

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-000956-MR

CHESTER DUNCAN

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE RON JOHNSON, JUDGE
ACTION NO. 90-CR-00087

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BAKER, GUIDUGLI AND PAISLEY, JUDGES.

PAISLEY, JUDGE. This is a pro se appeal from a judgment entered by the Bell Circuit Court which overruled appellant's CR 60.02 motion for relief. For the following reasons, we affirm.

The pertinent facts of this case were well stated by another panel of this court in an unpublished opinion rendered in Appeal No. 96-CA-524, which affirmed the trial court's denial of RCr 11.42 relief. Because no useful purpose would be served

by restating the history of this case in another way, we elect to adopt the facts set out in Appeal No. 96-CA-524 as our own, as follows:

Duncan was convicted by a jury in 1991 of one count of first-degree sodomy and two counts of first-degree sexual abuse against his minor step-children. He was sentenced to a total of 50 years imprisonment, and the Supreme Court of Kentucky denied any relief on his direct appeal.

In May 1993, Duncan filed a motion pursuant to RCr 11.42 in which he alleged that he received ineffective assistance of counsel. The trial court denied his motion without an evidentiary hearing, whereupon Duncan appealed to this Court. This Court vacated the order of the trial court denying the evidentiary hearing and remanded Duncan's case with instructions to conduct an evidentiary hearing so that "he may have an opportunity to substantiate his claim that his attorney's neglect obliged him to go to trial without the benefit of key witnesses."

The trial court complied with this Court's ruling and conducted an evidentiary hearing on the limited issue of Duncan's attorneys' failure to interview and call witnesses on his behalf at trial. Following the hearing, the trial court denied Duncan's motion.

As noted above, this court affirmed the trial court's denial of relief following the evidentiary hearing. Subsequently, in October 1998, appellant filed a motion to vacate the trial court's judgment pursuant to CR 60.02, alleging (1) that appellant's former attorney compelled appellant's brother to falsely testify during the RCr 11.42 evidentiary hearing, (2)

that the court's order denying RCr 11.42 relief inadequately reflected the court's judgment and included the fraudulent finding that appellant agreed and understood that a stipulation limiting the hearing to an effectiveness of trial counsel issue amounted to waiver of all other issues initially raised in appellant's RCr 11.42 motion, (3) that appellant was not provided with a copy of the court's order denying RCr 11.42 relief, thereby depriving him of his ability to file an effective appeal, and (4) that it was impossible for appellant's trial counsel to adequately represent him because counsel previously had been appointed to represent appellant's victims. Following an evidentiary hearing, the court overruled appellant's motion for CR 60.02 relief. This appeal followed.

Appellant first argues that his trial attorney coerced Stanley Duncan, appellant's brother, into testifying falsely at the RCr 11.42 evidentiary hearing. However, appellant's trial attorney gave testimony at the CR 60.02 hearing rebutting this accusation, and the court specifically found that Stanley Duncan's testimony that he had been coerced into making false statements was "inconsistent and unreliable." In addition, Stanley Duncan testified that he possessed no personal knowledge that could have helped substantiate his brother's claims at the hearing. Clearly, the court acted within its discretion by

finding that appellant had failed to provide sufficient evidence to support this allegation.

Next appellant argues both that the court's order denying RCr 11.42 relief contained false information and that he was unable to raise this issue at his RCr 11.42 evidentiary hearing because he was not given a copy of the order or otherwise made aware of its contents. However, evidence was presented during the CR 60.02 hearing to support the court's conclusion that appellant did in fact timely receive a copy of the order. Specifically, the court noted that the clerk's office sent two copies of the order to appellant and one to appellant's attorney, who testified that he also sent a copy of the order to appellant. As such, any allegations regarding the contents of that order should have been raised on direct appeal from the denial of RCr 11.42 relief. "CR 60.02 is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings. McQueen v. Commonwealth, Ky., 948 S.W.2d 415, 416 (1997).

Appellant's final argument, regarding John Brown's inability to effectively represent him, also lacks merit. First, appellant admits that he was present at the district court arraignment when Brown was allegedly told by the court that he could not represent appellant because of an apparent

conflict concerning Brown's alleged prior representation of appellant's victims. Appellant therefore should have raised this argument in his direct appeal from his conviction or in his motion for RCr 11.42 relief. See McQueen, supra. Moreover, even if appellant was in fact unaware of this alleged circumstance, the court received testimony from Brown during the CR 60.02 evidentiary hearing which rebutted any evidence suggesting that a conflict existed at the time of appellant's trial. We also note that although the court left the CR 60.02 hearing record open for nearly two years in an effort to afford appellant ample time to supplement the record and substantiate his claims, appellant never provided any such evidence. Hence, the court did not abuse its discretion by denying the requested relief.

The judgment of the Bell Circuit Court is affirmed.

ALL CONCUR.

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