

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001414-MR

JAMES T. ASHBY

APPELLANT

v. APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE SAM H. MONARCH, JUDGE
ACTION NOS. 97-CR-00103 AND 98-CR-00108

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING IN PART, VACATING AND REMANDING IN PART

** ** * * * * *

BEFORE: BARBER, McANULTY, AND TACKETT, JUDGES.

McANULTY, JUDGE. Appellant, James T. Ashby, appeals the trial court's summary dismissal of his RCr 11.42 motion. Having reviewed the record, we affirm in part and vacate and remand in part.

Appellant advances six (6) claims which he believes support a finding of ineffectiveness: (1) failing to move for disqualification of the local Commonwealth Attorneys Office; (2) agreeing to an alternative juror without seeking an additional

preemptory challenge; (3) neglecting an exculpatory matter of a petit juror sitting on a grand jury that indicted him; (4) failing to introduce the written report of the arresting officer that supposedly contained evidence pointing to perpetrators of the burglary other than Appellant; (5) failing to object to arresting officer's testimony about third party hearsay and receipt of a 911 call; and (6) allowing him to incur an enhanced sentence under the PFO count when he was never sentenced for the underlying burglary count.

On December 2, 1997, Appellant was indicted by a grand jury in Grayson County for the offense of third-degree burglary. On December 1, 1998, another grand jury in the county indicted Appellant with being a first-degree persistent felony offender. After declining a plea agreement from the Commonwealth, he was tried by a jury on both counts and sentenced to 20 years' imprisonment. The judgment was affirmed in an unpublished Kentucky Supreme Court opinion, final on September 27, 2001, Ashby v. Commonwealth, (1999-SC-0418-MR).

The motion seeking relief pursuant to RCr 11.42 was filed by Appellant pro se on January 2, 2002. No evidentiary hearing was held as the trial court concluded that the record refuted Appellant's claims.

We begin by reciting the well-established standard of review pertaining to claims of ineffective assistance of counsel as recently articulated by the Kentucky Supreme Court.

The standards which measure ineffective assistance of counsel have been set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord *Gall v. Commonwealth*, Ky., 702 S.W.2d 37 (1985). In order to be ineffective, the performance of defense counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result. *Strickland, supra*. It must be demonstrated that, absent the errors by trial counsel, there is a reasonable probability that the jury would have reached a different result. See *Norton v. Commonwealth*, Ky., 63 S.W.3d 175 (2001). The purpose of RCr 11.42 is to provide a forum for known grievances, not to provide an opportunity to research for grievances. *Gilliam v. Commonwealth*, Ky., 652 S.W.2d 856 (1983); *Haight, supra*.

Hodge v. Commonwealth, Ky., 116 S.W.3d 463, 468 (2003).

Appellant first asserts that his successor counsel was ineffective in failing to move for disqualification of the local Commonwealth Attorney's Office. Appellant was initially represented by Shan Embry. Embry continued her representation of Appellant until January 5, 1999, when she joined the Commonwealth Attorney's Office as an Assistant Commonwealth Attorney. Citing Whitaker v. Commonwealth, Ky., 895 S.W.2d 953 (1995), Appellant claims that the trial court should have found

ineffectiveness because his successor trial counsel's failure to move for disqualification was unreasonable and prejudicial.

Whitaker, 895 S.W.2d at 955-56, and Savage v. Commonwealth, Ky., 939 S.W.2d 325, 329 (1996), require that we remand this case for an evidentiary hearing on the nature of the attorney/client relationship. The Commonwealth argues that there is no evidence in the record to show that Embry, Appellant's original appointed counsel, participated in any manner as a member of the Commonwealth Attorney's office. However, there is simply no way of ascertaining Embry's participation absent a hearing. See Savage, 939 S.W.2d at 329 ("Pursuant to our holding in Whitaker, the trial court held a hearing to determine 'the depth to which the attorney/client relationship was established.'" (full citation omitted).

We believe that matters two (2) through six (6) above either should have been raised on direct appeal or are not pled with the degree of specificity required by RCr 11.42(2). RCr 11.42 "is not a substitute for appeal and does not permit review of alleged trial errors which fall short of a denial of due process." Haight v. Commonwealth, Ky., 41 S.W.3d 436, 443 (2001). Instead, "the collateral attack authorized by RCr 11.42, is limited to issues that were not and **could not** be raised on direct appeal." Id. (emphasis added). These claims

can not now be presented under the pretext of ineffective assistance of counsel. See id. at 442-43.

For the foregoing reasons, the trial court's summary dismissal of Appellant's RCr 11.42 motion is affirmed in part and vacated and remanded in part for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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