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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000367-MR

KEVIN SHEGOG

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 01-CR-00386

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** *

BEFORE: JOHNSON AND TAYLOR, JUDGES; BUCKINGHAM, SENIOR JUDGE.¹

JOHNSON, JUDGE: Kevin Shegog, pro se, has appealed from an order entered by the Campbell Circuit Court on December 30, 2004, which denied his pro se RCr² 11.42 motion to vacate, set aside, or correct the trial court's final judgment and sentence of imprisonment without holding an evidentiary hearing. Having concluded that the trial court erred in summarily denying

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

² Kentucky Rules of Criminal Procedure.

Shegog's claims of ineffective assistance of counsel, we vacate and remand for further proceedings.

Because Shegog directly appealed his 20-year sentence to the Supreme Court of Kentucky,³ we quote the pertinent facts of this case from its Opinion as follows:

Appellant's convictions stem from a robbery that was committed on May 28, 2001, at a BP gas station in Highland Heights, Kentucky. Joy Powell, a witness who was inside the gas station at the time of the robbery, stated that she observed an African-American male wearing a red and white sports jacket and a nylon stocking on his head pass by the front glass window and then enter the store. Once inside, Powell stated that the man grabbed her and, as he pulled the stocking down over his face, announced that he had a gun. Powell was ordered behind the counter with the store clerk and both were told to lie on the floor. After taking the money from the register, the robber fled the scene. Powell's husband Steve, who had been pumping gas, observed the man get into a dark colored vehicle with a vanity license plate that read "Shegog."

The following day, Powell was shown a photo line-up, but was unable to identify the robber due to the poor quality of the computer-generated images. Police thereafter compiled a second line-up of color photographs, from which Powell identified Appellant. Appellant was indicted for and ultimately convicted of first-degree robbery. The jury recommended a fifteen year sentence enhanced to twenty years by virtue of Appellant's persistent

³ Shegog v. Commonwealth, 141 S.W.3d 101 (Ky. 2004).

felony offender status. Judgment was entered accordingly⁴

The Supreme Court Opinion became final on September 16, 2004.

On December 8, 2004, Shegog filed a pro se RCr 11.42 motion to vacate, set aside, or correct his sentence, with a memorandum in support, as well as a motion for appointment of counsel, and a request for an evidentiary hearing. The Commonwealth filed its response to the motions on December 16, 2004, stating that Shegog had failed to set forth a specific factual basis for relief as is required for a motion pursuant to RCr 11.42. Based on the Commonwealth's response, the trial court denied Shegog's RCr 11.42 motion and his motion for appointment of counsel on December 30, 2004, without holding an evidentiary hearing.⁵ On January 10, 2005, Shegog filed a motion requesting that the trial court enter findings of facts and conclusions of law addressing its denial of his RCr 11.42 motion. Shegog also filed a motion requesting appointment of counsel and a motion pursuant to RCr 73.08 to compel cooperation of the Campbell Circuit Court Clerk in timely filing his motions. The trial court entered an order on January 25, 2005, denying all of Shegog's motions. Shegog filed this appeal from the December 30, 2004, order denying his RCr 11.42 motion.

⁴ Shegog, 142 S.W.3d at 103-04.

⁵ Shegog had mailed a reply to the Commonwealth's response to his RCr 11.42 motion; however, it was filed on January 4, 2005, after the trial court had already denied the motions.

Shegog makes the following seven arguments: (1) "Trial counsel was ineffective by withdrawing motion for expert witness on identification. Counsel failed to raise or preserve issue whether exclusion of expert testimony on unreliability of eyewitness identification denied Appellant a meaningful defense[;]" (2) "Trial counsel failed to challenge the authenticity of the search warrants, even when the face of the warrants revealed major discrepancies[;]" (3) "The Commonwealth violated appellant's due process rights by failing to disclose exculpatory evidence relating to a key prosecution witness that was currently on felony probation while testifying at appellant's trial[;]" (4) "Trial counsel failed to secure criminal/arrest records of Commonwealth witness(s)[;]" (5) "Trial counsel failed to subpoena telephone records, when records were vital to Appellant's defense and would have clearly established the Commonwealth witnesses to have fabricated their testimony[;]" (6) "The Commonwealth maliciously committed wrongdoing by manufacturing a counterfeit 911 tape[,], substituting the original[,], and offering bogus tape into evidence. Trial counsel was ineffective in failing to object or challenge the true authenticity of the 911 tape[;]" and (7) "Trial counsel failed to impeach or discredit Commonwealth witnesses concerning numerous inconsistent statements previously made." In its brief, the Commonwealth merely contends that

because Shegog failed to incorporate his memorandum of law by reference into his RCr 11.42 motion, the trial court was correct in denying the motion on the grounds that it failed to state a factual basis to support the allegation of ineffective assistance of counsel. However, we note that both the RCr 11.42 motion and the memorandum of law were filed on the same date, that Shegog utilized motion language in his memorandum, and that the memorandum referenced his RCr 11.42 motion. Further, in a subsequent motion Shegog requested that the trial court make specific factual findings and conclusions of law addressing its denial of his RCr 11.42 motion, his motion for counsel, and his motion for an evidentiary hearing.

In its order entered on January 25, 2005, denying Shegog's motions, the trial court stated as follows:

IT IS FURTHER ORDERED that Defendant's Motion for findings of fact and conclusions of law pursuant to R.Cr.11.42(2) is overruled. An 11.42 motion shall be signed and verified by the movant and shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion.

The Defendant, Shegog's 11.42 motion failed to offer any factual basis to support his allegation of ineffective assistance of counsel and, therefore, was summarily dismissed.

In fact, Shegog's RCr 11.42 motion was signed and verified, and although the Commonwealth states otherwise, Shegog's memorandum of law in support of his RCr 11.42 motion was also signed and verified.

In Commonwealth v. Miller,⁶ a case similar to the case before us, the former Court of Appeals noted that we do not impose on a prisoner who is proceeding pro se the same standards as those applied to legal counsel. The Court held that "Miller's motion was required to and gave the court and opposing party fair notice of the nature of the claim" [citations omitted].⁷ In the case before us, Shegog stated in his memorandum in support of his RCr 11.42 motion that at the time of the alleged robbery on May 28, 2001, key prosecution witness Steve Powell was under indictment for drug and weapon charges. Shegog further alleges that on January 16, 2002, approximately three months before Shegog's trial, Powell was sentenced to probation under the terms of a plea agreement which dismissed all charges except possession of a controlled substance. Shegog claims that even though his trial counsel knew of Powell's plea agreement, he failed to use this information to impeach Powell by showing that he had a motive to fabricate testimony against him. In light of Powell's critical eyewitness testimony that

⁶ 416 S.W.2d 358, 360 (Ky. 1967).

⁷ Id.

Shegog committed the robbery, we conclude that this allegation constitutes specific facts in support of a specific ground that may entitle Shegog to relief. Thus, since Shegog substantially complied with the requirements of RCr 11.42 by providing in his memorandum of law sufficient specificity as to the grounds on which the sentence is being challenged and the facts relied upon in support of such grounds, the trial court erred by summarily denying his RCr 11.42 motion.

For the foregoing reasons, we vacate the Campbell Circuit Court's order entered on December 30, 2004, dismissing Shegog's RCr 11.42 motion, his motion for appointment of counsel, and his motion for an evidentiary hearing, and the order entered on January 5, 2005, denying him additional findings and conclusions of law and appointment of counsel. This matter is remanded to the trial court for further proceedings on the merits of Shegog's RCr 11.42 motion and accompanying motions.

BUCKINGHAM, SENIOR JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS.

BRIEF FOR APPELLANT:

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