

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Supreme Court of Kentucky **FINAL**

2006-SC-000344-MR

DATE 4-24-08 EJA/Graum/D.C

RANDY HAIGHT

APPELLANT

V. ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BENJAMIN F. SHOBE, SPECIAL JUDGE
NO. 85-CR-000032

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

In this matter of right appeal Randy Haight asks this Court to find that the circuit court has jurisdiction to rule on a CR 59.05 motion to vacate the judgment on his RCr 11.42 motion, when this Court has already denied his motion to abate the appeal and affirmed the judgment denying Haight's RCr 11.42 motion. Under the law of the case doctrine, when this Court denied Haight's motion to abate his appeal pending the outcome of the CR 59.05 motion and entered our opinion affirming the circuit court's ruling on the RCr 11.42 motion, the circuit court no longer had jurisdiction to rule on the CR 59.05 motion. All other issues raised by Haight in this appeal should have and could have been raised on direct appeal or in his RCr 11.42 motion. Hence, we affirm.

On August 22, 1985, Randy Haight escaped from the Johnson County Jail, and in the course of committing First-Degree Robbery, murdered David Omar and Patricia Vance as they sat in their parked car. After an initial reversal of his conviction and

death sentences pursuant to a guilty plea, see Haight v. Williamson, 833 S.W.2d 821 (Ky. 1992), cert. denied, 507 U.S. 925, 113 S. Ct. 1296, 122 L. Ed. 2d 687 (1993), Haight was tried by a jury on January 10, 1994 - February 3, 1994. On March 21, 1994, final judgment was entered sentencing Haight to death on two counts of Murder, twenty (20) years on each of two counts of First-Degree Robbery, and five (5) years for Possession of a Handgun by a Convicted Felon, all to run concurrently. On direct appeal, Haight's conviction was affirmed by this Court on November 21, 1996. Haight v. Commonwealth, 938 S.W.2d 243 (Ky. 1996), cert. denied, 522 U.S. 873, 118 S. Ct. 110, 139 L. Ed. 2d 63 (1997).

Haight filed an RCr 11.42 motion to vacate on October 13, 1997, which was denied by the trial court on September 9, 1998. On September 21, 1998, Haight filed both an CR 59.05 motion asking the trial court to vacate the September 9, 1998 order, and his notice of appeal of the September 9, 1998 order. Thereafter on January 7, 1999, Haight filed a motion to abate the appeal pending the outcome of the trial court's ruling on the CR 59.05 motion. On February 11, 1999, this Court entered an order denying Haight's motion for abatement of the appeal, but granted Haight an extension of time to file his brief and perfect his appeal. This Court rendered its opinion affirming the denial of RCr 11.42 relief on June 15, 2000, which was final upon denial of Haight's petition for rehearing on April 26, 2001. Haight v. Commonwealth, 41 S.W.3d 436 (Ky. 2001), cert. denied, 534 U.S. 998, 122 S. Ct. 471, 141 L. Ed. 2d 386 (2001).

On November 29, 2001, Haight filed a motion in the circuit court seeking to amend and supplement his RCr 11.42 and CR 59.05 motions. At the status hearing held in the case in the circuit court on October 15, 2004, the Commonwealth argued that the circuit court no longer had jurisdiction to rule on Haight's pending claims. On

April 6, 2006, the circuit court entered its order denying the CR 59.05 motion “for the reason that the issues raised by Movant have been determined adversely to him by the Supreme Court Of Kentucky, and the Circuit Court is without jurisdiction to hear the additional evidence offered regarding the same issues.”

Citing Mills v. Commonwealth, 170 S.W.3d 310 (Ky. 2005), cert. denied, 547 U.S. 1005, 126 S. Ct. 1466, 164 L. Ed. 2d 251 (2006), Haight argues that the trial court erred in determining that it no longer had jurisdiction to rule on the pending CR 59.05 motion once this Court denied his motion to abate, and affirmed the judgment on the underlying RCr 11.42 motion. In Mills, this Court ruled that CR 59.05 applied to a final order on an RCr 11.42 motion, but specified that, unlike a civil case, the filing of a CR 59.05 motion would not suspend the time for filing an appeal of the RCr 11.42 motion under RCr 12.02.¹ Id. at 323. The Mills Court, however, allowed Mills’ untimely appeal to proceed, recognizing that Mills was entitled to rely on the pre-2005 cases determining that CR 59.05 applied to criminal cases and suspended the running of time for an appeal of an RCr 11.42 ruling. Id. Haight argues that given that his CR 59.05 motion was filed in 1998, he was likewise entitled to presume that the filing of his CR 59.05 motion would suspend the time for taking his appeal and render the September 9, 1998 order denying RCr 11.42 relief interlocutory, thereby retaining jurisdiction in the circuit court. As a result, Haight maintains that jurisdiction did not properly rest in this Court at the time this Court ruled on the motion to abate and affirmed the judgment on the RCr 11.42 motion.

The flaw in Haight’s argument is that the Mills case does not work in his favor. Mills made it clear that the filing of a CR 59.05 motion did not suspend the running of time for appeal. The only reason the Mills Court then allowed Mills to proceed with his

¹ Effective January 1, 2007, RCr 12.02 was amended to specify that CR 73.02(1)(e) now applies to criminal cases, thereby now suspending the running of the time for appeal upon the filing of a CR 59.05 motion in a criminal case.

untimely appeal in reliance on pre-2005 law was for the purpose of protecting his right to appeal. In the instant case, Haight preserved his right to appeal the judgment on his post-conviction motion by simultaneously filing his notice of appeal with his CR 59.05 motion. Haight sought and received an appeal from the judgment on his post-conviction motion. Further, the pre-2005 cases that this Court allowed Mills to rely on were decided in 2001-2004, after Haight's CR 59.05 motion was filed (1998), and even after this Court's order denying Haight's motion to abate (1999). Id., n. 8–10. Haight is essentially asking this Court to find that the circuit court has jurisdiction to make a ruling in a case that could possibly overturn this Court's appellate ruling on the same motion – the underlying RCr 11.42 claim. This Court has already ruled in 1999 that Haight's appeal would not be abated by the filing of the CR 59.05 motion. That ruling by this Court, and this Court's subsequent opinion affirming the judgment on RCr 11.42 motion, are now the law of the case and are controlling. See Thomas v. Commonwealth, 931 S.W.2d 446, 450 (Ky. 1996); Martin v. Frasure, 352 S.W.2d 817, 818 (Ky. 1961). Accordingly, the Jefferson Circuit Court properly determined that it did not have jurisdiction to rule on the CR 59.05 motion.

The remaining issues raised by Haight – that he was denied his right to counsel in the post-conviction proceeding because of conflicts of interest within the Department of Appellate Advocacy, that he should have been granted leave to amend and supplement his RCr 11.42 motion, that he was denied effective assistance of counsel at trial, and that he should have gotten Wanton Murder and Theft instructions – are issues that either were raised in the RCr 11.42 motion and on direct appeal, or should have been raised in the RCr 11.42 motion or on direct appeal. See Baze v. Commonwealth, 23 S.W.3d 619 (Ky. 2000), cert. denied, 531 U.S. 1157, 121 S. Ct. 1109, 148 L. Ed. 2d

979 (2001). RCr 11.42(3) provides, “The motion shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding.” See McQueen v. Commonwealth, 949 S.W.2d 70 (Ky. 1997), cert. denied, 521 U.S. 1130, 117 S. Ct. 2536, 138 L. Ed. 2d 1035 (1997). Also, to the extent that certain of the issues were raised for the first time in the CR 59.05 motion, it has been held that a party cannot invoke CR 59.05 to raise issues that could have been presented in the proceedings prior to entry of the judgment. Hopkins v. Ratliff, 957 S.W.2d 300, 301 (Ky.App. 1997). In viewing Haight’s CR 59.05 motion, we see that the issues raised in that motion were issues that were known to Haight prior to the filing of his RCr 11.42 motion.

This Court’s opinion affirming the post-conviction judgment directly addressed Haight’s claims in this appeal that his trial counsel was ineffective for failing to exercise peremptory challenges and that he was wrongfully denied the opportunity to amend and supplement his RCr 11.42 motion, as well as the numerous other arguments raised in that appeal. Haight, 41 S.W.3d at 443-444. This Court noted in that opinion that many of the claims raised in that appeal had already been raised and disposed of on direct appeal. Id. at 442-443. Haight has been given a full and fair opportunity to raise his post-conviction claims before this Court.

For the reasons stated above, the judgment of the Jefferson Circuit Court is affirmed.

All sitting. Lambert, C.J., Cunningham, Minton, Noble, Schroder, Scott, JJ., concur.

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