

Commonwealth of Kentucky
Court of Appeals

NO. 2005-CA-000389-MR

BURRELL HOWELL

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NO. 95-CR-00014

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DYCHE AND SCHRODER, JUDGES; ROSENBLUM, SENIOR JUDGE.¹

ROSENBLUM, SENIOR JUDGE: Burrell Howell appeals from an order of the Henderson Circuit Court overruling, in part, his motion to be provided, without charge, various information pertaining to his case. The trial court granted that portion of Howell's motion requesting that he be provided with a copy of the indictment in the case, but denied that portion of the motion

¹ Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

seeking a copy of the emergency room records and DNA tests performed on him and the victims in the case, and a copy of the trial court's January 20, 1998,² order denying Howell's petition for relief pursuant to RCr³ 11.42. For the reasons stated below, we affirm.

On January 3, 1995, Howell was indicted on six counts of first-degree sodomy (KRS⁴ 510.070) and six counts of first-degree sexual abuse (KRS 510.110). The charges were related to alleged sexual acts committed by Howell involving three children in April and September 1994.

Following a jury trial, Howell was convicted of five counts of first-degree sodomy and one count of first-degree sexual abuse. He was sentenced to a total of twenty years imprisonment. On February 22, 1996, the Kentucky Supreme Court rendered an unpublished opinion affirming Howell's convictions and sentence. See Case 95-SC-392-MR.

On July 24, 1997, Howell filed a petition for post-conviction relief pursuant to RCr 11.42. Following an evidentiary hearing, on January 20, 1998, the trial court

² The trial court's January 27, 2005, order overruling the motion at issue in this case refers to this order as having been issued on June 23, 1997. However, the order overruling the RCr 11.42 motion was entered January 20, 1998, and there is no June 23, 1997, order applicable to the RCr proceeding (which was not filed until July 24, 1997) contained in the record. In any event, Howell does not raise the RCr 11.42 order in his brief, and we construe the issue as having been abandoned.

³ Kentucky Rules of Criminal Procedure.

⁴ Kentucky Revised Statutes.

entered an order denying Howell's motion. This Court affirmed the trial court's denial of Howell's RCr 11.42 petition in an unpublished opinion rendered on November 19, 1999. See Case No. 1998-CA-001082.

In late 2004 or early 2005, it appears that Howell filed a motion seeking, without charge, a copy of his indictment in this case, a copy of emergency room records and DNA tests performed on him and the children, and a copy of the indictment in the case. A copy of the motion, however, does not appear in the record. On January 27, 2005, the trial court entered an order granting the motion with respect to a copy of the indictment, but denying the motion with respect to the remaining information requested. This appeal followed.

Before us, Howell contends that the trial court erred by denying his motion to be provided, without charge, emergency room records of the victims in the case and copies of DNA tests done on himself and the victims. Howell alleges that he is entitled to this information free of charge because he is indigent, and that the trial court's denial of free access to the information is a violation of due process.

Howell's motion does not appear in the record, and it is unclear what his objective in obtaining the information is. Presumably he plans to file an additional motion for post-conviction relief. We note, however, that he has already filed

an RCr 11.42 proceeding in which he could have pursued any theories relating to the emergency room records and DNA evidence. Thus the pursuit of this issue in a subsequent RCr 11.42 motion or CR 60.02 motion would be barred under RCr 11.42(3). Moreover, as the RCr 11.42 proceeding has been concluded and a further motion to invoke the trial court's jurisdiction pursuant to either a second RCr 11.42 motion or a CR 60.02 appears not to have been filed by Howell, there is apparently no pending action in the trial court to provide an underpinning for Howell's discovery motion.

Further, discovery in connection with a post-conviction proceeding is not required by either the state or federal Constitution. Sanders v. Commonwealth, 89 S.W.3d 380, 394 (Ky. 2002), *cert. denied* 124 S.Ct. 96, 540 U.S. 838, 157 L.Ed.2d 70. The purpose of post-conviction proceedings is to provide a forum for known grievances, not to provide an opportunity to research for grievances. Gilliam v. Commonwealth, Ky., 652 S.W.2d 856, 858 (1983), *cert. denied* 122 S.Ct. 471, 534 U.S. 998, 151 L.Ed.2d 386. Post-conviction proceedings are not the equivalent of a retrial, and pretrial rules of discovery do not apply. Moreover, a convicted inmate is not permitted to fish through official records in hopes that something may turn up to his benefit. Foley v. Commonwealth, 17 S.W.3d 878, 889 (Ky. 2000), *cert. denied* 121 S.Ct. 663, 531 U.S.

1055, 148 L.Ed.2d 565. As such, Howell is not permitted to undertake the "fishing expedition" as sought under his motion.

Finally, in United States v. MacCollom, 426 U.S. 317, 96 S.Ct. 2086, 48 L.Ed.2d 666 (1976), the United States Supreme Court considered the claim of an indigent federal prisoner to a free trial transcript to aid him in preparing a petition for a collateral attack on the judgment. The Court held that the decision of the lower court that an indigent prisoner should be furnished a free transcript as long as the federal statute did not "prohibit" furnishing one was a "novel approach to statutory construction." The Court held that the rule is to the contrary, that the expenditure of public funds is proper only when authorized by legislation or when required by constitutional interpretation. See also Gilliam v. Commonwealth, 652 S.W.2d at 859.

By analogy, if the emergency room records and DNA results are even available in the Henderson Circuit Court record in this case, Howell is not entitled to a free copy thereof. As previously noted, discovery in connection with a post-conviction proceeding is not required by either the state or federal constitution. Sanders v. Commonwealth, supra. Nor is discovery required by legislative authorization. As such, the expenditure of public funds for the discovery requested by Howell is not proper.

For the foregoing reasons the judgment of the
Henderson Circuit Court is affirmed.

ALL CONCUR.

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