

Commonwealth Of Kentucky
Court of Appeals

NO. 2002-CA-001979-MR

JAMES ALLEN WARD

APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 97-CR-00726

v.

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BARBER, GUIDUGLI, AND VANMETER, JUDGES.

VANMETER, JUDGE. James Allen Ward appeals from an order of the Fayette Circuit Court denying his motion to vacate, set aside or correct the court's judgment convicting and sentencing him to serve twenty (20) years for first degree assault and for being a first degree persistent felony offender (PFO). Ward's *pro se* motion was filed pursuant to RCr 10.26, RCr 11.42, and CR 60.02. We affirm.

Ward struck Luther Boaz with an aluminum baseball bat, rendering him unconscious. After a brief flight, Ward was apprehended and charged with assault. He was advised of his

Miranda rights, and he admitted striking Boaz. Meanwhile, Boaz was transported to the hospital by ambulance with injuries to his head and abdomen.¹

Ward was tried on June 15, 1998 for first degree assault (KRS 508.010), and for being a first degree PFO (KRS 532.080). Ward appeared *pro se*, with attorney Mike Palermo serving as stand-by counsel. During the trial, counsel moved for an instruction on fourth degree assault, stating that the jury was not required to believe that Boaz's injuries were serious. The trial court denied this motion on the ground that there could be no doubt that the injuries were serious physical injuries. The trial court instructed the jury on first and second degree assault (KRS 508.010 and 508.020), assault under extreme emotional disturbance (KRS 508.040), and voluntary intoxication (KRS 501.080). After the jury found Ward guilty of first degree assault, he waived jury sentencing and entered a guilty plea to first degree PFO pursuant to a plea agreement whereby the Commonwealth recommended an enhanced sentence of twenty years. On July 13, 1998, the trial court sentenced Ward in accordance with the Commonwealth's recommendation. The judgment of conviction was affirmed on direct appeal to the

¹ Boaz described the extent of his injuries at trial. He testified that he underwent surgery to reconstruct his jaw. He stated that he had three steel rods and several screws permanently implanted into his face, which affected his ability to speak. Boaz also said that he experienced pain every single day. As part of his testimony, Boaz showed the jury a 4-5 inch scar on his jaw from the surgery.

Kentucky Supreme Court.² Subsequently, the trial court denied Ward's motion for relief. This appeal followed.

The sole issue on appeal is whether the trial court erred by failing to find that Ward was afforded ineffective assistance when counsel failed to request an instruction on fourth degree assault based on the seriousness of the victim's injuries.³ Although the record shows that trial counsel did request an instruction on fourth degree assault, Ward attempts to minimize counsel's action by asserting that counsel sought the instruction solely on the ground of reckless behavior (KRS 508.030 (1)(b)), rather than on the ground of intentional or wanton behavior (KRS 508.030(1)(a)). He contends that counsel acted improperly by failing to request the instruction on the ground that Boaz did not suffer serious physical injury.

In fact, fourth degree assault turns on the existence of "physical injury" rather than on the existence of "serious physical injury," regardless of which mental state was involved in the commission of the assault. While the discussion below regarding the proposed instruction did center primarily on

² *Ward v. Commonwealth*, 1998-SC-000610-MR (unpublished opinion rendered June 15, 2000).

³ The trial court overruled this ground on the basis that claimed errors in the jury instructions are not reviewable upon an RCr 11.42 motion, citing *Boles v. Commonwealth*, Ky., 406 S.W.2d 853, 856 (1966). While *Boles* has not been expressly overruled or modified, courts in more recent cases have examined failures to object to jury instructions in the context of RCr 11.42, such that the continued validity of *Boles* must be questioned. See, e.g., *Commonwealth v. Davis*, Ky., 14 S.W.3d 9, 11 (1999).

Ward's mental state, the record shows that trial counsel did raise the issue of the degree of injury, properly noting that fourth degree assault required only the lesser degree of injury. However, the trial court quickly rejected the instruction due to the proof regarding the seriousness of the physical injury suffered by Boaz.

Issues raised during a trial must be reviewed on direct appeal. Any issue which could or should have been raised on direct appeal may not be reviewed pursuant to a motion for RCr 11.42 relief. *Haight v. Commonwealth*, Ky., 41 S.W.3d 436, 441 (2001); *Gross v. Commonwealth*, Ky., 648 S.W.2d 853, 856 (1983)(RCr 11.42 "provides a vehicle to attack an erroneous judgment for reasons which are not accessible by direct appeal"); *Bronston v. Commonwealth*, Ky., 481 S.W.2d 666, 667 (1972) (criminal defendant may not use an RCr 11.42 motion to try or retry "issues which could and should have been raised in the original proceedings . . . where the grounds of his motion are matters which must have been known to him at the time of trial"). As the issue before us on appeal is one which was raised before the trial court, the matter could and should have been addressed in Ward's direct appeal to the Kentucky Supreme Court. That being so, it is not subject to collateral attack in a subsequent motion for relief. The trial court did not err in

denying Ward's motion for relief under RCr 10.26, RCr 11.42,
and/or CR 60.02.

For the foregoing reasons, we affirm the order of the
Fayette Circuit Court.

ALL CONCUR.

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