

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001517-MR

HENRY MOORE

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE EDWIN M. WHITE, JUDGE
ACTION NO. 97-CR-00469

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AND ORDER

DISMISSING

** ** * * *

BEFORE: DYCHE, HUDDLESTON and KNOPF, Judges.

HUDDLESTON, Judge: Henry Moore appeals from a Christian Circuit Court order denying, without an evidentiary hearing or appointment of counsel, his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to vacate his sentence.

Moore was convicted of two counts of promoting contraband in the first degree¹ and of being a persistent felony

¹ Ky. Rev. Stat. (KRS) 520.050.

offender (PFO) in the first degree.² The conviction stemmed from events that occurred while Moore was incarcerated in the Christian County jail. He was observed attempting to dispose of a packet of marijuana cigarettes, and in a subsequent search of his locker jail officers seized a razor blade. Moore was sentenced to fifteen years' imprisonment. On direct appeal this Court affirmed Moore's conviction.

On March 16, 2001, Moore filed a motion pursuant to RCr 11.42 to vacate his sentence. He requested appointment of counsel and an evidentiary hearing. As grounds for the motion, Moore alleged that his trial attorney had rendered ineffective assistance by: (1) failing to raise a defense to the PFO charge, (2) failing to object to the use of invalid prior convictions, and (3) failing to investigate and discover an incomplete chain of custody over the marijuana. In support of his claims, Moore alleged that his attorney failed to function as an advocate because he was distracted by his own criminal problems.

The circuit court denied Moore's motion stating, "There is nothing in the record to indicate that counsel was ineffective. At the time of trial, his attorney was not facing criminal charges."

² KRS 532.080(3).

After Moore appealed the order denying his motion, this Court vacated and remanded in an unpublished opinion. In addressing Moore's claims, we said that:

[I]n the case before us, the trial court essentially treated the motion in the same manner as did the trial court in Fraser.^[3] It skipped the critical, initial inquiry: whether Moore's allegations were refuted on the face of the record - and went straight to the merits of the claim that counsel had failed to function as guaranteed by the Sixth Amendment of the United States Constitution. As Fraser directs, however, the essential question with respect to appointment of counsel and the propriety of an evidentiary hearing is not whether the record proves the allegations in the motion, but whether the record conclusively disproves those allegations.^[4] It is a subtle but decisive distinction essentially relating to the proper burden of proof. If the allegations are not clearly refuted, the movant is entitled to create a record - at a hearing and with the assistance of appointed counsel - to establish his claim of ineffective assistance of trial counsel.

³ Fraser v. Commonwealth, Ky., 59 S.W.3d 448 (2001).

⁴ Id. at 456.

On remand, the circuit court again denied Moore's motion without an evidentiary hearing or appointment of counsel, prompting Moore to appeal a second time. Moore contends that the circuit court did not comply with this Court's order on remand when it failed to appoint counsel and conduct an evidentiary hearing.

The Commonwealth correctly argues that Moore has failed to properly perfect his appeal. RCr 12.04(3) provides, in pertinent part, that "[t]he time within which an appeal may be taken shall be thirty (30) days after the date of entry of the judgment or order from which it is taken." The order from which Moore is appealing was entered on June 7, 2002. Moore did not file his notice of appeal until July 15, 2002. He urges us to adopt the rule set forth in Houston v. Lack,⁵ that a pro se prisoner's notice of appeal is filed at the moment of delivery to prison officials. The holding in Houston was based on a Supreme Court rule that deemed a document filed at the moment it is deposited in the mail for delivery.⁶ Kentucky has no such rule, and the Kentucky Supreme Court "has rejected extending application of the policy of substantial compliance to the filing of a notice of appeal. Filing a notice of appeal within

⁵ 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245 (1988).

⁶ Id. at 273, 108 S. Ct. at 2383, 101 L. Ed. 2d at 253.

the prescribed time frame is still mandatory and failure to do so is fatal to an appeal."⁷

Moore argues that he should not be held responsible for his failure to timely file the notice of appeal because he delivered the notice of appeal to prison authorities on June 27, 2002, for mailing. While under appropriate circumstances, a motion for belated appeal may be granted, Moore did not file such a motion. Further, he has offered no proof, by affidavit or otherwise, that he actually delivered his notice of appeal to prison authorities for mailing on June 27, 2002. Consequently, we must dismiss Moore's appeal for failing to timely perfect pursuant to RCr 12.04(3).

While we dismiss based on Moore's failure to timely perfect his appeal, we nevertheless elect to address Moore's argument that the circuit court failed to comply with this Court's directions on remand.

In its order denying Moore's motion to vacate, the circuit court considered each one of Moore's claims. The court first addressed Moore's claim that his trial counsel was impeded by felony criminal charges pending at the time he was

⁷ Fox v. House, Ky. App., 912 S.W.2d 450, 451 (1995), citing Workers' Compensation Board v. Siler, Ky., 840 S.W.2d 812 (1992) and City of Devondale v. Stallings, Ky., 795 S.W.2d 954 (1990).

representing Moore.⁸ The circuit court took judicial notice of the fact that counsel for Moore was indicted on June 25, 1999. According to the circuit court, "[t]he incidents that led to his [counsel's] indictment did not occur until February of 1999." Moore was tried in March 1998. Based on these facts, the circuit court's conclusion that Moore's argument in this regard is without merit is not erroneous.

The circuit court then addressed Moore's claim that the indictment returned against him was ambiguous and bogus. The court referred to the indictment in the record in making its determination that Moore's argument was without merit, noting that "[t]he record speaks for itself on this issue." The trial record was not made part of the record on appeal, so we do not have the indictment before us. In the absence of the indictment, we presume that the decision of the circuit court is correct.⁹

Finally, the circuit court addressed Moore's argument that the Commonwealth failed to establish a chain of custody for the marijuana, stating that "[t]his argument is also without merit. The record in this case clearly shows that the Commonwealth established the chain of custody for the marijuana

⁸ Moore does not claim that his attorney was under the influence of drugs, but only that he was distracted by his legal problems.

⁹ Napier v. Commonwealth, Ky., 298 S.W.2d 690 (1957).

cigarettes dropped by movant during a search of his cell." Again, without the trial record before us, we presume the action of the trial court was correct.¹⁰

Even were we not dismissing Moore's appeal on procedural grounds, the circuit court fully complied with the order of this Court on remand and correctly applied the requirements of Fraser in establishing that Moore's claims of ineffective assistance of counsel are refuted by the record. Thus, Moore was not entitled to an evidentiary hearing nor to appointment of counsel.

Moore's untimely appeal is dismissed.

KNOFF, Judge, CONCURS.

DYCHE, Judge, CONCURS IN RESULT.

ENTERED: April 4, 2003

/s/ Joseph R. Huddleston
Judge, Court of Appeals

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¹⁰ Id.