

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001426-MR

JOSEPH HUTSON

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD L. KOPOWSKI, JUDGE
ACTION NO. 98-CR-00270

COMMONWEALTH OF KENTUCKY

APPELLEE

CONSOLIDATED WITH: 2002-CA-001603-MR

JOSEPH HUTSON

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD L. KOPOWSKI, JUDGE
ACTION NO. 98-CR-00429

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: BAKER AND SCHRODER, Judges; and HUDDLESTON, Senior
Judge.¹

¹ Senior Status Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

BAKER, JUDGE: Joseph Hutson brings Appeal No. 2001-CA-001426-MR from a June 21, 2001, order and brings Appeal No. 2002-CA-001603-MR from a February 9, 1999, judgment of the Campbell Circuit Court. We affirm both appeals.

Appeal No. 2002-CA-001603-MR is a belated appeal taken from a judgment adjudicating appellant to be a persistent felony offender (PFO) in the second degree and sentencing him to ten years' imprisonment.² Appeal No. 2001-CA-001426-MR is taken from an order denying appellant's Ky. R. Crim. P. (RCr) 11.42 motion. As Appeal No. 2002-CA-001603-MR is a direct appeal, we shall first address it and then address the collateral appeal (Appeal No. 2001-CA-001462-MR).

Appeal No. 2002-CA-001603-MR

In his direct appeal, appellant raises three allegations of error: 1) the trial court erroneously failed to arraign appellant on the PFO charge, 2) the Commonwealth failed to prove the PFO charge by competent evidence, and 3) the trial court improperly took judicial notice of appellant's prior convictions.

Appellant failed to designate any of the videotape proceedings in this appeal, appellant only designated the circuit court record which consists of one volume. The Commonwealth argues that "[t]here is nothing in the record on

² Appellant was granted a belated appeal by an October 21, 2002, order entered by this Court.

appeal to support appellant's claims of error. Therefore, this Court must presume that the omitted record supports the decision of the trial court." Brief for Commonwealth at 2.

The relevant videotape proceedings were included in the appellate record in collateral Appeal No. 2001-CA-001426-MR. Appellant maintains that he "successfully consolidated the two cases [appeals], thus the transcript of evidence is now before this Court in the present appeal." Reply Brief for Appellant at 1. Appellant is incorrect. The video tape proceedings at issue were designated in Appeal No. 2001-CA-001426-MR and, thus, are properly before this Court in that appeal solely.

Appellant bears the burden of designating that portion of the record necessary for our review. Fannelli v. Commonwealth, Ky., 423 S.W.2d 255 (1968). We simply do not believe that the Court of Appeals is at liberty to utilize a record designated in one appeal when considering another appeal. As appellant failed to designate the necessary videotape proceedings in Appeal No. 2002-CA-001603-MR, we must presume that those proceedings support the trial court's decision. See Gillum v. Commonwealth, Ky. App., 925 S.W.2d 189 (1995). We thus summarily reject appellant's contentions of error.

Appeal No. 2001-CA-001426-MR

Appellant maintains that the circuit court concluded erroneously that he could not bring his argument concerning the

violation of the Interstate Agreement on Detainers (IAD). Appellant's allegation in his RCr 11.42 motion stated that "there was a serious issue of violation of the IAD and that Mr. Knoebber did not take the necessary steps to obtain documents from the penitentiary which would have bolstered the Affiant's claim that the IAD had been violated." In an RCr 11.42 motion, a circuit court is correct in refusing to address an issue that has been raised on direct appeal or which should have been raised in a direct appeal. Brown v. Commonwealth, Ky., 788 S.W.2d 500, 501 (1990). Thus, the Campbell Circuit Court was correct in refusing to address an argument concerning the violation of the IAD since appellant should have brought this issue on direct appeal. However, the circuit court was incorrect in refusing to address the issue of whether appellant's counsel was ineffective by failing to acquire documents that might have demonstrated a violation of the IAD.

During the RCr 11.42 hearing, the circuit court allowed appellant to testify concerning his counsel's ineffectiveness on this issue. Appellant also was allowed to call his trial counsel and question him as to this matter. Thus, we believe that a sufficient record was established to allow us to review appellant's ineffective counsel contention on this issue.

To demonstrate ineffective assistance of counsel, appellant must show that his counsel's representation was deficient and that these deficiencies prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 37, 39 (1984). First, appellant asserts that his counsel was ineffective for not introducing into evidence a May 6, 1998, letter that appellant wrote to the Campbell County Commonwealth attorney, in which appellant allegedly requested a disposition on detainer and a speedy trial as required by the IAD of which Kentucky is a party state. Kentucky Revised Statute (KRS) 440.450. Appellant argues that this letter would show that IAD procedures should have begun on May 6, 1998. Therefore, appellant's trial, held on December 10, 1998, would have been outside the 180 day period required by the IAD, denying him of his statutory right for a speedy trial.

Appellant has the burden to prove that he was deprived of some substantial right that would justify the extraordinary relief afforded by the RCr 11.42 hearing. Dorton v. Commonwealth, Ky., 433 S.W.2d 117, 118 (1968). The appellate record contains no evidence that a May 6, 1998, letter was written, except that in a July 1, 1998, letter from appellant to the Campbell County Commonwealth attorney, appellant alludes to a letter of this date. The record is devoid of any further evidence of the letter or that if the letter did exist appellant

followed the proper procedures outlined in the IAD in submitting the letter to the Commonwealth's Attorney.

In the RCr 11.42 hearing, appellant had ample opportunity to produce this letter and evidence of correct compliance with the IAD on May 6, 1998. He failed to do this. What the record does indicate is that proper IAD procedure was instigated on July 1, 1998. Thus, appellant's trial, held on December 10, 1998, fell within the 180 days required by the IAD. Appellant's counsel was not ineffective.

Second, appellant argues that his counsel was ineffective for failing to locate an alleged alibi witness, Bobbie Lawson. Appellant's counsel testified that he personally tried to serve Lawson on three different occasions at two different addresses. Counsel was told that a Bobbie Lawson did not live at the locations. Counsel made a liberal effort to subpoena the witness. Thus, no deficiency on the part of counsel existed.

For the foregoing reasons, the order in Appeal No. 2001-CA-001426-MR and the judgment in Appeal No. 2002-CA-001603-MR of the Campbell Circuit Court are affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR
APPELLANT:

Elizabeth R. Stovall
Dept. of Public Advocacy
LaGrange, Kentucky 40031

BRIEF AND ORAL ARGUMENT FOR
APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

Brian T. Judy
Asst. Attorney General
Frankfort, Kentucky