

RENDERED: FEBRUARY 25, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000467-MR

THEOPOLIS SMITH

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE EDWIN WHITE, JUDGE
ACTION NO. 01-CR-00279

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: HENRY AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.¹

MILLER, SENIOR JUDGE: Appellant Theopolis Smith (Smith), *pro se*, brings this appeal from an order of the Christian Circuit Court, entered February 5, 2004, summarily denying his motion for post-conviction relief pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. We affirm.

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute 21.580.

Before us, Smith raises the same arguments raised before the circuit court. He argues state and federal constitutional violations in the following issues: 1) jury selection, pursuant to Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); 2) prosecutorial misconduct; 3) ineffective assistance of counsel; 4) insufficient chain of custody; and 5) in the cumulative effect of the alleged violations.

The facts are succinctly presented in the memorandum opinion by the Kentucky Supreme Court:

On April 5, 2001, [Smith] met Tammy Hicks, a paid police informant, at a hotel room. Hicks testified that she gave [Smith] twenty dollars for cocaine. [Smith] left the room and returned later with an envelope that contained cocaine. The cocaine remained in the room until the police arrived. Although the police monitored the hotel room with video surveillance equipment, it is unclear how much, if any, relevant evidence was gleaned from the tapes. The bulk of the Commonwealth's case was provided by the testimony of Hicks and a police laboratory technician who identified the substance as cocaine.

On May 29, 2002, the circuit court sentenced Smith, pursuant to the jury's recommendation, to ten years on first-offense first-degree trafficking in a controlled substance (cocaine) in violation of Kentucky Revised Statutes (KRS) 218A.1412, enhanced to twenty years as a second-degree persistent felony offender (PFO) in violation of KRS 532.080.

Smith appealed as a matter of right to the Kentucky Supreme Court, raising the sole issue of insufficient evidence. On September 18, 2003, the Supreme Court affirmed the conviction (2002-SC-0523-MR).

First, because issues that could have been brought on direct appeal are not cognizable in an RCr 11.42 motion, we decline to address Smith's allegations of improper jury selection pursuant to Batson, prosecutorial misconduct, insufficient chain of custody, and cumulative error. Baze v. Commonwealth, 23 S.W.3d 619, 626 (Ky. 2000).

Second, with regard to Smith's claims of ineffective assistance of counsel, Smith alleges that counsel erred in allowing the introduction of a video tape; in failing to request a directed verdict at the close of the Commonwealth's case; and in failing to request an admonition following the Commonwealth's questioning of Smith in the PFO phase. Smith fails, however, to specifically argue how any of these alleged inactions by counsel were either deficient or prejudicial as set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).² Smith's conclusory allegations thus fail to meet the ineffective assistance standard.

² As indicated in the Supreme Court's opinion, Smith's counsel did make two general motions for a directed verdict. Despite finding that this did not sufficiently preserve Smith's direct appeal argument of insufficient evidence as to an element of the trafficking offense, the Court did discuss the merits of the argument before rejecting it.

The standard of review on appeal in an RCr 11.42 motion where the trial court has denied the request for post-conviction relief without an evidentiary hearing is whether the motion states grounds for relief that could not be conclusively resolved from the face of the record. Baze at 622.

"Conclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of a discovery deposition." Sanders v. Commonwealth, 89 S.W.3d 380, 385 (Ky. 2002), citing Sanborn v. Commonwealth, 975 S.W.2d 905 (Ky. 1998). Since Smith's arguments are barred as either conclusory or issues that could have been brought on direct appeal, and can be resolved by reference to the record, we hold that the circuit court committed no error in refusing to set aside Smith's conviction, pursuant to RCr 11.42, without holding an evidentiary hearing.

For the foregoing reasons, the order of the Christian Circuit Court is affirmed.

ALL CONCUR.

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