

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky **FINAL**

2003-SC-000475-MR

DATE 2-23-06 ELIZABETH COUNTY, P.C.

ROBERT KEITH WOODALL

APPELLANT

V. APPEAL FROM CALDWELL CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
97-CR-00053

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This is an appeal from a denial of RCr 11.42 relief in a death penalty case. In Woodall v. Commonwealth, 63 S.W.3d 104 (Ky. 2001), *cert. denied*, 537 U.S. 835, 123 S.Ct. 145, 154 L.Ed.2d 54 (2002), this Court affirmed Appellant's, Robert Keith Woodall's, convictions entered in the Caldwell Circuit Court. Appellant had pled guilty to the charges of murder, rape, and kidnapping of a female high school honor student. A jury sentencing trial returned a verdict of a recommended death sentence on the capital murder charge along with two consecutive life sentences for the rape and kidnapping charges.

Appellant subsequently requested relief under CR 60.02(f). The trial court denied Appellant's request and it is currently on appeal to this Court. 2004-SC-931-MR.

In this appeal, Appellant asserts seven trial court errors as well as twelve claims of ineffective assistance of counsel.

We find Appellant's claims lack merit; however, due to the severity of the punishment involved, we address all of Appellant's allegations.

TRIAL COURT ERRORS

Appellant alleges the trial court committed the following errors: (1) failure to hold a competency hearing; (2) failure to find Appellant mentally retarded; (3) failure to consider the voluntariness of Appellant's plea; (4) failure to consider arguments raised on direct appeal; (5) denial of leave to amend the RCr 11.42 motion; (6) denial of *ex parte* proceeding and expert funding; (7) denial of an RCr 11.42 evidentiary hearing.

First, we note the standard of review for RCr 11.42 relief. "Such motion is limited to issues that were not and could not be raised on direct appeal." Sanborn v. Commonwealth, 975 S.W.2d 905, 908-09 (Ky. 1998). Additionally, "[t]he purpose of RCr 11.42 is to provide a forum for known grievances, not to provide an opportunity to research for grievances." Haight v. Commonwealth, 41 S.W.3d 436, 441 (Ky. 2001) (citing Gilliam v. Commonwealth, 652 S.W.2d 856, 858 (Ky. 1983)). Accordingly, many of Appellant's claims are precluded by the RCr 11.42 standard of review.

Appellant's claims of error in failing to hold a competency hearing and in failing to find Appellant mentally retarded should have been raised on direct appeal. We note, however, the trial court, *sua sponte*, ordered a mental health evaluation of Appellant at Kentucky Correctional Psychiatric Center as a "precaution." Dr. Richard Johnson's evaluation revealed that Appellant was competent to stand trial, and there was no evidence of mental retardation. Furthermore, nothing in the record indicates Appellant is mentally retarded or is incompetent, and his allegations supporting this claim are speculative.

Appellant's claim that his guilty plea was unknowing, unintelligent, and involuntary was raised and decided on direct appeal. Woodall, *supra* at 131-32. Accordingly, it is precluded in this proceeding. Appellant also argues Sanborn should be overruled in order to allow reconsideration of arguments raised on direct appeal. We decline the invitation to take such a step, and find the trial court did not err in relying on Sanborn to preclude review of issues decided on direct appeal.

Appellant claims error in the denial of leave to amend the RCr 11.42 motion. We find no abuse of discretion in denying Appellant leave to amend. Appellant argues that Bowling v. Commonwealth, 926 S.W.2d 667, 670 (Ky. 1996), freely allows amendment. However, it remains within the province of the trial court to allow leave to amend only "when appropriate." *Id.* In this case, the trial court determined Appellant's request to amend was really a belated attempt to supplement his brief after time had expired. Accordingly, we find no error in the trial court's decision.

Appellant claims the trial court erred by denying his motion to proceed *ex parte* and for expert funding under KRS 31.185. We find no error on the part of the trial court. Our recent decision in Stopher v. Conliffe, 170 S.W.3d 307 (Ky. 2005), held KRS 31.185 inapplicable to post-conviction proceedings. As a result, Appellant was entitled to neither an *ex parte* hearing nor an order for expert funding.

Appellant's final assertion of trial court error is denial of an evidentiary hearing on his RCr 11.42 claims.

An evidentiary hearing is not required about issues refuted by the record of the trial 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, *supra* at 909 (citing Stanford v. Commonwealth, 854 S.W.2d 742, 743-44 (Ky. 1993)).

In this case, we find no error in denying an evidentiary hearing. It is clear the trial judge was able to conclusively resolve all of Appellant's claims based on the face of the record. Accordingly, an evidentiary hearing was not justified under such circumstances.

INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Appellant alleges twelve errors as ineffective assistance of counsel. In an RCr 11.42 action, "[a]n issue raised and rejected on direct appeal may not be relitigated in these proceedings by claiming that it amounts to ineffective assistance of counsel." Sanborn, supra at 908-09. Otherwise, the appropriate standard of review for an ineffective assistance claim is set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court summarized the standard as "performance of counsel . . . below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result." Haight, supra at 441 (citing Strickland, supra at 688).

Appellant first argues trial counsel was ineffective for failing to request a competency hearing and failing to raise mental retardation as an issue. As stated above, Dr. Johnson found no evidence of incompetence or mental retardation. Consequently, failing to pursue these avenues of trial strategy is not ineffective assistance of counsel.

Appellant argues counsel was ineffective for forcing him to enter a guilty plea, and then later for failing to move to withdraw the plea. This argument was raised and disposed of on direct appeal, and Appellant is barred from shrouding his involuntariness claim as ineffective assistance of counsel.

Appellant claims counsel was ineffective for failing to present additional mental health expert testimony in support of a third continuance prior to the April 1998 trial

date. Counsel presented the testimony of one psychiatric expert, but Appellant claims it was not enough. When claiming ineffective assistance, Appellant may not base his claims merely on the fact that a defense tactic was unsuccessful. Strickland, supra at 690. We find the testimony of one expert on the subject to be sufficient and reasonable assistance of counsel.

We address the next four claims together, as they all relate to mental health evaluation. Appellant claims counsel was ineffective for failing to present an insanity defense, an extreme emotional disturbance defense, a genetic defect defense, and failing to pursue further neurological testing. We find all of these claims are without merit.

Defense counsel chose a trial strategy which is not subject to second-guessing at this time. It was reasonable for defense counsel to rely on Dr. Johnson's evaluation, as well as the testimony of other mental health experts. See Haight, supra at 447. Appellant opines that trial counsel failed to investigate this plethora of mental health defenses.

The decision not to investigate must be professionally reasonable under the circumstances, and the reviewing court gives great deference to trial counsel's decisions. Strickland, supra at 691. In this case, defense counsel's decisions were objectively reasonable, and Appellant relies on hindsight to claim counsel used the wrong strategy. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight" Id. at 689. Even if defense counsel had put forth each of these mental health claims, Appellant still would not be

entitled to relief pursuant to the standard set forth in Strickland.¹ As a result, we find Appellant's allegations do not rise to the level of ineffective assistance of counsel.

Appellant's next three claims focus on mitigation evidence presented by the defense. Appellant acknowledges defense counsel offered the jury evidence of Appellant's fecal incontinence, squalid upbringing, and childhood sexual abuse. Appellant argues, however, that defense counsel was ineffective in convincing the jury that Appellant did not deserve the death penalty. The record reflects that defense counsel acted reasonably, and advocated Appellant's plight as appropriate under the circumstances. Furthermore, even if defense counsel had been a more zealous advocate of this evidence, it still would not create a reasonable probability the jury would have returned a lesser sentence. Accordingly, we find no ineffective assistance of counsel.

Appellant's final claim is that the ineffective assistance claims constitute cumulative error. We disagree. Each of Appellant's contentions has been addressed and all of the claims are without merit. Consequently, there is no cumulative error. Sanborn, supra at 913.

CONCLUSION

We find no error in the trial court's denial of RCr 11.42 relief, nor do we find Appellant received ineffective assistance of counsel. Accordingly, the judgment of the Caldwell Circuit Court is affirmed.

All concur.

ATTORNEY FOR APPELLANT

¹ "When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, supra at 695.

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