

RENDERED: NOVEMBER 24, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000865-MR

TERRANCE L. PAYNE

APPELLANT

APPEAL FROM HENDERSON CIRCUIT COURT
v. HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NOS. 91-CR-00169 & 91-CR-00170 & 92-CR-00042

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * * *

BEFORE: SCHRODER AND TACKETT, JUDGES; EMBERTON, SENIOR JUDGE.¹

EMBERTON, SENIOR JUDGE: This is an appeal from the denial of appellant's motion for RCr² 11.42 relief from a judgment entered pursuant to a guilty plea in 1992. Although the trial court appointed counsel and conducted an evidentiary hearing prior to denying appellant's motion, we have concluded that this avenue

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² Kentucky Rules of Criminal Procedure.

of relief is procedurally foreclosed by the time limitations of the rule itself. We therefore affirm the denial of relief.

Pursuant to a plea agreement under which first-degree persistent felony offender counts were dismissed in two separate indictments, appellant pled guilty to trafficking in a controlled substance, possession of a controlled substance, receiving stolen property and possession of a handgun by a convicted felon. In accordance with the Commonwealth's sentencing recommendations, appellant was sentenced on March 23, 1992, to a total of fourteen years' imprisonment. On September 23, 1997, appellant filed the RCr 11.42 motion which precipitated this appeal. In that motion, appellant alleged that the ineffective assistance of his retained counsel rendered the 1992 guilty plea involuntary. Despite the Commonwealth's contention that appellant's motion was time barred, the trial court appointed counsel and set the matter for an evidentiary hearing which, due to circumstances not pertinent to our decision, was ultimately conducted on July 18, 2002.

It was stipulated at the hearing that appellant's counsel during plea negotiations, Verdelski Miller, was at that time licensed to practice law in Indiana but not Kentucky; that there were no transcripts of the guilty plea proceeding available because the court reporter had died and her tapes and notes could not be found; and that the trial court conducted a

standard colloquy prior to accepting appellant's plea. Only appellant and his co-defendant, Tracy Lynette Jackson, testified at the hearing. The gist of their testimony was that Miller had failed to properly investigate their cases; had given them inaccurate information and bad advice concerning the sentences they were facing; and had deprived them of a legitimate defense by failing to advise them of a potential conflict in representing both of them or to obtain a waiver of dual representation.

In a thorough and well-reasoned opinion, the trial court determined that appellant had not been deprived effective assistance of counsel. Citing United States v. Hall,³ the trial court concluded that the failure to comply with RCr 8.30 did not rise to the level of constitutionally deficient performance because no actual conflict of interest was demonstrated. Here, counsel succeeded in obtaining for both appellant and his co-defendant the benefit of a very good bargain, a fact confirmed by appellant's own testimony. Appellant plainly stated that he decided to accept the Commonwealth's offer because he knew he would be eligible for parole in less than three years. The trial court also found nothing to support appellant's claim that Miller failed to properly investigate the case. Finally, the trial court concluded that counsel's failure to comply with the

³ 200 F.3d 966 (6th Cir. 2000).

formality of obtaining a *pro hac vice* order, standing alone, did not give rise to an inference that his assistance was less than effective.

While we find no error in any of these findings, we are convinced that the decision of the trial court must be affirmed for a more basic reason: appellant's failure to demonstrate entitlement to proceed under RCr 11.42. In his motion, appellant states that he was aware as early as 1994 that Miller was not licensed to practice in Kentucky. It seems plain to us that when he chose to retain out-of-state counsel, it was incumbent upon him to inquire as to his ability to practice in a different state. Furthermore, the record clearly discloses that the trial court had appointed Kentucky counsel to represent appellant in "all stages of proceedings in this Court on the charges contained in the indictment, including trial." Appellant's testimony that he hired Miller because he could not afford his original counsel does not comport with the record.

Thus, appellant's failure to demonstrate that "the facts upon which the claim is predicated were unknown to [him] or could not have been ascertained by the exercise of due diligence" places his motion outside the three-year limitation contained in RCr 11.42(10). The wisdom of that limitation is vividly displayed by this case. Because of the passage of so much time from judgment to hearing, transcripts could not be

obtained due to the death of the court reporter and trial counsel could not be located. The trial court did not err in denying the requested relief and its judgment is hereby affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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