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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000012-MR

GARY DILLARD — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE EDWIN M. WHITE, JUDGE
ACTION NOS. 94-CR-00221 & 94-CR-00433

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TACKETT, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: Gary Dillard appeals pro se from an order of the Christian Circuit Court denying his motion seeking RCr 11.42 relief. For the reasons stated hereafter, we affirm.

In January 1995, Dillard was convicted of murder and three counts of first-degree wanton endangerment. After a jury trial he was sentenced to life imprisonment on the murder charge, as well as five years on each of the wanton endangerment charges.

In December 1995, while his timely appeal to the Kentucky Supreme Court was pending, Dillard filed the underlying pro se motion seeking RCr 11.42 relief from the trial court's judgment. Although the motion was abated pending the supreme court's resolution of the pending appeal, it was not redocketed once the supreme court rendered its September 1996 opinion[1] affirming the trial court's judgment. Instead, Dillard filed numerous other pro se motions seeking relief on various grounds. A review of the record shows that the original, but still abated, RCr 11.42 proceeding was cited as grounds for denying Dillard's subsequent motions for RCr 11.42 and CR 60.02 relief, and that the merits of the issues raised in those subsequent motions were never addressed. Finally, in March 2004 Dillard sought to revive the abated RCr 11.42 motion. After the trial court denied the requested relief on the merits in December 2004, this appeal followed.

Dillard asserts on appeal that the trial court erred by denying him RCr 11.42 relief without first appointing counsel, and without conducting an evidentiary hearing. We disagree.

RCr 11.42(5) provides:

> Affirmative allegations contained in the answer shall be treated as controverted or avoided of record. If the answer raises

[1] *Dillard v. Commonwealth,* 95-SC-116-MR (Ky., Sept. 26, 1996).

> a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing and, if the movant is without counsel of record and if financially unable to employ counsel, shall upon specific written request by the movant appoint counsel to represent the movant in the proceeding, including appeal.

Thus, Dillard was entitled to the appointment of counsel only if there were material issues of fact below which could not be "determined on the face of the record."[2]

The underlying issues raised by Dillard include his claim that he was afforded ineffective assistance because trial counsel did not support his self-defense claim by calling "readily available and willing defense witnesses" on his behalf. He alleged below that four named witnesses

> would have testified to the facts that they were there in the parking lot of the Greenville Road Tavern and they saw the deceased reach for his gun and that they know, the movant did not plant a gun near the deceased body. However, no subpoenas were served on these witnesses, and they did not appear for movant's trial.

However, Dillard does not assert that either he or his trial counsel knew of these potential witnesses before trial, and the underlying RCr 11.42 motion was not accompanied by affidavits of any of the proposed witnesses. Moreover, although Dillard's 1999 motion seeking CR 60.02 relief was accompanied by the affidavits of three alleged potential witnesses, only one of

[2] RCr 11.42(5). *See also Fraser v. Commonwealth,* 59 S.W.3d 448 (Ky. 2001).

those witnesses, Michael Pollard, was among those named in the original motion seeking RCr 11.42 relief. Pollard's affidavit stated in pertinent part only that at the time of the shooting, he

> was standing in the parking lot of Gray's Bar. I saw, Mr. Weaver argue with Gary Dillard, and when Mr. Weaver, reached behind his back like he was going to pull something out, shots were fired, then Mr. Weaver, and his gun, hit the ground.

Contrary to Dillard's claim, neither Pollard's affidavit nor those of the other two affiants indicated that any of the three potential witnesses could testify that he saw the victim holding a gun rather than simply reaching behind his back. Instead, the affiants' testimony would have been similar to that described in the supreme court's summary of the evidence which indicated that eyewitnesses testified that just before the shooting,[3]

> Weaver was holding his hands into the air at one point and then lowered them. However, these latter witnesses were unable to tell whether Weaver did so in an attempt to reach for a weapon, his car keys, or to steady himself.

The supreme court noted that Dillard testified that he drew his gun only after Weaver "made a motion as if he was trying to draw a gun," and that he then shot Weaver in self defense after Weaver pushed his daughter aside "and reached for a gun." Thus,

[3] *Dillard v. Commonwealth,* 95-SC-166-MR, slip op. at 3 (Ky., Sept. 26, 1996).

contrary to Dillard's claim, on its face the record shows that the affiants' testimony would have been cumulative of other testimony which indicated that Weaver moved as if he could be reaching for a gun. Hence, Dillard was not prejudiced by trial counsel's failure to call the affiants as witnesses.[4]

Next, Dillard asserts that he is entitled to relief based on his claim that "*Remmer* [*v. United States*[5]] violations occurred when the Sheriff and a deputy, both of whom were prosecution witnesses, invaded the province of the juror room while jurors were in the midst of deliberation, all under the guise of simply providing jurors lunch." As the record shows and Dillard admits that this issue was addressed by the trial court in a postconviction hearing, it is not a proper matter for review pursuant to this RCr 11.42 proceeding. Further, since the remaining issues which were raised in Dillard's RCr 11.42 motion below were not specifically addressed on appeal, they will be treated as having been waived.[6]

Since we agree with the trial court's conclusion that the record on its face refuted the allegations made in Dillard's RCr 11.42 motion, it follows that the court did not err by

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[4] *Strickland v. Washington*, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

[5] 347 U.S. 227 (1954), 74 S.Ct. 450, 98 L.Ed.654 (1954).

[6] *See Milby v. Mears,* 580 S.W.2d 724 (Ky.App. 1979).

failing to appoint counsel below.[7] Finally, given the absence of any "material issue of fact that cannot be determined on the face of the record,"[8] the trial court did not err by denying Dillard's request for an evidentiary hearing.

The court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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Attorney General of Kentucky

Dennis W. Shepherd
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[7] RCr 11.42(5). *See Fraser,* 59 S.W.3d at 453.

[8] RCr 11.42(5). *See, e.g., Glass v. Commonwealth,* 474 S.W.2d 400 (Ky. 1971); *Hopewell v. Commonwealth,* 687 S.W.2d 153 (Ky.App. 1985).