

RENDERED: August 29, 2003; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-000435-MR

CARLOS FAULKNER

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT  
HONORABLE DOUGLAS M. STEPHENS, JUDGE  
ACTION NO. 92-CR-00614

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION AFFIRMING

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BEFORE: GUIDUGLI AND JOHNSON, JUDGES; AND HUDDLESTON, SENIOR JUDGE.<sup>1</sup>

JOHNSON, JUDGE: Carlos Faulkner, pro se, has appealed from an order entered by the Kenton Circuit Court on November 28, 2001, which denied his second motion to vacate, set aside, or correct his sentence pursuant to RCr<sup>2</sup> 11.42. Having concluded that the issues raised by Faulkner in his second RCr 11.42 motion should

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<sup>1</sup> Senior Judge 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.

<sup>2</sup> Kentucky Rules of Criminal Procedure.

have and could have been raised in his initial RCr 11.42 motion, we affirm.

On the morning of September 20, 1992, Lesly Briede was beaten to death with a barbell and stabbed several times with a pair of scissors in her Fort Wright home in Kenton County, Kentucky. Faulkner was immediately identified as a suspect and he was brought in for questioning by Chief Gene Weaver of the Ft. Wright Police Department later that night. At that time, Faulkner denied any responsibility for the death of Briede and he was released from custody following his interrogation by Chief Weaver. Later that night, the Ft. Wright Police Department received additional information linking Faulkner to Briede's murder, and early in the morning on September 21, 1992, Faulkner was brought in for further questioning.

When Faulkner arrived at the police station, Chief Weaver immediately informed him of his Miranda<sup>3</sup> rights and Faulkner executed a written waiver encompassing those rights. Faulkner was then placed in an interrogation room, at which time he invoked his right to counsel. The questioning ceased and the Commonwealth's Attorney, Donald C. Buring, who was present in the interrogation room, informed Faulkner that he believed Faulkner had in fact killed Briede and that he intended to seek the death penalty against him. Later that afternoon, Faulkner

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<sup>3</sup> Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

was sentenced to a term of 90 days in the Kenton County Detention Center on an unrelated felony conviction.

On September 24, 1992, while Faulkner was incarcerated, Chief Weaver obtained and executed a search warrant of Faulkner's person in order to retrieve hair samples from him.<sup>4</sup> On September 30, 1992, Faulkner contacted Chief Weaver and informed him that he would like to discuss his involvement in Briede's murder. Shortly thereafter, Faulkner was transported to the Ft. Wright Police Department where he once again signed a written waiver encompassing his Miranda rights. Faulkner then confessed to Briede's murder. Faulkner claimed he was high on cocaine when he killed Breide. Faulkner told Chief Weaver that he entered the house through the garage door and that he obtained the murder weapon, a barbell, shortly after he entered the home. After Faulkner beat Breide to death with the barbell, he also stabbed her several times with a pair of scissors he found in the kitchen. Faulkner told Chief Weaver that he killed Breide because he was in love with her and that he did not want anyone else to have her. After Faulkner confessed, Chief Weaver asked him if his confession was the product of any promises or assurances and Faulkner responded that it was not.

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<sup>4</sup> Testing of the hair samples sometime later linked Faulkner to Briede's murder.

On October 5, 1992, Faulkner was charged with the murder of Briede. On December 5, 1992, Faulkner was indicted by a Kenton County grand jury for murder,<sup>5</sup> burglary in the first degree,<sup>6</sup> and for being a persistent felony offender in the first degree (PFO I).<sup>7</sup> Shortly thereafter, the Commonwealth notified Faulkner of its intention to seek the death penalty. On April 19, 1993, Faulkner filed a motion to suppress the statements he made on September 30, 1992, and a motion requesting a physiological examination. Faulkner claimed the incriminating statements he made on September 30, 1992, were obtained in violation of his Fifth Amendment right to counsel.

On May 5, 1993, Faulkner filed a motion to prohibit the Commonwealth from pursuing the death penalty due to his acceptance and reliance upon certain promises and assurances that were allegedly made during the interrogation process. Faulkner claimed he only confessed after the Commonwealth assured him that the death penalty would not be sought if he cooperated. Thus, Faulkner argued that his confession was involuntary and therefore violative of the Fifth and Fourteenth

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<sup>5</sup> Kentucky Revised Statutes (KRS) 507.020.

<sup>6</sup> KRS 511.020.

<sup>7</sup> KRS 532.080(3).

Amendments to the United States Constitution and Section 11 of the Kentucky Constitution.<sup>8</sup>

On September 8, 1993, the trial court entered an order denying Faulkner's motion to suppress the statements he made on September 30, 1992, and an order adjudging Faulkner competent to stand trial based upon a report issued by the Kentucky Correctional Psychiatric Center (KCPC).<sup>9</sup> The trial court found that Faulkner's confession was not the product of any assurances or promises of leniency. The trial court concluded that Faulkner had failed to demonstrate that any such agreement ever existed.<sup>10</sup> The trial court also concluded that Faulkner had waived his Fifth Amendment right to remain silent when he initiated contact with the police on September 30, 1992.<sup>11</sup>

On September 20, 1993, the Commonwealth filed a demand for jury sentencing in an effort to preclude Faulkner from escaping the death penalty by pleading guilty to the charges contained in the indictment. Shortly thereafter, Faulkner did

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<sup>8</sup> The due process clauses of the Fifth and Fourteenth Amendments prohibit the use at trial of any statements obtained from a suspect as a result of police coercion. See, e.g., Spano v. New York, 360 U.S. 315, 79 S.Ct. 1202, 3 L.E.2d 1265 (1959); Fields v. Commonwealth, Ky., 12 S.W.3d 275, 283 (2000); and Commonwealth v. Cooper, Ky., 899 S.W.2d 75, 75-76 (1995).

<sup>9</sup> Faulkner was examined by the KCPC, which issued a report indicating that he was competent to stand trial.

<sup>10</sup> An evidentiary hearing was held on the issue on August 25, 1993, at which time Chief Weaver and Commonwealth's Attorney Donald Buring both testified that no promises or assurances were ever made to Faulkner concerning the Briede murder.

<sup>11</sup> See, e.g., Smith v. Commonwealth, Ky., 920 S.W.2d 514, 517 (1995).

in fact plead guilty to murder, burglary in the first degree, and to being a PFO I. On September 23, 1993, the trial court accepted Faulkner's guilty plea and entered an order denying the Commonwealth's demand for jury sentencing. The trial court reasoned that only a defendant has the right to demand jury sentencing under RCr 9.84(2).<sup>12</sup> On November 16, 1993, the trial court entered its final judgment and sentence of imprisonment. Faulkner was sentenced to life imprisonment without the possibility of parole for 25 years on the murder conviction, and 20 years on the burglary conviction, enhanced to life due to his status as a PFO I.

On November 21, 1996, nearly three years after the final judgment and sentence was entered, Faulkner filed a motion to vacate, set aside or correct his sentence pursuant to RCr 11.42. Faulkner raised several allegations in his RCr 11.42 motion, all of which related to the alleged ineffective assistance of his trial counsel. More specifically, Faulkner claimed his trial counsel's representation was deficient due to counsel's failure to request a change of venue and a competency hearing. Faulkner also claimed his trial counsel coerced him into pleading guilty and that he was incorrectly advised that he

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<sup>12</sup> Although this ruling was never contested, we note that the Commonwealth's right to demand jury sentencing in a capital case was upheld by the Supreme Court in Commonwealth v. Johnson, Ky., 910 S.W.2d 229, 231 (1995).

would be eligible for parole in 12 years as a result of his guilty plea.

On December 20, 1996, the trial court denied Faulkner's motion to vacate, set aside or correct his sentence pursuant to RCr 11.42. The trial court found Faulkner's arguments to be no more than conclusory allegations unsupported by the record. The trial court concluded that Faulkner's guilty plea was a result of the enormity of the evidence against him and the gravity of the penalty he was facing (death by electrocution) and not the result of any coercive activity on the part of his trial counsel. In fact, the trial court even went so far as to sanction both Faulkner and his attorney under CR<sup>13</sup> 11 for filing a frivolous motion entirely unsupported by the record.<sup>14</sup>

Faulkner did not appeal the denial of his initial RCr 11.42 motion and he was apparently undeterred by the sanctions imposed upon him by the trial court as he filed a second RCr 11.42 motion on August 7, 2001. Faulkner raised a host of issues in his second RCr 11.42 motion, which we have summarized as follows: (1) that his Sixth Amendment right to counsel and his Fifth Amendment right to remain silent were violated on September 21, 1992, when Chief Weaver and Commonwealth's

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<sup>13</sup> Kentucky Rules of Civil Procedure.

<sup>14</sup> Faulkner was fined \$350.00 and his attorney was fined \$150.00.

Attorney Donald Buring continued questioning him after he invoked his right to counsel, (2) that his indictment for capital murder, burglary in the first degree and PFO I was invalid and therefore violative of his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and Section 11 of the Kentucky Constitution, (3) that his trial counsel was ineffective for failing to request a change of venue, (4) that his trial counsel was ineffective for failing to seek a full competency hearing, (5) that his trial counsel was ineffective for permitting the trial judge to play an active role in the plea agreement process, and (6) that the aforementioned violations collectively deprived him of his due process rights under the Fourteenth Amendment to the United States Constitution and Section 11 of the Kentucky Constitution and his Sixth Amendment right to a fair trial.

On November 28, 2001, the trial court summarily denied Faulkner's motion concluding that all the issues raised in his second RCr 11.42 motion should have and could have been raised in his initial RCr 11.42 motion, which was filed on November 21, 1996. This appeal followed.

The arguments raised by Faulkner on appeal are procedurally barred as they should have and could have been raised in his initial RCr 11.42 motion. RCr 11.42(3) specifically states:

The motion shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding.

The Supreme Court of Kentucky has consistently interpreted this provision as barring successive RCr 11.42 motions.<sup>15</sup> As was stated by our state's highest Court in Hampton v. Commonwealth,<sup>16</sup> "[t]he courts have much more to do than occupy themselves with successive 'reruns' of RCr 11.42 motions stating grounds that have or should have been presented earlier." In addition, RCr 11.42(10) also states:

Any motion under this rule shall be filed within three years after the judgment becomes final, unless the motion alleges and the movant proves either:

(a) that the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence; or

(b) that the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

Faulkner filed his second RCr 11.42 motion on August 7, 2001, nearly eight years after the judgment became final.

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<sup>15</sup> See Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 454 (2001); Crick v. Commonwealth, Ky., 550 S.W.2d 534, 535 (1977); and Butler v. Commonwealth, Ky., 473 S.W.2d 108, 109 (1971).

<sup>16</sup> Ky., 454 S.W.2d 672, 673 (1970) (citing Kennedy v. Commonwealth, Ky., 451 S.W.2d 158, 159 (1970)).

Faulkner should have and could have raised all six issues contained in his second RCr 11.42 motion in his initial RCr 11.42 motion. In fact, Faulkner did raise the issue of ineffective assistance of counsel in his initial RCr 11.42 motion. Notwithstanding this procedural deficiency, in the interest of justice, we will address each of these allegations and explain why each is without merit.

Faulkner first claims that his Sixth Amendment right to counsel was violated on September 21, 1992, when Chief Weaver and Commonwealth's Attorney Donald Buring continued questioning him after he invoked his right to counsel. Faulkner claims that after he invoked his right to counsel, the interrogation ceased and Chief Weaver informed him that he would be taken home, however, according to Faulkner, about an hour later both Chief Weaver and Commonwealth's Attorney Donald Buring returned and continued to interrogate him without the benefit of counsel. Faulkner further contends that Chief Weaver even testified at the suppression hearing that he violated Faulkner's constitutional rights by questioning him after he had invoked his right to counsel.

Faulkner's assertions are clearly refuted by the record. Chief Weaver did in fact testify at the suppression hearing, which was conducted on August 25, 1993, however, at no point in time did he admit to violating Faulkner's

constitutional rights by questioning him after he had invoked his right to counsel. Moreover, any issues regarding a potential Miranda violation were not properly preserved as they should have been raised at trial.<sup>17</sup> In addition, we fail to see the relevance of any alleged Miranda violation as Faulkner did not make any incriminating statements during the brief interrogation that took place on September 21, 1992. Furthermore, Faulkner has failed to demonstrate why this issue could not have been raised in his initial RCr 11.42 motion. Thus, Faulkner's first argument is entirely without merit.

Faulkner's second argument is equally deficient. Faulkner contends that his indictment was invalid due to the fact the Commonwealth used the underlying burglary charge to "enhance the charge of murder from first degree to a capital offense punishable by death." Faulkner claims that "[a]s a matter of law the charge of capital murder can not be enhanced under KRS 532.080." This argument completely lacks merit as Faulkner was originally indicted for murder, which is a capital offense.<sup>18</sup> Faulkner's status as a persistent felony offender was used to enhance the burglary conviction, not the murder conviction. Thus, the indictment in the case sub judice was entirely consistent with the provisions of KRS 532.080.

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<sup>17</sup> See, e.g., Springer v. Commonwealth, Ky., 998 S.W.2d 439, 446 (1999).

<sup>18</sup> See KRS 507.020(2).

Faulkner next argues that his trial counsel's representation was ineffective because counsel failed to request a change of venue. As previously discussed, this issue was raised in Faulkner's initial RCr 11.42 motion. The trial court disposed of the matter by concluding that Faulkner waived any claim regarding change of venue by virtue of his guilty plea. We agree. Moreover, Faulkner has completely failed to demonstrate that he would not have been able to obtain a fair trial in Kenton County or that he was prejudiced in any way by trial counsel's failure to request a change of venue. Thus, Faulkner has failed to meet the standard for ineffective assistance of counsel as set forth in Strickland v. Washington.<sup>19</sup>

Faulkner further claims that his trial counsel was ineffective by failing to request a full competency hearing prior to his guilty plea. This assertion amounts to no more than a conclusory allegation as it is clearly refuted by the record. On September 8, 1993, the trial court found Faulkner competent to stand trial based upon a report issued by the KCPC, in which Dr. Victoria Yunker opined that Faulkner was competent to stand trial. Thus, a competency hearing was held and Faulkner was adjudged competent to stand trial. Faulkner now attempts to cast doubt on the validity of this hearing by claiming that he was evaluated by several other doctors besides

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<sup>19</sup> 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984).

Dr. Yunker.<sup>20</sup> However, since Faulkner does not suggest that these evaluations contain any opinions contrary to the one issued by the KCPC, he has completely failed to demonstrate precisely how he was prejudiced by his trial counsel's alleged deficiency. As was stated by the trial court in its order denying Faulkner's initial RCr 11.42 motion, "[i]n summary, there was a competency hearing, evidence was presented at that hearing of [Faulkner's] competency, and there is absolutely no showing to this day that there is any contrary opinion regarding [Faulkner's] competence."

Faulkner also claims that his constitutional rights were violated when his counsel "erred in his effectiveness, by allowing the presiding judge to play an active role in the plea agreement [process]." Faulkner claims the trial judge suggested that he would be inclined to render a less severe penalty if Faulkner pleaded guilty to the charges contained in the indictment. On September 20, 1993, the trial court did in fact inform Faulkner in open court that it would be inclined to impose a penalty of life without the possibility of parole for 25 years as opposed to death if Faulkner pled guilty; however, the trial court also informed Faulkner that the Commonwealth had the right to a sentencing hearing and that if the court believed that death was an appropriate penalty at the conclusion of such

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<sup>20</sup> Faulkner claims he was evaluated by Dr. Mark A. Modlin of the Kenton County Jail and Dr. David Laniers from Cincinnati, Ohio, in addition to Dr. Yunker.

a hearing, Faulkner would be permitted to withdraw his guilty plea. Faulkner has failed to demonstrate that he was prejudiced in any way by the trial court's participation in the plea bargain process.

In his final claim for relief, Faulkner argues that the aforementioned violations collectively deprived him of his due process rights under the Fourteenth Amendment to the United States Constitution and Section 11 of the Kentucky Constitution and his Sixth Amendment right to a fair trial. In view of the fact that the individual allegations raised in Faulkner's second RCr 11.42 motion are unconvincing and entirely without merit, they can have no cumulative effect.<sup>21</sup> Moreover, Faulkner is not entitled to an evidentiary hearing as the arguments raised in his second RCr 11.42 motion are clearly refuted by the record. An evidentiary hearing under RCr 11.42(5) is only required when the motion "raises a material issue of fact that cannot be determined on the face of the record."<sup>22</sup>

Based upon the foregoing reasons, the order of the Kenton Circuit Court denying Faulkner's second RCr 11.42 motion is affirmed.

ALL CONCUR.

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<sup>21</sup> Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 913 (1998); Bowling v. Commonwealth, Ky., 942 S.W.2d 293, 308 (1997); McQueen v. Commonwealth, Ky., 721 S.W.2d 694, 701 (1986).

<sup>22</sup> Stanford v. Commonwealth, Ky., 854 S.W.2d 742, 743-44 (1993).

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