

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002279-MR
AND
NO. 2005-CA-001036-MR

EVERETT DARONE SIMPSON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
HONORABLE JAMES D. ISHMAEL JR.
ACTION NO. 99-CR-01130-1

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: TAYLOR AND VANMETER, JUDGES; EMBERTON, SENIOR JUDGE.¹

TAYLOR, JUDGE: Everett Darone Simpson brings *pro se* Appeal No. 2003-CA-002279-MR from a September 24, 2003, Opinion and Order of the Fayette Circuit Court summarily denying his Ky. R. Crim. P. (RCr) 11.42 motion. Everett Darone Simpson also brings *pro se* Appeal No. 2005-CA-001036-MR from a March 3, 2005, Opinion

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 Kentucky Revised Statutes 21.580.

and Order of the Fayette Circuit Court summarily denying his Ky. R. Civ. P. (CR) 60.02 motion to vacate sentence. We affirm.

Appellant was convicted by a jury upon five counts of first-degree robbery. In July 2000, appellant was sentenced to a total of forty years' imprisonment. Appellant pursued a direct appeal of his conviction, and the appeal was affirmed by opinion of the Supreme Court in Appeal No. 2000-SC-0625-MR.

Appellant then filed an RCr 11.42 motion to vacate sentence based upon various claims of ineffective assistance of counsel. Without an evidentiary hearing, the circuit court denied the motion by Opinion and Order entered September 24, 2003. Appellant brings Appeal No. 2003-CA-002279-MR from the circuit court's September 24, 2003, order summarily denying his RCr 11.42 motion.

Subsequently, on February 18, 2005, appellant filed a motion pursuant to CR 60.02 to alter, amend or vacate his sentence. On March 3, 2005, the circuit court entered an Opinion and Order summarily denying appellant's CR 60.02 motion. Appellant brings Appeal No. 2005-CA-001036-MR from this Opinion and Order.

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Appellant contends the circuit court committed error by denying his RCr 11.42 motion without an evidentiary hearing.

Specifically, appellant claims that there were material issues of fact that could not be resolved upon the face of the record, thus necessitating an evidentiary hearing upon his motion.

Appellant's RCr 11.42 motion raises various claims of ineffective assistance of trial counsel. To prevail, appellant must demonstrate that trial counsel was ineffective and that such ineffectiveness was prejudicial. Strickland v. Washington, 466 U.S. 668 (1984). To demonstrate prejudice, appellant must prove that absent trial counsel's errors the outcome of the trial would have been different. A movant is not entitled to an evidentiary hearing where the allegations can be refuted upon the face of the record. Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001).

Appellant initially contends that trial counsel was ineffective for using a peremptory strike to remove a biased juror and for failing to move the trial court to remove the juror for cause. Appellant alleges that Juror No. 165 admitted to having knowledge of appellant's case from media coverage and also admitted to being racially biased. Having such knowledge and being biased, appellant believes that trial counsel should have moved the trial court to excuse the juror for cause rather than exercising a peremptory challenge. Even if trial counsel erred, we are unable to conclude that such error was

prejudicial. As to the absence of prejudicial effect, we must agree with the circuit court's reasoning:

Lastly, Movant claims his attorney failed to challenge for cause and request removal of an admittedly biased juror with racist views. The Record shows Juror 165 state[sic] he had knowledge of the case through the Lexington Herald-Leader. (22/3/00/VCR/29 at 14:10:49). The Record shows that Juror 165 was struck with both sides agreeing to the propriety of the strike and the Judge noting this on her notepad. (14:17:54-56). When Juror 165 later showed on the juror list, the Record shows trial counsel made sure to use a peremptory strike so that Juror would not be on the panel. (15:18:45). Although Movant believes that the peremptory strike should have been used to strike a different unfavorable juror, he fails to state what juror needed to be removed and how it would change the outcome of the trial. Movant may disagree with what specifically was done, however, he must remember he is not entitled to have an error-free trial that goes exactly the way he would want it to. . . .

Simply put, appellant failed to indicate how the outcome of the proceedings was affected by use of the peremptory challenge and which juror counsel should have used the peremptory challenge to strike. Accordingly, we conclude appellant failed to demonstrate that counsel's alleged deficient performance was prejudicial.

Appellant also argues that trial counsel was ineffective for failing to object to the denial of his right to confront two victims and to move for dismissal or mistrial. It

appears that two victims, Ramon Ramos and Miguel Hernandez, did not testify at trial. Appellant believes that the victims' failure to testify denied appellant the right to confront witnesses as secured by the United States Constitution. He also alleges that the Commonwealth failed to prove the offenses of first-degree robbery and that trial counsel was ineffective for failing to move for directed verdict or mistrial.

We again refer to the trial court's order denying appellant's RCr 11.42 motion and adopt its reasoning herein upon these issues:

Movant first claims his attorney failed to object to the denial of confrontation and move for a dismissal or mistrial . . . when Commonwealth prosecuting witness, who were alleged victims, failed to appear at trial. Although Movant does not have a right to confront witnesses, he must also remember that to prove ineffective assistance under the *Strickland* standard he must prove that having Ramon Ramos and Miguel Harnandez testify would change the outcome of the trial. The Record shows testimony given by police officers present at the scene; testimony from three of the victims; testimony for an eyewitness, Kenner Dyer; and testimony from the co-defendant, Damien Huguely. There was also physical evidence presented at trial. If anything, the testimony of the two absent witnesses would only support what was presented at trial. Ergo, ineffective assistance of counsel would not be proven.

Next Movant contends his trial attorney failed to object to the Commonwealth's failure to establish beyond a reasonable doubt every element of the crimes. It is

true that the Commonwealth is responsible to prove every element of a crime charged beyond a reasonable doubt. However, there is nothing stating victims have to be present at trial in order to show all elements of a crime beyond a reasonable doubt. Testimony was given on the record by police officers, an eyewitness, the co-Defendant, and through physical evidence supporting the showing of the elements of the crimes. Trial counsel made appropriate motions for directed verdict at the appropriate times and all were properly overruled by the Court, based on the principles of *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991).

As such, we are of the opinion that appellant failed to prove any prejudicial effect from trial counsel's alleged errors and thus, such allegations are refuted upon the face of the record.

Appellant lastly alleges that the cumulative effect of the errors requires an evidentiary hearing. Having found no prejudicial error, we summarily reject this contention.

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Appellant alleges the circuit court committed error by denying his CR 60.02 motion without an evidentiary hearing. Appellant raised various arguments in this motion, including: "violation of court reporter act," ineffective assistance of appellate counsel, erroneous jury instructions, error in failing to remove a juror for cause, and prosecutorial misconduct. As to appellant's allegation concerning ineffective assistance of

appellate counsel, we observe there is no constitutional right to effective assistance of appellate counsel and the claim of “[i]neffective assistance of appellate counsel is not a cognizable issue in this jurisdiction.” Lewis v. Commonwealth, 42 S.W.3d 605, 614 (Ky. 2001). As to appellant’s remaining contentions of error, these contentions should have been raised either by direct appeal or RCr 11.42 motion. It is well-established that CR 60.02 is only available to raise allegations of error that could not have been raised by direct appeal or RCr 11.42 motion. Gross v. Commonwealth, 648 S.W.2d 853 (Ky. 1983). As appellant's remaining contentions of error could have been raised upon direct appeal or RCr 11.42 motion, we decline to reach the merits of such allegations.

For the foregoing reasons, the orders of the Fayette Circuit Court in Appeal Nos. 2003-CA-002279-MR and 2005-CA-001036-MR are affirmed.

ALL CONCUR.

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