

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-000466-MR

DONALD RAY VIOLETT

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NOS. 92-CR-00532 & 92-CR-00626

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, DYCHE, and KNOFF, Judges.

COMBS, JUDGE: Donald Ray Violet (Violet) appeals from the denial of his second RCr¹ 11.42 motion by the Warren Circuit Court. We affirm the denial of his second, successive motion.

After a mistrial followed by a new trial, a Warren County jury convicted Violet of one hundred fifty-seven (157) counts of sexual abuse in the first degree and five (5) counts of rape in the first degree. He was sentenced to a total of seven hundred fifty-four years (754) in prison. As a matter of right, Violet appealed his conviction to the Supreme Court of

¹ Kentucky Rules of Criminal Procedure.

Kentucky. On October 19, 1995, the Supreme Court affirmed Violett's conviction in a published opinion that became final on November 9, 1995. Violett v. Commonwealth, Ky., 907 S.W.2d 773 (1995).

Violett has since attacked his conviction numerous times. He has filed several petitions for writs of *habeas corpus* in the courts of the Commonwealth as well as in federal courts. He has also filed several petitions for writs of mandamus with this Court and with the Supreme Court of Kentucky. In November 1995, Violett filed a motion pursuant to CR 60.02² to vacate his conviction, a motion which the trial court denied. In August 1999, Violett filed his first RCr 11.42 motion with the Warren Circuit Court, claiming ineffective assistance of counsel. The trial court appointed the Department of Public Advocacy (DPA) to represent him. DPA filed a supplemental RCr 11.42 motion on his behalf. After holding an evidentiary hearing, the trial court denied the motion on June 11, 2001, as being without merit. Violett appealed that denial, and this Court affirmed.

While the appeal from the denial of his first RCr 11.42 motion was still pending before this Court, Violett filed a second RCr 11.42 motion to vacate his conviction. He again alleged various arguments involving ineffective assistance of

² Kentucky Rules of Civil Procedure.

counsel. He alleged numerous acts of malfeasance or non-feasance on the part of his trial counsel, claiming: (1) that he violated the attorney-client privilege; (2) that he failed to discover that prior to Violet's indictment, the investigating officer had falsely accused him of numerous crimes over a period of ten years; (3) that he failed to object to the officer's proffered expert testimony since the officer was never qualified as an expert.

Violet also claimed that in the course of seeking an indictment, the prosecutor violated numerous grand jury procedures. He argued that his attorney was remiss in failing to challenge the indictment based on prosecutorial misconduct. He argued that his step-daughter, who was one of his victims, testified that she feared that her mother would lose her home if she reported that Violet had sexually abused her. Violet contended that his attorney failed to investigate this mere "economic fear" and proved inadequate in failing to base a defense on it.

Violet also argued that his new trial was barred by double jeopardy because his attorney "tricked him" into agreeing to allow the videotape of the first trial to be presented to the second jury. He argued that his attorney failed to investigate and to discover that his other victim, his biological daughter, was more than twelve years of age when he had sex with her and

that there was no evidence of forcible compulsion. As a result, he contends that he could not have been charged with rape in the first degree as to her. Violettt also challenged the sufficiency of the evidence and the propriety of the jury instructions, again attributing these errors to the ineffectiveness of his counsel. The trial court summarily denied as meritless all of the allegations in Violettt's second RCr 11.42. Violettt appeals once again to this Court.

In his appellant's brief filed *pro se*, Violettt raises numerous allegations of error. He contends that his trial attorney was ineffective for not objecting when the Commonwealth sought to amend the indictment to conform to the evidence presented at trial after the close of its case. Violettt also contends that upon granting the Commonwealth's motion and amending the indictment, the trial court lost jurisdiction over his case.

During his first trial, the trial court had declared a mistrial due to the health problems experienced by Violettt's attorney. Violettt claims that the court ordered the mistrial absent manifest necessity; thus, he contends that double jeopardy barred his re-trial. Violettt argues that the trial court violated his right to due process by reading to the jury only one of the one hundred twenty-three (123) instructions regarding sexual abuse in the first degree. According to

Violett, this error in instruction forced the jury to "flip a coin" and either to acquit him on all counts of sexual abuse or to convict him of all. Furthermore, he claims that the trial court violated his due process rights by refusing to correct a misstatement in his pre-sentence investigative report - another error that allegedly invalidated his conviction.

Kentucky courts have articulated a specific procedure allowing for a graduated series of steps by which a prisoner may attack his criminal conviction. Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856 (1983). As the Supreme Court has stated in Gross, this mechanism is neither haphazard nor overlapping. On the contrary, it is organized and sequential, setting forth the rules regarding direct appeals: RCr 11.42 and CR 60.02. Id. According to the high court,

RCr 11.42 provides a procedure for a motion to vacate, set aside or correct sentence for "a prisoner in custody under sentence or a defendant on probation, parole or conditional discharge." It provides a vehicle to attack an erroneous judgment for reasons which are not accessible by direct appeal. In subsection (3) it provides that "the motion shall state **all** grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude **all** issues that could reasonably have been presented in the same proceeding." (Emphasis added). Id.

Violett has previously invoked all of the post-conviction remedies to which he was entitled. He has already

availed himself of his right to a direct appeal of his conviction. Furthermore, he has previously filed both an RCr 11.42 motion and a CR 60.02 motion.

The courts have much more to do than occupy themselves with successive 'reruns' of RCr 11.42 motions stating grounds that have or should have been presented earlier. Hampton v. Commonwealth, Ky., 454 S.W.2d 672, 673 (1970), quoting Kennedy v. Commonwealth, Ky., 451 S.W.2d 158, 159 (1970).

Violett was required to present all the grounds for relief in his first RCr 11.42 motion. See Hampton v. Commonwealth, supra; Case v. Commonwealth; Ky., 467 S.W.2d 367 (1971); and Butler v. Commonwealth, Ky., 473 S.W.2d 108 (1971). Since he is seeking a review of the denial of his second, successive RCr 11.42 motion, this Court must refrain from reviewing the motion.

We affirm the trial court's denial of the motion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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