

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000206-MR

MATTHEW KENNY HOUSTON

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 96-CR-00338

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, McANULTY AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Matthew Kenny Houston appeals from the January 9, 2003, Opinion and Order of the Fayette Circuit Court. We affirm.

Appellant was convicted of assault in the second degree (Kentucky Revised Statutes (KRS) 508.020) and with being a persistent felony offender in the first degree (KRS 532.080). The charges were the result of a dispute that arose between appellant and his wife, Belinda Allen, while in the home of a friend. Both had been drinking when the disagreement occurred.

Appellant ultimately hit Allen in the mouth, knocked her into some chairs and then stabbed her in the abdomen. Following a jury trial, appellant was sentenced to fifteen years imprisonment. A direct appeal ensued, and this Court upheld the conviction in Appeal No. 1996-CA-003136-MR.

While appellant's direct appeal was pending, he filed a Ky. R. Crim. P. (RCr) 11.42 motion in the Fayette Circuit Court. The motion was overruled without a hearing. Appellant then filed a motion for reconsideration requesting an evidentiary hearing and appointment of counsel. The circuit court granted appellant an evidentiary hearing, but denied his request for appointment of counsel. Thereafter, the circuit court denied appellant's RCr 11.42 motion. Appellant appealed to this Court, and the matter was remanded for appointment of counsel. Upon remand, appellant was appointed counsel and an evidentiary hearing was held. In an order entered January 9, 2003, the Fayette Circuit Court denied appellant's RCr 11.42 motion. This appeal follows.

Appellant contends his trial counsel was ineffective for failing to investigate a pending felony charge against Allen and for failing to utilize such evidence to demonstrate she had an incentive to cooperate with the Commonwealth. He specifically contends Allen was attempting to "curry the favor" of the prosecution in exchange for a favorable result in her

case. Appellant asserts that if counsel had brought the pending felony charge to the attention of the jury, it would have demonstrated that she had a motive for testifying against him.

It is an established principle that the standard of review for claims of ineffective assistance of counsel pursuant to RCr 11.42 "is limited to issues that were not and could not be raised on direct appeal. An issue raised and rejected on direct appeal may not be relitigated in these proceedings by claiming that it amounts to ineffective assistance of counsel." Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 909 (1998).

Appellant filed a direct appeal from the judgment of conviction, and this Court rendered an opinion on July 10, 1998. In that appeal, appellant raised the issue of Allen's pending felony charge and its possible use to attack her credibility. In an opinion affirming appellant's conviction, this Court stated as follows:

Before trial, [appellant] learned that Allen had a robbery charge pending against her. Following trial, his counsel became aware that there were outstanding warrants for her arrest. Houston insisted before the trial court that a "reasonable inference can be drawn from this record that as of . . . the date of the trial, the police were holding these warrants over the complaining witness's head to insure that she appear and testify for them." (Defendant's Memorandum in Support of Motion for a New Trial at 8). Appellant contends that this evidence would have been material during his trial to attack Allen's credibility and that the

evidence indicated that she had a motive to lie for the Commonwealth

We disagree with [appellant's] contention that the trial court abused its discretion by denying his motion for a new trial Since [appellant's] evidence does not in any way establish that the victim was not assaulted by him, we fail to perceive that his claim of newly-discovered evidence satisfies the required standard. We detect no abuse of discretion in the trial court's denial of [appellant's] motion for a new trial.

Appellant argued in his direct appeal that if evidence of Allen's pending felony charge had been introduced at trial, it would have demonstrated to the jury that she had a motive to lie for the Commonwealth. This is essentially the same argument appellant now makes to this Court. Appellant is not permitted to relitigate the same issue by now claiming it amounts to ineffective assistance of counsel. See Sanborn, 975 S.W.2d 905.

For the foregoing reasons, the Opinion and Order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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