

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: APRIL 23, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2007-SC-000754-MR

FINAL

DATE 5/14/09 Kelly Klaber D.C.
APPELLANT

ROBERT CARL FOLEY

V. ON APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
NO. 91-CR-00180

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This is an appeal from an order denying Appellant's CR 60.02 motion to reopen his 1997 RCr 11.42 proceeding in light of this Court's ruling in Martin v. Commonwealth, 207 S.W.3d 1 (Ky. 2006). Because this Court has recently held that Martin is not to be retroactively applied if the judgment on the collateral attack was final before Martin was rendered, Leonard v. Commonwealth, 2007-SC-000531-MR, the lower court properly denied the CR 60.02 motion in this case. Hence, we affirm.

On September 2, 1993, Appellant, Robert Foley, was convicted in the Laurel Circuit Court of murdering brothers Rodney and Lynn Vaughn in 1991 and sentenced to death. His conviction and death sentence were affirmed on direct appeal. Foley v. Commonwealth, 942 S.W.2d 876 (Ky. 1996), hereinafter Foley I. On October 4, 1997, Foley filed his RCr 11.42 motion, alleging, among

other things, that his trial counsel was ineffective for not raising the issue of venue in a timely manner. The trial court's denial of the RCr 11.42 motion was affirmed by this Court in Foley v. Commonwealth, 17 S.W.3d 878 (Ky. 2000), overruled in part on other grounds by Stopher v. Conliffe, 170 S.W.3d 307 (Ky. 2005), hereinafter Foley II. As to the claim that trial counsel was ineffective for failing to raise the venue issue in a timely manner, this Court concluded, "the change of venue issue was raised on direct appeal and cannot be relitigated in this proceeding." Id. at 886.

Subsequently, Foley filed a motion for a new trial pursuant to CR 60.02 and RCr 10.02. The trial court denied that motion, and we affirmed in Foley v. Commonwealth, 2003 WL 21993756 (Ky. 2003), hereinafter Foley III. Foley also sought federal habeas corpus relief, which was denied by the United States District Court. That denial was affirmed in Foley v. Parker, 488 F.3d 377 (6th Cir. 2007), cert. denied sub nom. Foley v. Simpson, ___ U.S. ___, 128 S. Ct. 2507 (2008) (rejecting claim that Foley was denied fair trial due to pre-trial publicity and refusal to grant change in venue).

On July 6, 2007, Foley filed a motion pursuant to CR 60.02(e) and (f) for relief from the judgment denying his 1997 RCr 11.42 motion. Foley argued that in light of this Court's 2006 decision in Martin, 207 S.W.3d at 1, the trial court should vacate the November 4, 1997 judgment and conduct a hearing on his claim that trial counsel was ineffective for failing to properly present his motion for a change in venue at trial. The trial court denied the motion on August 24, 2007, on grounds that Martin is not applicable in death penalty

cases, the venue issue had already been addressed in Foley's direct and RCr 11.42 appeals, successive RCr 11.42 and CR 60.02 motions are not allowed, and the RCr 11.42 and CR 60.02 motions were untimely. The appeal to this Court followed.

In Martin, we held that issues unsuccessfully appealed on direct appeal can give rise to a separate claim of ineffective assistance of counsel, which may be pursued in collateral proceedings. Id. at 5. While that holding is directly at odds with the trial court's 1997 judgment denying Foley's RCr 11.42 motion and this Court's opinion upholding it, this Court has recently ruled that Martin is not to be retroactively applied if the judgment on the collateral attack was final before Martin was rendered. Leonard v. Commonwealth, 2007-SC-000531-MR. In the instant case, the judgment on the RCr 11.42 motion was final on June 15, 2000, well before the 2006 opinion in Martin. Accordingly, Martin cannot be retroactively applied in this case. Because retroactive application of Martin was the basis of the CR 60.02 motion in this case, the trial court properly denied the motion.

Given our ruling in Leonard, we need not address the other issues raised in this appeal. For the reasons stated above, we affirm the judgment of the Laurel Circuit Court.

All sitting. All concur.

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