

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001560-MR

JESSE B. HENSLEY

APPELLANT

v. APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 92-CR-00065

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, KNOPF, AND SCHRODER, JUDGES.

BARBER, JUDGE: Appellant, Jesse Hensley (Hensley), appeals Pro Se the Harlan Circuit Court's denial of his motion pursuant to RCr 11.42. The Harlan Circuit Court's ruling is affirmed.

Hensley was charged with assaulting his wife, causing acute peritonitis that eventually led to her death. Hensley was convicted of wanton murder. He asserts that years after his conviction a relative made him aware that the Commonwealth had offered him a plea bargain agreement.

The plea bargain offer allegedly made suggested that Hensley would plead guilty to the charges and the Commonwealth would recommend a ten year sentence. Hensley filed a motion pursuant to RCr 11.42 claiming that had he been made aware of this offer by defense counsel, he would have accepted it. Hensley contended that defense counsel was ineffective in failing to communicate the plea offer to him, and that he was deprived of his constitutional rights as a result.

The Commonwealth contends that Hensley's previous motion under RCr 11.42 raised the issue of ineffective assistance of counsel. The Commonwealth claims that all questions regarding the effectiveness of counsel should have been made at that time. The prior motion was denied, and that denial was affirmed on appeal. The Commonwealth asserts that Hensley's arguments are barred by the doctrine of res judicata.

In this motion, as in the prior motion, Hensley asserted that defense counsel erred in failing to file a motion to suppress the statements given by Hensley's daughter. He contended that his daughter's statements were different from those she had given initially, and were the result of coercion by her mother's relatives. Hensley urges that this shows ineffective assistance of counsel.

He also argues that defense counsel was ineffective in failing to call a potential defense witness who was allegedly

present when the attack occurred. The record shows that defense counsel was unsuccessful in attempts to question that witness because of the witness's perpetual intoxication. Hensley contends that defense counsel should have sought an order incarcerating the witness until he was sober enough to testify. No provision in law is cited in support of this contention.

The Harlan Circuit Court denied Hensley's motion, finding no support for Hensley's assertions in the record, and ruling that the issue raised had already been ruled upon in his earlier motion. We affirm that the issue of counsel's alleged ineffectiveness was raised and ruled upon in Hensley's earlier motion. For this reason, no reversible error is shown in the trial court's denial of the requested relief.

An RCr 11.42 movant must set forth with specificity all facts which he relies upon for the claimed relief and all issues relevant to his motion. Hodge v. Commonwealth, 116 S.W.3d 463 (Ky. 2003). Failure to raise an issue of which the defendant is aware may result in waiver of that issue. The Supreme Court has held that "a defendant is required to avail himself of RCr 11.42 while in custody under sentence or on probation, parole or conditional discharge, as to any ground of which he is aware, or should be aware, during the period when this remedy is available to him." Gross v. Commonwealth, 648 S.W.2d 853, 857 (Ky. 1983). "Final disposition of that motion,

or waiver of the opportunity to make it, shall conclude all issues that reasonably could have been presented at that proceeding." Id. Failure to raise an issue in an earlier appeal or motion precludes a later motion on that issue. Barnett v. Commonwealth, 979 S.W.2d 98 (Ky. 1998). A defendant may not make successive motions on the same grounds. Under Kentucky law, successive motions raising issues which were or could have been raised in the direct appeal or in an earlier motion may be summarily denied. McQueen v. Commonwealth, 948 S.W.2d 415 (Ky. 1997).

Additionally, Hensley's claim that a relative told him that "someone down home" told the relative about the alleged plea bargain offer is insufficient to reverse a conviction. This is so even if, as Hensley now asserts, he did not hear from the relative until after the earlier post-conviction motion was ruled upon. In his reply brief, Hensley claims that he was not informed about a plea bargain offer and argues that he was entitled to an evidentiary hearing on this issue. He claims reversible error in the trial court's denial of such a hearing, contending that:

During a meeting with his trial counsel prior to trial, trial counsel made the following statement, while allegedly on the telephone with Henry Johnson [the prosecutor]: "Henry wants to know if you will take 10 years." Hensley replied, "I

didn't do this." Trial counsel next stated
"Henry said he didn't think you would."

Clearly, if this recollection is true, Hensley was aware of the alleged plea bargain issue even prior to trial, and could have raised it in his earlier motion claiming ineffective assistance of counsel. Failure to do so waived that issue. Hensley's own recitation of the facts shows that some sort of offer was discussed by the parties, and that Hensley refused to admit guilt. An evidentiary hearing is necessary only where the issue raised is not clearly answered by the record. Osborne v. Commonwealth, 992 S.W.2d 860 (Ky.App. 1998). As the trial court was able to make a determination of the relevant facts upon the record, no evidentiary hearing was necessary. We affirm the trial court's ruling.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jesse B. Hensley, Pro Se
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky