

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-002403-MR

STEVE RAY

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT  
HONORABLE DARREN W. PECKLER, JUDGE  
ACTION NO. 99-CR-00167

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

BUCKINGHAM, JUDGE: Steve Ray appeals from an order of the Boyle Circuit Court denying is RCr<sup>1</sup> 11.42 motion and from an order denying his CR<sup>2</sup> 59.05 motion to alter, amend, or vacate the first order. We affirm.

Based upon a controlled buy by a confidential informant, a Boyle County grand jury indicted Ray for two counts of first-degree trafficking in a controlled substance (cocaine).

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<sup>1</sup> Kentucky Rules of Criminal Procedure.

<sup>2</sup> Kentucky Rules of Civil Procedure.

Ray retained counsel and entered a plea of not guilty. A jury was empanelled by the Boyle Circuit Court on May 3, 2001, for a trial on the charges. During the course of the trial, a juror became ill. The court then declared a mistrial, and the trial was rescheduled.

Prior to the beginning of the second trial, Ray's attorney was permitted to withdraw from his representation. Ray refused the appointment of a public advocate, and he represented himself at the second trial. The jury found Ray guilty of both counts and recommended a sentence of ten years on each count to be served consecutively. The court sentenced Ray to twenty years in prison in accordance with the jury's verdict, and the Kentucky Supreme Court upheld his convictions and sentences on direct appeal.

Ray subsequently filed an RCr 11.42 motion to vacate his convictions and sentences. In an order entered on August 21, 2003, the trial court denied the motion without granting an evidentiary hearing. Ray moved to vacate that order pursuant to CR 59.05, but that motion was likewise denied by the court. This appeal followed.

Ray contends that he is entitled to relief from the judgment convicting and sentencing him and that the court should have conducted an evidentiary hearing to examine his claims. He raises five separate arguments in his brief. We conclude that

the court properly denied the motion without granting an evidentiary hearing because each of the grounds could have been raised on direct appeal.

Ray's first argument is that he was subjected to double jeopardy when he was tried the second time because the court should not have granted a mistrial during the first trial. He asserts that the ill juror could have continued to serve and, alternatively, that he had the right to waive a trial by twelve jurors and consent to his case being tried by only eleven jurors, although he apparently made no such request to the court when the matter arose.

Ray's second argument relates to the court having previously granted a continuance of his trial due to the absence of a prosecution witness on a scheduled trial date. Ray maintains that a police detective advised the court at the time that the witness had been served with a subpoena, but the true fact was that the witness had not been served. Ray contends that the continuance was obtained by a fraud on the court and that he should now be entitled to collateral relief from the judgment.

Ray's third argument is that he was denied his due process rights because the prosecutor took unfair advantage of him when he represented himself at the second trial. He alleges that the prosecutor used "the rules of court in ways they were

not intended to be used as noted above, ignoring rules of evidence and of procedure and carrying out a trial by ambush and subterfuge in order to secure a conviction."

Ray's fourth argument is that he was deprived of his right to counsel because the court erroneously allowed the attorney who represented him at the first trial to withdraw from his case. Finally, Ray's fifth argument is that he was denied the right to counsel at the sentencing phase of the trial. However, he concedes that he waived counsel at the first phase of the trial and did not request the court to appoint him counsel during the second phase.

An RCr 11.42 motion "is limited to issues that were not and could not be raised on direct appeal." Sanborn v. Commonwealth, 975 S.W.2d 905, 908-09 (Ky. 1998). Each of the above issues were issues that could have been raised on direct appeal. Therefore, the trial court properly denied the motion without an evidentiary hearing.

The order of the Boyle Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Steve Ray, *Pro Se*  
Marion Adjustment Center  
St. Mary, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky  
  
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