone argued his trial counsel was ineffective in several ways. However, the only argument which Malone continues to pursue on appeal is that his trial counsel was ineffective for failing to get his text messages admitted into evidence.

Malone argued below that he was prejudiced by his counsel’s failure to get his text messages admitted into evidence because they would have provided a different explanation as to why he acted as he did towards Cruz. Malone explained that his trial counsel attempted to have the text messages introduced and entered into evidence, but the trial court refused to admit them based upon Kentucky Rules of Evidence (KRE) 106. He then argued that the trial court should have admitted them. He requested an evidentiary hearing.

Malone was appointed counsel. However, after DPA reviewed the record in accordance with Kentucky Revised Statutes (KRS) 31.110(2)(c), it moved to be permitted to withdraw as counsel as this was “not a proceeding that a reasonable person with adequate means would be willing to bring at his or her own expense[.]”

Malone opposed DPA's motion to withdraw, arguing DPA should not be permitted to withdraw because it did not adequately investigate whether he had any claims where no one from DPA consulted with him. He also argued that allowing DPA to withdraw could prejudice him as he is not allowed to file successive RCr 11.42 claims.

The circuit court granted DPA's motion to withdraw and explained its reasoning as follows:

Malone is incorrect that DPA must first consult with him before making such a determination. The Court will give deference to DPA when undertaking a review to determine if a *pro se* litigant is entitled to DPA representation. DPA did not summarize for the Court why it believes that a reasonable person with adequate means would not be willing to bring this post-conviction action at his or her own expense. However, after a complete review of Malone's post-conviction motion and the record, this Court must agree with DPA that a reasonable person with adequate means would not bring this post-conviction action.

Malone testified in his own defense and basically admitted to committing the offenses of assault and burglary. A police officer also testified that he witnessed Malone assaulting the victim, after Malone admitted to breaking down the door to her apartment. The jury could have sentenced Malone to life imprisonment with the PFO enhancement. Instead, however, the jury recommended a sentence of 70 years. If this case is reversed on Malone's *pro se* post-conviction motion, he again would face a possible life sentence.

Malone then filed a motion to supplement his RCr 11.42 motion. In this motion, he reiterated and clarified some of his claims, but not any that relate to the issue he is pursuing on appeal.

After the Commonwealth responded to Malone's RCr 11.42 motion, Malone simultaneously filed a motion to amend his RCr 11.42 motion and filed his reply to the Commonwealth's response to his RCr 11.42 motion. Malone argued in his motion to amend that since filing his initial motion, he was informed by his prison legal aid that there were additional claims he could present and requested additional time to present these new grounds. However, Malone did not state what these new grounds were.

In his reply on the RCr 11.42 motion, Malone admitted his trial counsel argued to the trial court that the text messages should be introduced as business records and that the trial court ruled that the text messages could not be introduced because they were incomplete (rather than because they contained hearsay). Malone disputed the Commonwealth's argument that his direct appeal precluded him from raising this issue, arguing that the Kentucky Supreme Court did not directly address whether the text messages should have been admitted because his appellate counsel never argued the trial court erred by failing to admit the text messages and instead only argued that the trial court erred by failing to allow him to use the text messages to refresh his recollection.

While Malone continued to argue in his reply that his trial counsel was ineffective in failing to get his text messages admitted, the specifics of this argument changed. He argued trial counsel erred by: (1) failing to have the text messages authenticated pursuant to KRE 901 as business records pursuant to KRE 803(6); (2) failing to show the text messages were relevant pursuant to KRE 401 (when they were extremely important to his extreme emotional disturbance defense); and (3) failing to adequately prepare to have the text messages introduced by not adequately investigating and studying the law concerning how to have text messages admitted.

Malone filed a separate motion requesting that the circuit court rule on his pending motion to amend so that he could submit an amended RCr 11.42 motion.

Without an evidentiary hearing, the circuit court denied Malone's RCr 11.42 motion without first ruling on his motion to amend his RCr 11.42 motion. As to the text messages issue, the circuit court explained that during the trial, a detective testified the results of a forensic examination of Malone's and Cruz's cell phones were incomplete due to the incompatibility of the analysis software and the phones and, therefore, the trial court ruled the messages inadmissible. The circuit court explained Malone could not meet his burden of showing that he received ineffective assistance of counsel where the Kentucky Supreme Court previously

determined on direct appeal there was no error in excluding the text messages and their admission would not have changed the outcome of the trial.

Malone then filed a motion to alter, amend or vacate this order because the circuit court failed to make a ruling on his motion to amend his RCr 11.42 motion, but again failed to disclose what his new grounds were.

The circuit court denied this motion, explaining that Malone never disclosed new grounds for RCr 11.42 relief or provided sufficient grounds to hold the case in abeyance and that an evidentiary hearing was not warranted on his RCr 11.42 claims.

Malone argues that DPA should not have been permitted to withdraw. Malone had no constitutional right to counsel or effective assistance of counsel for his RCr 11.42 motion. *Moore v. Commonwealth*, 199 S.W.3d 132, 140 (Ky. 2006). He also had no right to appointment of counsel under RCr 11.42(5) because his RCr 11.42 motion could be resolved without an evidentiary hearing. *Moore*, 199 S.W.3d at 140. *See Fraser v. Commonwealth*, 59 S.W.3d 448, 456 (Ky. 2001) (explaining the interaction between RCr 11.42(5) and KRS 31.110(2)(c)); *Commonwealth v. Stamps*, 672 S.W.2d 336, 339 (Ky. 1984) (same).

Malone had no right to be represented on his RCr 11.42 motion where DPA and circuit court determined that it was “not a proceeding that a reasonable person with adequate means would be willing to bring at his or her own

expense[.]” KRS 31.110(2)(c). After DPA withdrew, Malone had “no further right to be represented by counsel under the provisions of this chapter.” *Id.*

Malone received everything he was due pursuant to KRS 31.110(2)(c). Therefore, there can be no error in the circuit court’s permitting DPA to withdraw. We also note that Malone has failed to allege any prejudice from not having counsel.

Similarly, Malone’s claim that the circuit court erred by failing to grant his motion to amend and failing to rule on this motion until after his RCr 11.42 motion was denied has no merit. Kentucky Rules of Civil Procedure (CR) 15, which governs amended and supplemental pleadings, is applicable to RCr 11.42 motions. *Roach v. Commonwealth*, 384 S.W.3d 131, 135 (Ky. 2012). We review the circuit court’s determination as to whether to allow an amended pleading for abuse of discretion. *Insight Kentucky Partners II, L.P. v. Preferred Auto. Servs., Inc.*, 514 S.W.3d 537, 555 (Ky.App. 2016).

CR 15.01 only allows amendments of pleadings after a responsive pleading is served either by leave of court or by written consent of the adverse party and specifies that “leave shall be freely given when justice so requires.” We note that “[a] trial court may deny the right to amend a pleading on the basis of ‘the futility of the amendment itself,’ which essentially equates to a failure to state a claim upon which relief could be granted.” *Insight Kentucky Partners II, L.P.*, 514

S.W.3d at 555 (quoting *Bank One, Kentucky, N.A. v. Murphy*, 52 S.W.3d 540, 550 (Ky. 2001) (Keller, J., concurring in part and dissenting in part)).

While it would have been a better practice for the circuit court to rule on Malone's motion to amend before denying his RCr 11.42 motion, we agree with the circuit court that justice did not require that Malone be given leave to amend his RCr 11.42 motion and any amendment would have been futile because Malone never stated what new grounds he wished to add. Even after his motion for leave to amend was denied, he failed to do so. On appeal, we still do not know what grounds Malone wished to add.

Furthermore, Malone has failed to establish how he was prejudiced by the circuit court's denying him the opportunity to allow his new unknown claims to proceed. As explained in *Harding v. Kentucky Title Tr. Co.*, 269 Ky. 622, 108 S.W.2d 539, 548 (1937), "even where the court's refusal to permit an amended pleading to be filed [is] technically erroneous, it is yet to be considered a harmless error, if upon the whole case it does not appear to have prejudiced the rights of the complaining party." Because Malone failed to show how an amendment would have helped him, any error in failing to allow such amendment was harmless.

Malone also failed to establish he received ineffective assistance of counsel regarding trial counsel's failure to get Malone's text messages admitted into evidence during his trial. "The two-pronged test for ineffective assistance of

counsel is (1) whether counsel made errors so serious that he was not functioning as ‘counsel’ guaranteed by the Sixth Amendment, and (2) whether the deficient performance prejudiced the defense.” *Fraser*, 59 S.W.3d at 456-57.

None of Malone’s arguments regarding his text messages establish that his trial counsel erred or he was thereby prejudiced. Malone’s counsel attempted to have the text messages admitted into evidence, but the trial court denied their admission for two reasons: (1) Malone’s text messages only presented one side of the exchange and it would be unfair to allow them to be introduced where text messages from the victim could not be introduced with them; and (2) there was insufficient evidence as to how the messages the Commonwealth did obtain were retrieved.

Malone’s arguments focus entirely on the trial court’s second basis for excluding the text messages. He argues his trial counsel was ineffective in getting the text messages admitted because he failed to establish that the text messages were relevant (KRE 401) and authentic (KRE 901) business records (KRE 803(6)). While it is possible that Malone’s trial counsel could have presented further evidence to establish how those text messages were retrieved, trial counsel could not do anything to make the evidence itself more complete.

In excluding the text messages for incompleteness and unfairness, the trial court relied on KRE 106 and KRE 403. KRE 106 provides: “When a writing

or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.” KRE 403 provides: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of . . . confusion of the issues, or misleading the jury[.]”

We agree this was a valid ground for excluding the text messages. There was nothing Malone’s trial counsel could have done to produce the missing text messages from Cruz’s portion of the text exchange; they simply could not be retrieved despite the best efforts of the police. Regardless of any other approach or argument counsel could have made, the trial court’s ultimate ruling excluding the text messages would not have changed.

While Malone is correct that his trial counsel did not appeal this ruling (but rather appealed whether the trial court erred in not allowing Malone to refresh his recollection with the text messages), if this ruling had been appealed, it was not a basis for reversal. Malone could not establish any prejudice from his trial counsel’s either failing to make alternative arguments for the admission of the text messages or failing to appeal their exclusion. Significantly, in its opinion, the Kentucky Supreme Court noted Malone stated he remembered what he had texted to Cruz and was able to and did testify about the contents of his messages to her,

and Malone did not dispute that he broke into Cruz's apartment, broke her nose and stabbed her.

While Malone argues the text messages were vital to establish his defense of extreme emotional distress, he did not explain how the text messages could establish this defense if his testimony about them could not. As the Supreme Court pointed out, Malone testified that his extreme emotional distress was triggered by his conversation with Cruz's boyfriend rather than text messages from Cruz. If admitted, the text messages would not have helped Malone because they neither negated his guilt nor helped to establish any mitigating circumstances. Therefore, the outcome at trial would not have changed regardless of whether the text messages were admitted and any error by the trial counsel in failing to persuade the trial court to admit them would have been harmless.

Accordingly, we affirm the Fayette Circuit Court's order denying Malone's RCr 11.42 motion.

ALL CONCUR.

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