

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001529-MR

JEFFERY K. HUNT

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NOS. 92-CR-00041 AND 92-CR-00042

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: ABRAMSON AND TAYLOR, JUDGES; KNOPF,¹ SENIOR JUDGE.

TAYLOR, JUDGE: Jeffery K. Hunt brings this *pro se* appeal from a June 20, 2005, order of the McCracken Circuit Court summarily denying his Ky. R. Crim. P. (RCr) 11.42 motion. We affirm.

In May 1988, appellant unlawfully entered the home of a seventy-three year old woman, brutally beat her, raped her, and stole her purse. In September 1990, appellant returned to

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

the same woman's home and attempted to gain entry. The woman apparently retrieved a pistol and fired shots into the air causing appellant to flee. In April 1991, appellant burglarized the home of another woman. Appellant was ultimately indicted by a McCracken County Grand Jury of first-degree burglary, first-degree rape, theft by unlawful taking under \$100.00, second-degree burglary, and second-degree persistent felony offender (Indictment No. 92-CR-00041). Appellant was also indicted upon second-degree burglary, theft by unlawful taking over \$100.00, and second-degree persistent felony offender (Indictment No. 92-CR-00042).

Pursuant to a motion filed by the Commonwealth, Indictment Nos. 92-CR-00041 and No. 92-CR-00042 were consolidated for trial. Following a jury trial, appellant was found guilty of first-degree burglary, first-degree rape, criminal attempt to commit second-degree burglary, second-degree burglary, theft by unlawful taking over \$100.00 and of being a second-degree persistent felony offender. Appellant received an enhanced sentence of 150 years' imprisonment in lieu of all other sentences imposed.

Appellant's conviction was reversed by the Kentucky Supreme Court in Appeal No. 92-SC-301-MR. Upon remand, Indictment Nos. 92-CR-00041 and No. 92-CR-00042 were not consolidated. On December 8, 1994, appellant was retried upon

the offenses enumerated in Indictment No. 92-CR-00041. Appellant was ultimately found guilty of first-degree burglary, first-degree rape, and attempted burglary. The jury also found appellant guilty of being a second-degree persistent felony offender. Appellant received a life sentence to be served in lieu of the other sentences imposed. By opinion rendered June 20, 1996, the Kentucky Supreme Court affirmed appellant's conviction.

Following the jury trial upon Indictment No. 92-CR-00041, appellant entered a plea of guilty to the offenses charged in Indictment No. 92-CR-00042. Pursuant to a plea agreement with the Commonwealth, appellant pleaded guilty to second-degree burglary, theft by unlawful taking over \$100.00, and to being a second-degree persistent felony offender. Appellant was sentenced to ten years' imprisonment.

On July 25, 1996, appellant filed a motion to vacate sentence pursuant to RCr 11.42, for appointment of counsel and to proceed *informa pauperis*. The circuit court granted the motions to proceed *informa pauperis* and for appointment of counsel. The Commonwealth responded to appellant's motion to vacate. On October 28, 1996, counsel for appellant entered an appearance, but did not supplement appellant's *pro se* motion. During the next eight years, there was no activity of record.

On May 19, 2005, appellant filed a *pro se* "Motion To Supplement Petition Pursuant to RCr 11.42 - Movant Hereby Requests That The Court Will Consider All Issues of Ineffective Assistance of Counsel, Pursuant To Both His Original RCr 11.42 Petition (as previously tendered, *pro se*) And Those Stated Herein This Supplement as Well As Those Now Raising Under Indictment No. 92-CR-00042." Appellant subsequently filed a motion for an evidentiary hearing, motion for appointment of counsel and a "Motion To Vacate, Set Aside The Judgment Of Conviction, With An Order Of Involuntary Dismissal; Or The Effects Thereof, Pursuant To CR 41.02(1); Due To The Ineffective Assistance of Counsel and Prosecutorial Misconduct." By order entered June 20, 2005, the circuit court summarily denied appellant's pending motions without an evidentiary hearing. This appeal follows.

A motion pursuant to RCr 11.42 is properly denied without an evidentiary hearing if the allegations raised can be conclusively refuted upon the face of the record. Baze v. Commonwealth, 23 S.W.3d 619 (Ky. 2000). The circuit court must grant an evidentiary hearing only if the allegations cannot be conclusively proved or disproved by an examination of the record. Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001).

Appellant contends his trial counsel rendered ineffective assistance by failing to inform him the grand jury

that returned the indictments against him may have been improperly empaneled. Appellant relies upon Commonwealth v. Nelson, 841 S.W.2d 628 (Ky. 1992), and specifically argues that therein the Kentucky Supreme Court "found that McCracken County Grand and Petit juries were improperly empaneled from march [sic] 28, 1988 to July 25, 1992" Appellant's Brief at 5.

A review of the opinion in Nelson reveals that the Supreme Court actually evaluated the grand jury procedures utilized by the Jefferson Circuit Court. See Nelson 841 S.W.2d 628. The Nelson Court did not review the grand jury procedures being utilized by the McCracken Circuit Court. Id. Thus, appellant's contention is without merit, and the circuit court properly denied appellant's RCr 11.42 motion without an evidentiary hearing.

Appellant next contends that counsel appointed to pursue his RCr 11.42 claim in circuit court was ineffective. Appellant specifically argues that such counsel was ineffective for failing to supplement his *pro se* RCr 11.42 motion or in the alternative, for failing to withdraw as counsel.

It is well-established that there is no right to counsel or to effective assistance of counsel for pursuit of a collateral attack such as an RCr 11.42 motion. Moore v. Commonwealth, 199 S.W.3d 132 (Ky. 2006). As such, appellant's

argument that his RCr 11.42 counsel was ineffective is without merit, and the circuit court properly denied appellant's motion without an evidentiary hearing.

For the foregoing reasons, the order of the McCracken Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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