

Commonwealth of Kentucky
Court of Appeals

NO. 2002-CA-001652-MR

DAMION DALTON

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH ABRAMSON, JUDGE
ACTION NO. 00-CR-001193

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** *

BEFORE: BARBER, DYCHE, AND McANULTY, JUDGES.

BARBER, JUDGE: Damion Dalton appeals from an order of the Jefferson Circuit Court denying his motion for post-conviction relief pursuant to RCr¹ 11.42 and CR² 60.02. In his motion Dalton contends that he received ineffective assistance of counsel. Because Dalton has previously filed a motion pursuant

¹ Kentucky Rules of Criminal Procedure.

² Kentucky Rules of Civil Procedure.

to RCr 11.42 in which he could have raised the issue of ineffective assistance of counsel, we affirm.

On February 25, 2000, Dalton entered the residence of Tara Thompson, choked and struck Thompson causing her physical injury, and threatened to kill her. On March 19, 2000, Dalton attempted to evade the police in his vehicle, drove recklessly, and, after finally stopping his vehicle, fought with a police officer causing him physical injury.

On May 31, 2000, the Jefferson County Grand Jury indicted Damion Dalton on nineteen counts, including the felony charges of two counts of third-degree assault (KRS 508.025), possession of a firearm by a convicted felon (KRS 527.040), tampering with physical evidence (KRS 524.100), first-degree fleeing or evading police (KRS 520.095), first-degree burglary (KRS 511.020), and second-degree persistent felony offender (KRS 532.080), and the misdemeanor offenses of fourth-degree assault (KRS 508.030), terroristic threatening (KRS 508.080), and third-degree criminal mischief (KRS 512.040).

On Dalton's motion, the first-degree burglary, fourth-degree assault, and terroristic threatening charges were severed from the remaining charges and set for trial. The trial commenced on February 6, 2001, and continued through February 7, 2001. On the morning of February 8, 2001, after the testimony of six witnesses, Dalton withdrew his plea of not guilty and

entered a plea pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), to the amended charge of second-degree burglary (KRS 511.030), fourth-degree assault, terroristic threatening, and three additional charges which had not been set for trial: possession of a firearm by a convicted felon, third-degree assault, and third-degree criminal mischief. All remaining counts of the original indictment were dismissed. Pursuant to his plea agreement with the Commonwealth, the total recommended sentence was ten years with the Commonwealth objecting to probation and Dalton reserving the right to argue for probation. On March 28, 2001, Dalton was sentenced to a total sentence of ten years to serve.

On April 6, 2001, Dalton filed a motion for post-conviction relief pursuant to RCr 11.42. The motion requested that the trial court reconsider probation based upon Dalton's learning disability and dyslexia. In the alternative, Dalton, who is an African-American, requested that the trial court set aside his Alford plea on the basis that he had entered the plea solely because the jury selected for his trial consisted of twelve Caucasians and only one African-American. On June 26, 2001, an evidentiary hearing was held on the motion, and on July 19, 2001, the trial court entered an order denying Dalton's motion for post-conviction relief.

On April 26, 2002, Dalton filed a second motion for post-conviction relief. The motion reflected that it was filed pursuant to RCr 11.42 and CR 60.02. The motion alleged that Dalton received ineffective assistance because trial counsel allowed him to enter an Alford plea to the burglary charge even though Dalton was a resident of the dwelling he was charged with unlawfully entering, and because trial counsel failed to challenge the persistent felony offender indictment. The motion argued that since Tara Thompson's residence was also his residence, he entered her residence lawfully, and that since the Commonwealth used his prior felony conviction to charge him with possession of a handgun by a convicted felon, it could not also use the prior felony conviction to charge him as a persistent felony offender. On June 12, 2002, the trial court entered an order denying Dalton's motion for post-conviction relief. This appeal followed.

As noted above, Dalton previously filed an RCr 11.42 motion in Jefferson Circuit Court on April 6, 2001, and the motion was denied by an order entered July 19, 2001. Dalton is precluded from raising issues in a successive RCr 11.42 motion which could have been raised in the first motion. RCr 11.42(3); McQueen v. Commonwealth, Ky., 949 S.W.2d 70, 71 (1997). The allegations of ineffective assistance raised by Dalton in his April 2002 motion could have been raised in his April 2001 RCr

11.42 motion, and he is precluded from raising those issues in his subsequent April 2002 RCr 11.42 motion.

Similarly, CR 60.02 is not a separate avenue of appeal to relitigate issues which could have been raised in a motion under RCr 11.42. Land v. Commonwealth, Ky., 986 S.W.2d 440, 442 (1999); McQueen v. Commonwealth, Ky., 948 S.W.2d 415, 416 (1997), *cert. denied*, 521 U.S. 1130, 117 S.Ct. 2535, 138 L.Ed.2d 1035 (1997); Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983). CR 60.02 is meant to provide relief which is not available by direct appeal or under RCr 11.42. Barnett v. Commonwealth, Ky., 979 S.W.2d 98, 101 (1998). Because Dalton could have raised the present allegations of ineffective assistance in his April 2001 RCr 11.42 motion, he may not raise those allegations in a subsequent CR 60.02 motion.

For the foregoing reasons the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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