

Commonwealth Of Kentucky
Court of Appeals

NO. 2002-CA-000923-MR

MICHAEL DALE NICHOLAS

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 98-CR-00283

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: PAISLEY AND TACKETT, JUDGES; AND HUDDLESTON, SENIOR
JUDGE.¹

TACKETT, JUDGE: Michael Dale Nicholas appeals from an order of the McCracken Circuit Court denying his petition for relief pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42 without an evidentiary hearing. Several of the issues raised in this proceeding were considered and previously rejected by this court. Because the trial court was able to address Nicholas' allegations by referring to the record at trial, no evidentiary

¹ 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.

hearing was needed on his motion and we affirm the trial court's decision.

Nicholas was convicted by a jury in 1999 of first-degree fleeing or evading, and driving with no operator's license. During the penalty phase of the trial, the jury also determined that Nicholas was a persistent felony offender in the first degree and recommended a sentence of twelve years' incarceration. The trial court sentenced Nicholas accordingly and he filed a direct appeal with this court arguing that the trial court had erroneously excluded exculpatory hearsay testimony and that the Commonwealth had introduced evidence of prior bad acts in violation of Richardson v. Commonwealth, Ky., 674 S.W.2d 515 (1984). We affirmed his conviction in an unpublished opinion and the Kentucky Supreme Court denied discretionary review on October 17, 2001.

In his RCr 11.42 motion for post-conviction relief, Nicholas again raised the issues of the excluded hearsay testimony and the prior bad acts evidence introduced at his trial. In addition Nicholas alleged that there was insufficient evidence to prove his status as a persistent felony offender and that his attorney rendered ineffective assistance of counsel for failing to object to the evidence that was introduced to support that charge. Nicholas also requested an evidentiary hearing on

these matters; however, the trial court denied his request for relief without holding a hearing. This appeal followed.

We first consider the fact that Nicholas' arguments regarding the exclusion of exculpatory hearsay evidence and the admission of prior bad acts evidence have already been considered and rejected by this court on direct appeal. In a 1998 case, the Kentucky Supreme Court set forth this court's duties with regard to issues which have been or could have been raised on direct appeal as follows:

In an RCr 11.42 proceeding, the movant cannot raise issues which were raised and decided on direct appeal. Stanford v. Commonwealth, Ky., 854 S.W.2d 742 (1993), cert. denied, 510 U.S. 1049, 126 L. Ed. 2d 669, 114 S. Ct. 703 (1994). In Brown v. Commonwealth, Ky., 788 S.W.2d 500 (1990), this Court held that the law of the case doctrine prevents review of issues raised in the direct appeal. "It is not the purpose of RCr 11.42 to permit a convicted defendant to retry issues which could and should have been raised in the original proceeding, nor those that were raised in the trial court and upon appeal considered by this court." Id. at 501 (quoting Thacker v. Commonwealth, Ky., 476 S.W.2d 838, 839 (1972)).

Wilson V. Commonwealth, Ky., 975 S.W.2d 901. 903-904 (1998). We have previously determined that Nicholas' arguments regarding the excluded hearsay and included prior bad acts evidence lacked merit. Consequently, the trial court acted correctly in refusing to consider them as grounds for relief under RCr 11.42. Moreover, Nicholas' contention that the evidence introduced to

support the jury's finding that he is a persistent felony offender was insufficient should have been raised on his direct appeal and cannot be considered now as a ground for post-conviction relief.

In addition, Nicholas argues that his trial counsel was ineffective for failing to object to the evidence introduced by the Commonwealth to prove his persistent felony offender status. During the persistent felony offender portion of the trial, the Commonwealth called a Kentucky probation officer to testify about Nicholas' prior felony convictions for robbery in Florida and vehicular homicide in Minnesota. Nicholas argues that, since the probation officer had no personal knowledge of these convictions, his trial counsel was ineffective for failing to object to the evidence of Nicholas' prior felonies. However, a review of the record reveals that the Commonwealth also introduced copies of the judgments containing Nicholas' prior convictions and sentences certified by the courts which maintained those records. The evidence of Nicholas' prior judgments was admissible under the hearsay rule pursuant to our prior decision in Skimmerhorn v. Commonwealth, Ky. App., 998 S.W.2d 771 (1998). Consequently, his trial counsel was not ineffective for failing to object to the admission of this evidence.

The trial court is not required to hold an evidentiary hearing on an RCr 11.42 motion where the movant's allegations are clearly refuted by the record. Stanford v. Commonwealth, Ky., 854 S.W.2d 742 (1993). Nicholas argued three grounds for post-conviction relief which were, or should have been, raised on direct appeal. Thus, the trial court could not revisit them in an evidentiary hearing on his RCr 11.42 motion. Moreover, Nicholas' contention that his trial counsel was ineffective for failing to object to the allegedly insufficient evidence of his persistent felony offender status is refuted by the trial record. In summary, Nicholas has failed to raise any issues incapable of being decided on the face of the record and, therefore, he was not entitled to an evidentiary hearing by the trial court.

For the forgoing reason, the order of the McCracken Circuit Court denying Nicholas' request for relief pursuant to RCr 11.42 is affirmed.

ALL CONCUR.

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