

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002099-MR

ALDEAN HENDERSON, JR.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 80-CR-000412

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, MINTON AND VANMETER, JUDGES.

GUIDUGLI, JUDGE. Aldean Henderson, Jr. (hereinafter "Henderson") appeals prose from the order of the Jefferson Circuit Court denying his CR 60.02(f) motion. We affirm.

This is Henderson's fourth CR 60.02 motion. It follows his direct appeal, a RCr 11.42 motion and three prior CR 60.02 motions. His conviction was upheld on direct appeal to the Kentucky Supreme Court in Henderson v. Commonwealth, Ky., 636 S.W.2d 648 (1982). The denial of his previous RCr 11.42 and

CR 60.02 motions were affirmed by this Court in unpublished opinions. This appeal is from the Jefferson Circuit Court's denial of a CR 60.02 motion filed on January 15, 2002. In that motion, Henderson alleged that he was deprived of his right to counsel, that the official record did not include an essential exchange between Henderson and the court concerning his assigned public advocate, and that his prior appellate counsel was ineffective, thus depriving him of a meaningful direct appeal. The trial court denied his motion and this appeal followed.

Henderson first argues that he was denied counsel at his trial. This claim is based upon his contention that his court-appointed counsel did not meet with him enough to adequately prepare for his trial and that counsel failed to keep Henderson adequately informed of his trial preparations and strategy. Henderson alleges that this is not a claim for ineffective assistance of counsel but rather a denial of counsel. In the first sentence of his argument on this issue (page 8 of appellant's brief), Henderson states, "[d]ue to the trial court's failure to appoint counsel to represent the appellant at trial, the appellant did not have any legal representation from an attorney during the entire pretrial stages of his trial." The record clearly refutes this statement and Henderson's arguments to the contrary. In fact, the Kentucky Supreme Court addressed the issue of ineffective

assistance in Henderson's direct appeal. In its opinion, our Supreme Court held:

From this conviction review is sought in which the public advocate notices thirteen errors allegedly occurring in the trial. (footnote omitted). We have considered the multiple urgings of the Appellant as set out in both the public advocate's briefs and the briefs filed *pro se*, and find only those discussed in this opinion as having any merit.

. . .

The first argument meriting discussion is the Appellant's expressed dissatisfaction with his assigned counsel, first noted at the inception of the trial. Although this dissatisfaction is described in the record in a variety of terms, it can be synopsised in the Appellant's own words: "He never told me nothing." After hearing and evaluating the Appellant's protests, the trial court concluded that "You seem to be more concerned with what he tells you, and not what he actually does."

The trial began, and the record clearly reflects that Appellant's counsel was active, alert, imaginative and resourceful. He conducted an active voir dire; made a logical opening statement; made numerous timely objections, many of which were sustained; made a motion to test the legality of the arrest; conducted thorough cross-examination of all witnesses; and made a motion for directed verdict of acquittal at the close of the Commonwealth's case. For the Appellant's case, his counsel called two available defense witnesses, (footnote omitted) as well as putting the Appellant himself on the stand. Defense counsel presented the defense of alibi to the jury, utilizing the testimony of the Appellant, his mother, and the local probation and

parole officer. At the close of the Appellant's case, counsel again renewed his motion for a directed verdict of acquittal. Closing argument was substantial (in light of the overwhelming evidence), and the jury was polled after the verdict was rendered. Post-trial motions for a new trial and a judgment notwithstanding the verdict were timely filed. During the PFO portion of the trial, counsel was again most aggressive, including but not limited to preserving the record on appeal.

. . .

In the opinion of this court, it is beyond question that the quality of professional representation rendered in this case was reasonably effective. (footnote omitted).

As to Appellant's contention that he was by right entitled to new counsel upon the grounds that he found his counsel to be ineffective, we reiterate that a defendant who is represented by a public defender or appointed counsel does not have a constitutional right to be represented by any particular attorney, and is not entitled to the dismissal of his counsel and the appointment of substitute counsel except for adequate reasons or a clear abuse by counsel. See Baker v. Commonwealth, Ky.App., 574 S.W.2d 325 (1978); Fultz v. Commonwealth, Ky., 398 S.W.2d 881 (1966). No adequate reasons or abuse by counsel are demonstrated in the Appellant's case. His efforts appear to be no more than an attempt to delay the proceedings against him, and the trial court properly utilized its discretion in this case by refusing Appellant substitute counsel.

Id. at 649-651.

In Henderson's subsequent RCr 11.42 and CR 60.02 motions, including the present one, the Courts have held that his claim of ineffective assistance of counsel had been raised on direct appeal and addressed by the Supreme Court's opinion and thus, could not be raised again. For example, in this Court's opinion rendered April 14, 2000, this Court held:

With regard to appeal no. 1999-CA-001201, we conclude that the disposition of this matter is governed by the applicable law of the case. Specifically, the issues contained in the RCr 11.42 motion were addressed and decided by our Supreme Court in Henderson v. Commonwealth, *supra*. Therefore, that holding operates as the law of the case, is binding on this court, and cannot be disturbed by this Court. [Commonwealth v. Schaefer, Ky., 639 S.W.2d 776 (1982)]. Given that our highest Court has determined that these specific claims made by Henderson lack merit, we are neither authorized nor inclined to attempt to disrupt that holding as it operates as a judgment upon which we must, and shall, adhere. [Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986)].

[Henderson v. Commonwealth, 1998-CA-001201-MR and 1998-CA-002106-MR, p. 4, a not-to-be-published opinion rendered April 14, 2002].

Henderson attempts to argue that this issue is not one of ineffective assistance of counsel but that he had no representation. As stated previously, that simply is not true. He was represented by appointed counsel and as found by our Supreme Court that "it is beyond question that the quality of

professional representation rendered in this was case reasonably effective." Despite Henderson's argument to the contrary, the issue he raises is one of ineffective assistance of counsel which has been previously addressed and is binding on him and all courts. Once decided by our Supreme Court, that issue is final and cannot be raised again.

Henderson next argues that the court reporter did not transcribe the entire proceeding between him and the court prior to the beginning of his jury trial and that this prejudiced his claim that he was not represented at trial. Again, this claim has no merit and is refuted by the record. Prior to the beginning of the jury trial on June 18, 1980, there was a lengthy exchange among Henderson, his attorney, the Commonwealth Attorney and the judge. This exchange dealt with Henderson's claim that he was not ready to proceed to trial because his appointed counsel had only met with him for a short period a couple of times before the trial date. Despite counsel's assurances that he was well prepared, had investigated the facts, talked to witnesses, reviewed the Commonwealth's case, and had discussed a very favorable plea agreement (which Henderson had rejected), Henderson vehemently denied that he was ready for trial. Throughout this discussion, the trial court made the following comments to Henderson concerning appointed counsel: "He is doing his best for you. He is doing more than

anybody else can do. The test is if he is prepared to go and he says he is prepared to go. You [Henderson] seem to be more concerned with what he tells you, and not with what he actually does." The court also stated that there had been an informal, off the record, discussion with the parties relative to Henderson's concerns about his attorney's contacts with him. After discussing Henderson's concerns and being informed by counsel that he was well prepared and ready to try the case, the court denied Henderson's motion for a continuance. Clearly the record refutes Henderson's allegation. Furthermore, as the trial court held "Henderson had ample opportunity to present this argument on appeal and through post-conviction relief but has not chosen to raise the issue until now. Civil Rule 60.02 is not intended as an additional opportunity to re-litigate the same issues which could 'reasonably have been presented' by direct appeal or RCr 11.42 proceedings" citing McQueen v. Commonwealth, Ky., 948 S.W.2d 415, 416 (1997). We agree with the trial court that Henderson's claim is without merit and was not timely pursued.

Henderson's third argument as to ineffective appellate counsel is also without merit. The circuit court denied relief based upon Harper v. Commonwealth, Ky., 978 S.W.2d 311 (1998). In Harper, the Kentucky Supreme Court held:

[Harper] claims that Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985), guarantees the effective assistance of counsel on the first appeal as a matter of right, and urges this Court to consider its decision in Hicks v. Commonwealth, Ky., 825 S.W.2d 280 (1992), in which we stated, "[w]e will not examine anew an appeal reviewed, considered and decided by this Court." Id. at 821. However, Evitts, supra, is factually distinguishable in that Evitts' counsel made a mistake which caused the appeal to be dismissed, essentially depriving Evitts of any appeal. The opinion in Hicks, supra, addressed this distinction.

We think there is a substantial difference in the situation of a convicted defendant for whom no appeal was even taken or one whose appeal was dismissed solely due to neglect of counsel and the situation of a defendant whose appeal was completely processed and the judgment affirmed. In the first case, there was never any consideration of the merits of any substantive issue by the appellate court. In the latter case, the appellate court has considered and decided the merits of the appeal. We will not examine anew an appeal reviewed, considered and decided by this Court.

RCr 11.42 cannot be used as a vehicle for relief from ineffective assistance of appellate counsel. Vunetich v. Commonwealth, Ky., 847 S.W.2d 51 (1992); Commonwealth v. Wine, Ky., 694 S.W.2d 689 (1985). Notwithstanding the procedural deficiency, Appellant has failed to demonstrate any prejudice. We are of the opinion that Appellant was represented well on direct appeal.

Id. at 318.

Having thoroughly reviewed Henderson's claims of error and believing them to have no merit, we affirm the order of the Jefferson Circuit Court denying his CR 60.02(f) motion.

ALL CONCUR.

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