

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2001-CA-002767-MR

JAMES L. CARTER

APPELLANT

v. APPEAL FROM SIMPSON CIRCUIT COURT  
HONORABLE WILLIAM R. HARRIS, JUDGE  
ACTION NO. 98-CR-00040

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

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BEFORE: GUIDUGLI, JOHNSON AND KNOPF, JUDGES.

GUIDUGLI, JUDGE. James L. Carter ("Carter") appeals from an opinion and order of the Simpson Circuit Court denying his motion for RCr 11.42 relief. We affirm.

On August 30, 1996, Carter was indicted by the Simpson County Grand Jury on the charges of murder and second-degree persistent felony offender ("PFO"). The indictment arose from the July 9, 1996, shooting death of Bobby Allen Bundy ("Bundy") in Franklin, Kentucky. The indictment was based in part on the

written statements of Benny Hogan and Gary Matthews, who each stated during the murder investigation that they witnessed Carter shoot and kill Bundy.

Trial on that indictment was continued on several occasions by motion of both Carter and the Commonwealth. Ultimately, the Commonwealth moved to dismiss the indictment without prejudice, and the motion was sustained.

On April 6, 1998, the grand jury returned a second indictment on the same offenses. The matter proceeded to trial in November, 1998. At trial, the Commonwealth produced Hogan and Matthews as witnesses. Despite having signed statements in 1996 stating that Carter was the shooter, Hogan and Matthews recanted and testified that they did not know who shot Bundy.

Upon hearing the evidence, the jury returned a verdict of guilty on the charges of murder and second degree PFO. Carter was sentenced to 30 years in prison. Thereafter, he prosecuted a direct appeal to the Kentucky Supreme Court. Carter argued therein that he was denied conflict free counsel because his trial counsel also represented Matthews in an unrelated criminal charge. Carter also argued that the trial court improperly admitted into evidence the written statements of Hogan and Matthews because they had recanted those statements and gave differing statements at trial. The Kentucky Supreme Court rejected both arguments and affirmed Carter's conviction.

Carter then filed a pro se motion seeking RCr 11.42 relief. As a basis for the motion, he maintained that he received ineffective assistance of counsel at trial because counsel 1) failed to seek a dismissal for failure to receive a speedy trial; 2) failed to reveal a potential conflict resulting from counsel's representation of a witness; 3) failed to compel the production of documents regarding ownership of the gun used in the shooting; and, 4) failed to impeach the testimony of the Commonwealth's witnesses.

On October 25, 2001, the trial court rendered an opinion and order on Carter's motion which forms the basis of the instant appeal. The trial judge addressed each of Carter's claims, and concluded that Carter had failed to raise a claim sufficient to support relief under RCr 11.42. He further opined that no evidentiary hearing on the motion was required because all issues raised by Carter were justiciable by reference to the record. This appeal followed.

Carter now argues that the trial court erred in denying his motion for RCr 11.42 relief. He maintains that he was entitled to an evidentiary hearing, and raises the same claims of ineffective assistance that were argued before the trial court. He seeks to have his conviction reversed.

We have closely examined the record, the law, and the written arguments, and find no error in the trial court's denial

of Carter's motion for RCr 11.42 relief. On the issue of whether counsel improperly failed to move for a speedy trial, the trial court properly found that, arguendo, even if counsel provided ineffective assistance in failing to so move, Carter did not show that he was prejudiced by the alleged failure. As the parties are well-aware, one claiming ineffective assistance must prove that counsel provided ineffective assistance and that but for the ineffective assistance, the outcome of the trial would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Carter's trial occurred approximately seven months after the indictment. During most of this period, he was not incarcerated. And as the trial court properly noted, neither Carter nor the Commonwealth sought a continuance during that period. Carter offered nothing to show that the seven-month period between indictment and trial was excessive, nor did he show that the purported delay ran afoul of Strickland. As such, we find no error on this issue.

Carter next argues that he was denied the right to a "conflict free counsel" because counsel was actively representing both Matthews and Carter simultaneously. He further argues that he received ineffective assistance when counsel failed to bring this alleged conflict to his attention. We need not address this argument as this issue was raised and

adjudicated on direct appeal to the Kentucky Supreme Court.

Wilson v. Commonwealth, Ky., 975 S.W.2d 901 (1998).

Carter's third argument is that he was denied effective assistance when counsel failed to seek the production of documents relating to the ownership of the gun used to kill Bundy. Carter appears to argue that counsel should have demanded production of unspecified documents which would have indicated that the murder weapon was owned by a Richard Kirk. He claims that counsel's failure on this issue is violative of the Kentucky and United States Constitutions.

Carter's argument on this issue must fail for at least two reasons. First, he fails to identify precisely what documents counsel allegedly failed to produce. And second, just as with the speedy trial issue, no showing has been made as to how or why the outcome of the proceeding would have been different but for the alleged ineffective assistance.

Strickland, supra.

Carter's final argument is that he received ineffective assistance when counsel failed to impeach the Commonwealth's witnesses and failed to seek a charge of perjury against the witnesses. Specifically, he maintains that Matthews and Hogan made materially false statements when they told investigating officers that Carter shot Bundy, and he argues

that since these statements constitute perjury, he is entitled to have his conviction reversed.

Carter's argument is not persuasive. While he styles the argument as relating to ineffective assistance, the body of the argument makes no reference to the right to effective assistance or why he allegedly did not receive said assistance under the facts at bar. The trial court is presumptively correct in its rulings, City of Louisville v. Allen, Ky., 385 S.W.2d 179 (1964), and Carter has not overcome that presumption.

For the foregoing reasons, we affirm the opinion and order of the Simpson Circuit Court denying Carter's motion for RCr 11.42 relief.

ALL CONCUR.

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