

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: JUNE 25, 2009

NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000589-MR

DATE 7/16/09 Kelly Klaber D.C.
APPELLANT

LANNIE WAYNE MILLER

V.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2004-CA-001645-MR
WARREN CIRCUIT COURT NOS. 84-CR-00308,
84-CR-00389 AND 84-CR-00416

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Lannie Wayne Miller appeals from a January 30, 2008 Order of the Court of Appeals denying his motion for appointment of counsel for assistance in his belated appeal of the Warren Circuit Court's denial of his RCr 11.42 and CR 60.02 post-conviction motions. Following his convictions for second-degree manslaughter and for being a second-degree persistent felony offender, Miller was sentenced to twenty years' imprisonment by the Warren Circuit Court. In an opinion rendered on February 6, 1986, No. 85-SC-00243-MR, this Court affirmed Miller's convictions and sentence. In addition to his direct appeal, Miller has also filed four RCr 11.42 motions and three CR 60.02 motions, all of which were denied by the circuit court and affirmed by the Court of Appeals.

Convinced that the Court of Appeals did not err in denying Miller's request for appointment of counsel in this instance, we affirm.

RELEVANT FACTS

On October 28, 2003, the Warren Circuit Court entered orders denying Miller's most recent RCr 11.42 and CR 60.02 post-conviction motions.¹ Because the Department of Public Advocacy (DPA) attorney previously assigned to Miller's case had left the DPA to take another job, Miller was mistakenly never notified that his post-conviction motions had been denied, and as a result, was not able to file a timely appeal of these orders. On September 15, 2004, Miller filed *pro se* a motion with the Court of Appeals seeking permission to file a belated appeal of these post-conviction denials. On October 6, 2004, the Court of Appeals denied Miller's request, finding that his case did not meet the criteria for belated appeals set forth in Commonwealth v. Wine, 694 S.W.2d 689 (Ky. 1985), and Merrick v. Commonwealth, 132 S.W.3d 220 (Ky. App. 2004). Miller filed a *pro se* motion for discretionary review with this Court, which was granted. In an order entered on October 12, 2006, No. 2004-SC-000877-D, this Court vacated the Court of Appeals order and remanded this matter with instructions for the court to further consider Miller's motion for a belated appeal in light of Moore v. Commonwealth, 199 S.W.3d 132 (Ky. 2006).

On December 5, 2006, the Court of Appeals remanded Miller's case to the Warren Circuit Court with instructions for the court to hold an evidentiary

¹ The CR 60.02 motion that was denied in 2003 was Miller's third CR 60.02 motion he had filed with the Warren Circuit Court. The RCr 11.42 motion denied was Miller's fourth RCr 11.42 motion.

hearing to determine whether Miller implicitly or explicitly waived his right to an appeal. After conducting a hearing, the Warren Circuit Court entered its findings of fact and conclusions of law on June 29, 2007, ruling that Miller had not waived his right to appeal the denial of his post-conviction motions. As a result, Miller filed a second *pro se* motion with the Court of Appeals to file a belated appeal of his post-conviction motions, and on August 10, 2007, the Court of Appeals granted Miller's request. Several months later, on December 5, 2007, Miller filed with the Court of Appeals a motion and request for appointment of counsel to assist in the preparation of his belated appeal. On December 21, 2007, the Court of Appeals passed Miller's motion pending a review by the DPA pursuant to KRS 31.110.

On January 23, 2008, the DPA responded to the court's order of review and recommended that Miller's motion for appointment of counsel be denied, concluding that this "post-conviction proceeding . . . is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense." KRS 31.110(2)(c). After considering the DPA's recommendation and Miller's own motion, the Court of Appeals agreed that Miller's request did not meet the guidelines under KRS 31.110(2)(c) for appointment of counsel and denied his motion. The Court of Appeals included in its denial instructions for Miller to file a *pro se* brief on or before sixty days from the date of its order and noted that his failure to file a brief within that time period may result in a dismissal of the appeal. Miller now appeals from the order denying his motion

to appoint counsel.

ANALYSIS

KRS 31.110(2)(c) provides that an indigent defendant is entitled to be represented by an attorney in a post-conviction appeal. However, the statute also states that

if the counsel appointed in such post-conviction remedy, with the court involved, determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his or her own expense, there shall be no further right to be represented by counsel under the provisions of this chapter.

KRS 31.110(2)(c). In Fraser v. Commonwealth, 59 S.W.3d 448, 456 (Ky. 2001), this Court reiterated that when a movant is “statutorily ineligible for representation by the DPA” because of the provision in KRS 31.110(2)(c), a judge may refuse to appoint counsel for post-conviction appeals.²

Here, the Court of Appeals determined that Miller’s appeal of the denial of two of his post-conviction motions was not “a proceeding that a reasonable person with adequate means would be willing to bring at his own expense.” Miller has not provided to this Court any valid grounds from which we can conclude this determination is incorrect. Miller’s assertion that a judge cannot allow the DPA to withdraw as counsel is not particularly relevant to this matter: this appeal concerns whether Miller should be entitled to the

² Miller cites to Commonwealth v. Ivey, 599 S.W.2d 456 (Ky. 1980), for the proposition that an indigent appellant is always entitled to the appointment of counsel when he makes such a request. However, Fraser, *supra*, clearly overruled that aspect of Ivey and maintained that an indigent appellant is not entitled to the appointment of counsel if the restriction outlined in KRS 31.110(2)(c) applies. Fraser, 59 S.W.3d at 456.

appointment of counsel, not whether the DPA can withdraw from the case.³ Therefore, the Court of Appeals did not err when it determined that Miller's belated appeal was not one that a reasonable person with his own means would pursue and acted within its discretion in denying Miller's request for counsel to be appointed.

Miller also alleges in his statement of facts that the heading on the DPA's response to the Court of Appeals' order to review Miller's motion pursuant to KRS 31.110(2)(c) lists the incorrect case number. Miller contends that because of this error, the DPA must have reviewed the wrong file when it concluded that a reasonable person would not bring this action at his own expense. However, the DPA's response in the record that was actually filed with the Court of Appeals includes the correct case numbers and correctly specifies that the appeal is from Warren Circuit Court. Thus, there is no indication that the DPA reviewed the wrong file in making its recommendation to the Court of Appeals. This Court also notes that this finding does not prevent Miller from pursuing his belated appeal. In denying his request for counsel, the Court of Appeals specified that Miller could file *pro se* briefs and that CR 76.12 provides adequate and detailed instructions for this process.

CONCLUSION

Despite Miller's argument to the contrary, the Court of Appeals acted properly when it denied his request for the appointment of counsel. As

³ Furthermore, the record indicates that Miller had not been represented by the DPA and has been filing his own *pro se* motions since September 15, 2004, when Miller filed his first motion for a belated appeal.

provided in KRS 13.110(2)(c), if the appointed counsel along with the court determine that the appeal is not one that a reasonable person would bring at his own expense, then an indigent appellant is not entitled to the appointment of counsel. That is exactly what occurred in this case. Therefore, the January 30, 2008 Order of the Court of Appeals denying Miller's motion for appointment of counsel is affirmed.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Lannie Wayne Miller
#027741
Kentucky State Reformatory
3001 West Hwy. 146
LaGrange, KY 40032

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

David Bryan Abner
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601