

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001550-MR

WILLIAM LOFTON

APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY
NO. 2004-SC-000115-D

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE TOM MCDONALD, JUDGE
INDICTMENT NO. 94-CR-001446

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: McANULTY, MINTON, AND SCHRODER, JUDGES.

MINTON, JUDGE: This matter comes to us on remand from the Kentucky Supreme Court. After examining the record and the supplemental arguments of counsel, we conclude that we must affirm the trial court's decision to deny William Lofton's Kentucky Rules of Civil Procedure (CR) 60.02 post-conviction motion.

As noted in our previous opinion,¹ Lofton appeals from the denial of his motion for relief under CR 60.02. In that motion, Lofton challenges the effectiveness of his appellate counsel following the affirmance of his conviction and sentence by the Kentucky Supreme Court on direct appeal. We affirmed the trial court's decision to deny relief, and the Kentucky Supreme Court granted discretionary review. Ultimately, the Supreme Court did not issue an opinion on the merits of Lofton's claims. Rather, that court issued an order remanding the matter to us for reconsideration because we did not have the complete record of the trial court when we issued our opinion. Since our first opinion, the Jefferson Circuit Clerk has forwarded the entire record to us; and the parties have, at our request, filed supplemental briefs. Having examined those briefs and the record, we must again affirm.

As discussed in our original opinion, the United States Supreme Court held in Smith v. Robbins² that a claim of ineffective assistance of appellate counsel would be reviewed under the familiar standards used for claims involving ineffective assistance of trial counsel. Although we interpreted that holding logically to infer that the Fourteenth Amendment requires that counsel involved in a convicted

¹ Rendered January 30, 2004.

² See Smith v. Robbins, 528 U.S. 259 (2000).

defendant's direct, matter of right appeal perform effectively, the Supreme Court did not expressly so hold. But in Evitts v. Lucey, issued before Smith v. Robbins, the Supreme Court did definitively hold that "[a] first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney."³ Regardless, the Kentucky Supreme Court recently reaffirmed its longstanding, seemingly contrary position when it held that "[i]neffective assistance of appellate counsel is not a cognizable issue in this jurisdiction."⁴

In his supplemental brief, Lofton contends that we interpreted Smith v. Robbins and its predecessors correctly, meaning that his claims of ineffective assistance of appellate counsel must be cognizable. Despite our concerns about the continued viability of our state rule that ineffective assistance of counsel is not cognizable, as an intermediate appellate court, we are bound by the precedents established by the Kentucky Supreme Court.⁵ So under the clearly articulated precedent of the Kentucky Supreme Court, Lofton's claims of ineffective assistance of counsel are not cognizable.

³ 469 U.S. 387, 396 (1985).

⁴ Lewis v. Commonwealth, 42 S.W.3d 605, 614 (Ky. 2001).

⁵ Rules of Supreme Court (SCR) 1.030(8)(a) ("The Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court.").

For these reasons, the decision of the Jefferson Circuit Court denying William Lofton's CR 60.02 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joseph Ray Myers
Dennis J. Burke
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Todd D. Ferguson
Assistant Attorney General
Frankfort, Kentucky