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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001277-MR

TERRY FRAZIER — APPELLANT

v.

APPEAL FROM UNION CIRCUIT COURT
HONORABLE TOMMY W. CHANDLER, JUDGE
ACTION NO. 92-CR-00078

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
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BEFORE: GUIDUGLI, McANULTY AND MINTON, JUDGES.

GUIDUGLI, JUDGE. Terry Frazier ("Frazier") appeals from an order of the Union Circuit Court denying his pro se RCr 11.42 motion for relief from a criminal judgment. For the reasons stated herein, we affirm.

On November 2, 1992, Frazier was indicted by the Union County Grand Jury on charges of murder, first-degree robbery, and first-degree burglary. The charges stemmed from the

robbery, burglary, and murder of Tina Marie Wagner on October 16, 1992. It was alleged that Frazier went to Wagner's home in Morganfield, Kentucky, where during the course of the robbery he stabbed her multiple times resulting in her death.

After Frazier successfully moved for a change of venue, he entered into a plea agreement with the Commonwealth. The terms of the plea provided that Frazier would plead guilty in exchange for the Commonwealth's sentencing recommendation. Pursuant to the plea, Frazier acknowledged his guilt and the veracity of the charges against him. On August 9, 1993, he was sentenced to twenty (20) years in prison on each of the robbery and burglary counts, and received a sentence of life without the possibility of parole for twenty-five (25) years on the murder charge. The terms of imprisonment were ordered to run consecutively.

On July 7, 1994, Frazier apparently filed a RCr 11.42 motion which was later withdrawn. A second RCr 11.42 motion was filed on July 17, 1996. As a basis for the second motion, Frazier alleged that the trial court improperly failed to find aggravating factors and failed to suppress statements made during police questioning. The motion was denied on December 2, 1996. Frazier appealed to this Court, which rendered an unpublished opinion on October 23, 1998. A panel of this Court affirmed the trial court's denial of the motion, but remanded

that matter with instructions that the robbery and burglary sentences run concurrently with the murder sentence.

On July 5, 2001, Frazier filed a third RCr 11.42 motion. He alleged therein that his trial counsel, James Crumlin ("Crumlin"), was suffering from serious mental and physical impairment while representing Frazier, and that this impairment resulted in the rendering of deficient performance. Upon considering the motion, the circuit court entered an order on May 19, 2003, which forms the basis of the instant appeal. The circuit court denied the relief sought, and opined that the claims had either already been addressed in prior motions, or were conclusory allegations not supported by fact. This appeal followed.

Frazier now argues that the circuit court erred in denying the July 5, 2001, RCr 11.42 motion for relief. He first claims that the trial court improperly failed to rule upon the motion without the benefit of an evidentiary hearing. He maintains that the court improperly failed to designate which issues in his motion had been previously reviewed and which issues the court believed were not sufficiently supported by facts to support an evidentiary hearing. Frazier also points to a May, 2001 letter from Crumlin to the Kentucky Bar Association ("KBA")in which Crumlin stated that his health had deteriorated to the point that he was "prevented from taking care of any kind

of official business." Frazier contends that he alleged and proved that Crumlin was physically and mentally impaired at the time of the guilty plea proceedings, and that the trial court erred in failing to conclude that Crumlin rendered ineffective assistance.

We have closely examined the record and the law, and find no error in the circuit court's denial of Frazier's motion for relief. Frazier's argument centers on the May, 2001 letter from Crumlin to the KBA in which Crumlin discusses his poor health. Frazier relies on this impairment in support of his contention that he received ineffective assistance from Crumlin. We do not find this argument persuasive. The letter in question appears to be in response to a communication to Crumlin from the KBA regarding a search for Frazier's files. In his letter, Crumlin apologized for having no recollection of having represented Frazier, and stated that he retired from the practice of law in 1997. He went on to state that "[m]y health has deteriorated to the point that my sight, ability to speak, think clearly and move without assistance prevents me from taking care of any kind of official business."

Frazier states as fact that he alleged and proved that Crumlin was physically and mentally impaired at the time of the guilty plea proceedings. This assertion is far from accurate. Crumlin represented Frazier in or about 1993, but wrote of his

physical and mental impairment some eight years later in 2001. Crumlin's 2001 letter provides no indication of physical or mental impairment in 1993, and we cannot find that the circuit court erred in so concluding.

Frazier also relies on Crumlin's 2001 letter in support of the assertion that he was entitled to an evidentiary hearing on the motion for relief. As the parties are well aware, an RCr 11.42 movant is not entitled to an evidentiary hearing on the motion where the allegations contained in the motion are justiciable by reference to the record. Hodge v. Commonwealth, Ky., 68 S.W.3d 338 (2001). In Hodge, the Supreme Court of Kentucky held that the dispositive inquiry on the issue of whether a hearing is required is whether the record refutes the allegations raised. In the matter at bar, the eight year span between Crumlin's representation of Frazier and Crumlin's statement regarding his incapacitation refutes Frazier's claim that he "alleged and proved that his trial attorney, James A. Crumlin, was physically and mentally impaired at the time of the guilty plea proceedings . . . ." If Crumlin's statement regarding his poor health was not so remote in time from the representation, Frazier may have been entitled to a hearing on the issue. We cannot conclude, however, that Crumlin's declining health in 1997 compels the trial court to investigate his health in 1993. This is especially true in light of the

fact that competent representation is presumed and does not have to be proven. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2032, 80 L.Ed.2d 674 (1984). Accordingly, we cannot conclude that the circuit court erred in refusing to conduct a hearing on Frazier's motion for relief.

For the foregoing reasons, we affirm the order of the Union Circuit Court overruling Frazier's motion for RCr 11.42 relief.

ALL CONCUR.

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