

RENDERED: January 21, 2005; 10:00 a.m.

NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001688-MR

NATHAN MARKSBERRY

APPELLANT

v. APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 89-CR-00140

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, TACKETT, AND VANMETER, JUDGES.

TACKETT, JUDGE: Nathan Marksberry appeals from the order of the Grant Circuit Court denying his criminal post-conviction motions under Rule of Criminal Procedure (RCr) 11.42 and Rule of Civil Procedure (CR) 60.02. Marksberry argues on appeal that the court should have granted relief because his counsel was allegedly ineffective for failing to adequately consult with him about filing a direct appeal, citing Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). The

Commonwealth responds that these issues have either have or should have been litigated in prior post-conviction motions. We agree that these issues have already been litigated and affirm the judgment of the circuit court.

Marksberry was convicted of murder in 1991 for the death of Paula Dority in Grant County, Kentucky. Marksberry waived his right to direct appeal after having been orally advised of his right to an appeal by the court upon conviction and again at sentencing. Marksberry did file a motion for belated appeal with the Kentucky Supreme Court, which remanded the matter to the Grant Circuit Court for a determination of whether Marksberry made an effective waiver of his right to appeal. A special judge sitting for the Grant Circuit Court concluded after an evidentiary hearing held in December, 1993, that he had waived his right to appeal. Marksberry then filed a post-conviction motion under RCr 11.42 alleging various grounds for relief. This motion was denied by the circuit court after an evidentiary hearing in 1995, and the denial was affirmed by this Court in 1997. The Kentucky Supreme Court denied discretionary review. Marksberry sought and was denied habeas corpus relief in the federal courts. He now returns to this Court seeking relief from the circuit court's order denying his motion without an evidentiary hearing.

Marksberry argues on appeal that the Roe v. Flores-Ortega case above is a "watershed case" announcing a new rule which should be applied to his case. We conclude that Marksberry's understanding of this case is seriously flawed. Flores-Ortega rejected the approach used by the 9th Circuit Court of Appeals, which had drawn a bright-line rule that an attorney who fails to file an appeal without an express instruction not to do so by his client is per se ineffective. Instead, the Flores-Ortega case stands for nothing more than that the standard in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) should be applied in cases where ineffective assistance of counsel is claimed from the failure to file an appeal when the wishes of the client are not clear from consultation. Under these circumstances, rather than take the approach used by the First and Ninth Circuits, the Supreme Court held that a person claiming ineffective assistance of counsel must meet the Strickland test and demonstrate that counsel's performance deviated from the acceptable standard of professional performance and that because of such deviation, he was prejudiced in some way. The Court noted that among the factors to be strongly considered is whether the person claiming ineffective assistance had any sort of non-frivolous issue to present upon a direct appeal.

The record is very clear that the courts of this Commonwealth have already evaluated counsel's performance under Strickland and found that Marksberry's claims did not meet the standard. Marksberry's claims in this successive motion have or should have been litigated in prior proceedings, and we therefore affirm the decision of the Grant Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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