

RENDERED: January 23, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000501-MR

BERNARD KEITH PUTTY

APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELEER, JR., JUDGE
INDICTMENT NO. 97-CR-00307

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: McANULTY, MINTON, and SCHRODER, Judges.

MINTON, Judge: Bernard Keith Putty appeals pro se from the circuit court's order that denied his motion for relief under Kentucky Rules of Criminal Procedure (RCr) 11.42. The substance of his RCr 11.42 claim is that his trial counsel was constitutionally ineffective by failing to move for a change of venue or to request individual voir dire of prospective jurors

in light of their possible exposure to prejudicial pretrial publicity and heightened security at trial. He also argues on appeal that the circuit court erred by failing to hold an evidentiary hearing on his RCr 11.42 motion. We affirm the trial court.

Putty was convicted by a Hopkins Circuit Court jury in November 1998 of four counts of criminal solicitation of murder, and he was sentenced to prison for a total of thirty years. At trial, the Commonwealth's proof consisted mainly of evidence obtained from Putty himself that he and the murder victim, Gary Clark, were part of a drug syndicate that was importing marijuana and cocaine from Texas into western Kentucky. According to the Commonwealth's evidence, Putty's motive for soliciting persons to kill Clark was that Clark had either threatened or agreed to inform law enforcement about the syndicate's activities. Clark was killed by a bullet through the middle of his forehead.

The Kentucky Supreme Court affirmed Putty's conviction on direct appeal in October 2000.¹ In November 2001, Putty filed pro se a motion for relief from the judgment, citing RCr 11.42 and RCr 10.26, the substantial and palpable error rule. Putty

¹ See, Putty v. Commonwealth, Ky., 30 S.W.3d 156 (2000).

also requested appointment of counsel and an evidentiary hearing. The trial court denied all of these motions.

Putty's arguments concerning his trial counsel's failure to request a venue change and failure to request individual voir dire of prospective jurors were not raised at trial or on direct appeal. These were alleged trial errors known to Putty and his counsel at the time of trial and at the time of appeal. All of these issues could have been subjected to appellate review. Putty's failure to raise these issues at trial or his failure to inform the Supreme Court of these substantive issues on direct appeal prevents a collateral attack on the judgment via RCr 11.42.²

Even if the arguments of ineffective assistance of counsel were properly before the Court pursuant to RCr 11.42, we would have found no error in the trial court's denial of the motion. The trial record simply refutes Putty's claim that he was denied a fair trial because of prospective jurors tainted by prejudicial pretrial publicity. The voir dire during jury selection by the trial court and by counsel demonstrates the lack of foreknowledge of the case by the prospective jurors. For the few who did indicate some prior knowledge about the

² Bronston v. Commonwealth, Ky., 481 S.W.2d 666 (1972).

case, the trial court conducted individual voir dire at the bench outside the hearing of the remaining prospective jurors.

Trial counsel's performance must be shown to fall below the objective standard of reasonableness and must be so prejudicial as to deprive the defendant of a fair trial and a reasonable result.³ Based upon that standard, the trial court correctly denied Putty's RCr 11.42 motion upon the merits.

Finally, Putty argues that the trial court erred by not granting his motion for an evidentiary hearing. However, "[a]n evidentiary hearing is not required when the issues presented may be fully considered by resort to the court record of the proceeding" ⁴ Since the issues Putty raised were capable of resolution by resort to the record, no evidentiary hearing was required.

For the reasons discussed above, we affirm the Hopkins Circuit Court's denial of Putty's motion for RCr 11.42 relief and for an evidentiary hearing.

ALL CONCUR.

³ Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984).

⁴ Newsome v. Commonwealth, Ky., 456 S.W.2d 686, 687 (1970).

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