

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-000542-MR

WILLIAM WENDELL FRANCE

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 99-CR-00022

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, BUCKINGHAM, AND HENRY, JUDGES.

BARBER, JUDGE: Appellant, William France (France), appeals pro se from an order of the Montgomery Circuit Court denying his request for relief under RCr 11.42. France contends that the ruling being appealed is the trial court's failure to strike the Commonwealth's Response to his motion, as it was filed by a prior defense counsel for France who is now the Commonwealth's Attorney in Montgomery County. The court's order denying the motion to strike also ruled upon the merits of the post-

conviction motion. The orders of the Montgomery Circuit Court are affirmed.

The Commonwealth requests that this Court ignore various pleadings submitted by France, including an affidavit which was not notarized. France shows this Court that as a prisoner acting pro se, he had no ability to have the affidavit notarized prior to filing. This point is well taken. As the pleadings constitute a record of the issues before this Court, and were provided to the trial court for review prior to appeal, we decline the Commonwealth's request and included those documents in our review of this matter.

France was convicted of two counts of third degree sodomy with his fifteen year old son. France's conviction was affirmed on direct appeal. France then filed a motion pursuant to RCr 11.42. The issues raised in the RCr 11.42 motion were whether the Commonwealth willfully withheld exculpatory evidence at trial. France claimed that the disciplinary records of the school attended by the complaining witness would have shown that the complaining witness denied any sexual abuse by France. France admits that these denials were not made part of the reports, and thus could not be reviewed by the court. The court held an in camera review of the records held by various agencies, and released all relevant reports to both defense and

prosecution. There is no evidence supporting France's contention, and thus the claim for relief must fail.

France also asserted ineffective assistance of counsel, claiming that counsel's defense was not viable. It is uncontroverted that defense counsel interviewed witnesses, made extensive discovery, entered pre-trial motions, successfully excluded potentially improper and prejudicial evidence which the Commonwealth desired to introduce, and defended France throughout the trial. The law presumes that counsel has provided adequate assistance. Moore v. Commonwealth, Ky., 983 S.W.2d 479 (1998). France has not shown ineffective assistance of counsel. The record contains ample supporting evidence allowing the trial court to determine the merits of the action. We find no reversible error in the court's ruling, and it is therefore affirmed.

France appeals the denial of his motion to strike the Commonwealth's response. The Commonwealth filed a Response to France's RCr 11.42 motion. The Response was signed by George Moore, who is currently the Commonwealth's Attorney for Montgomery County, and was previously defense co-counsel for France in an earlier sodomy action. Following France's acquittal in the earlier action, Mr. Moore was elected Commonwealth's attorney for an area including Montgomery County. France asserts that Mr. Moore should have been disqualified from

replying to the motion for post-conviction relief in the underlying action and claims that there was substantial prejudice to his rights because Mr. Moore was not disqualified. France also asserts that the failure to disqualify Mr. Moore from prosecution of the underlying conviction was in error, and prejudiced his rights.

The record does not contain any motion asking for the disqualification of Mr. Moore, nor did France or defense counsel request that Mr. Moore be barred from being present in the courtroom during pre-trial proceedings in the underlying trial. The record shows that it was the Assistant Commonwealth's Attorney who handled the case below, and that Mr. Moore did not take any part in the prosecution of France. For this reason, we affirm the trial court's ruling regarding the issue of counsel's disqualification.

When Mr. Moore filed a response to the motion for post-conviction relief, France filed a motion to strike the response, and requested that Mr. Moore be barred from participation in the post-judgment motion. Mr. Moore filed an affidavit stating that he had to sign the Commonwealth's Response himself as the motion was filed during a period when his office had no Assistant Commonwealth's Attorney. An Assistant Commonwealth's Attorney handled the remainder of the practice on the motion. While it is clear that Mr. Moore should

not have handled the action, France has failed to show that the filing of the response prejudiced his rights in any manner.

The Montgomery circuit court reviewed the record below, and found that France had failed to show that he was deprived of any substantial right justifying the extraordinary relief requested. Where the record refutes that allegations raised in a post-conviction motion, the trial court may exercise its discretion in denying the requested relief. Hodge v. Commonwealth, Ky., 68 S.W.3d 338 (2001). The trial court may deny the defendant an evidentiary hearing. Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726 (1986).

We affirm the rulings of the Montgomery Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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