

RENDERED: FEBRUARY 3, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-001604-MR

MICHAEL JENNINGS

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 95-CR-001213

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: JOHNSON, KNOPF, AND VANMETER, JUDGES.

VANMETER, JUDGE: Michael Jennings appeals from the Jefferson Circuit Court's denial of his CR 60.02 motion. For the following reasons, we affirm.

On June 1, 1995, Jennings pled guilty to two counts of murder. He was ordered to serve a term of life imprisonment on each count, to run concurrently. This court subsequently affirmed the circuit court's denial of Jennings's pro se RCr 11.42 motion as follows:

Michael Jennings appeals the denial of his motion for Kentucky Rules of Criminal Procedure (RCr) 11.42 relief in which he alleged that his trial counsel was

ineffective in failing to advise him that under Kentucky Revised Statutes (KRS) 640.040 he was ineligible for the death penalty because he was under the age of sixteen at the time the offenses were committed. He also alleges error in the failure to appoint counsel and conduct a hearing on his motion. We affirm.

On June 1, 1995, appellant pled guilty to the murders of Toriano Oldham and Frederick Crook, accepting the Commonwealth's offer to recommend a sentence of life imprisonment for each offense, to be served concurrently. At the time appellant committed these offenses he was fourteen years old. In his post-conviction motion, appellant argued solely that his retained counsel was ineffective in failing to advise him that he was ineligible for the death penalty by operation of KRS 640.040. This appeal stems from the denial of that motion.

In Hill v. Lockhart, [474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985),] the United States Supreme Court specifically applied the Strickland[v. Washington], 466 U.S. 668, 104 S.Ct. 2052, 890 L.Ed.2d 26 (1984)] standard to challenges to guilty pleas based upon ineffective assistance of counsel. The Hill court stated that in order to satisfy the "prejudice" prong of the Strickland analysis, a defendant must show that there is a reasonable probability that, but for counsel's error, he would not have pled guilty and would have insisted on going to trial. [106 S.Ct. at 369-70.] Appellant cannot satisfy that standard in this case.

Even if appellant had been misinformed as to his eligibility for the death penalty (and attachments submitted by appellant himself suggest that he was not), it is impossible for appellant to show prejudice from the error because he still received the benefit of a very good bargain. His counsel successfully negotiated a bargain which

excluded the possibility to being sentenced to life without the possibility of parole for twenty-five years. Given the substantial evidence of guilt contained in the record, the nature of crimes themselves in which each victim was shot repeatedly with a semi-automatic weapon, the appellant's eight-month interstate flight culminating in his arrest in California, we are convinced that counsel obtained for appellant a substantial benefit in a very good bargain. Under these circumstances, appellant simply cannot meet the Strickland standard as there is no reasonable probability that, but for the possibility of receiving the death penalty, he would have refused to plead guilty and have insisted upon going to trial.

Because the allegations of appellant's motion are conclusively refuted by the record, he was not entitled to appointment of counsel or a hearing on his motion. [Hopewell v. Commonwealth, 687 S.W.2d 153 (Ky. App. 1985).]¹

Jennings subsequently filed a pro se motion pursuant to CR 60.02(e) and (f), which the circuit court denied on February 19, 2003. Jennings's second pro se motion pursuant to CR 60.02 was denied by the circuit court on June 14, 2004. This appeal followed.

"Relief afforded by a 60.02 proceeding is extraordinary in nature and should be related to those instances where the matters do not appear on the face of the record, were not available by appeal or otherwise, and were discovered after rendition of the judgment without fault of the party seeking

¹ *Jennings v. Commonwealth*, No. 1998-CA-002058-MR, slip op. at 1-3 (Ky.App. Feb. 18, 2000).

relief."² Here, Jennings's arguments are barred because, as he admits in his reply brief, he has not advanced any arguments other than those which were or could have been made in his prior 11.42 motion, which at that time were considered and rejected by the circuit court and affirmed by this court on appeal.³

The Jefferson Circuit Court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas D. Collins
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Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Dennis W. Shepherd
Assistant Attorney General
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² *Board of Trustees of Policemen's and Firemen's Retirement Fund of City of Lexington v. Nuckolls*, 507 S.W.2d 183, 186 (Ky. 1974).

³ *Gross v. Commonwealth*, 648 S.W.2d 853, 855-56 (Ky. 1983) (defendant's CR 60.02 motion to vacate judgment on ground that guilty plea was not voluntarily and knowingly made could have been raised in post-conviction relief proceedings).