

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001751-MR

JOSEPH L. SILVERBURG

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 99-CR-001518

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: THOMPSON AND HOWARD, JUDGES; HENRY,¹ SENIOR JUDGE.

HENRY, SENIOR JUDGE: Joseph L. Silverburg appeals from an opinion and order of the Jefferson Circuit Court which denied his motion made pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 and Kentucky Rules of Civil Procedure (CR) 60.02 to vacate his conviction and for an evidentiary hearing.

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

On March 16, 2000, following a jury trial, Silverburg was convicted in Jefferson Circuit Court of four counts of robbery in the first degree and of being a persistent felony offender in the first degree. The convictions stemmed from his commission of a series of hold-ups at ATM machines in Louisville. During the course of the trial, Silverburg was represented by several attorneys, and undertook part of the representation himself. Silverburg's conviction was affirmed on appeal to the Kentucky Supreme Court, in an opinion rendered on October 19, 2006 (2001-SC-0400-MR). While his direct appeal was pending, Silverburg filed a *pro se* motion to vacate the judgment pursuant to RCr 11.42 and CR 60.02 on March 22, 2002. Counsel was subsequently appointed to represent him. This counsel eventually withdrew from the representation. The attorney subsequently appointed to represent Silverburg in the post-conviction proceedings made a successful motion to secure funds for an expert to conduct a competency evaluation to determine whether a mental illness or personality disorder was preventing Silverburg "from developing a trusting relationship with counsel." Dr. Martha Wetter conducted a psychological evaluation of Silverburg on April 2, 2004, in which she opined that Silverburg has a paranoid mistrust of attorneys. On July 14, 2005, the circuit court entered an order denying his motion made pursuant to RCr 11.42, without holding an evidentiary hearing. This appeal followed.

As a preliminary matter, we note that there are several serious omissions in the record before us. These have been detailed at some length in the brief for the Commonwealth. Silverburg has suggested in his reply brief that the fault for these

omissions rests with the Kentucky Supreme Court for failing to release the entire record to this Court after it had completed its review of his case on direct appeal. The records of our Court show that appellant's counsel checked out the record on February 22, 2006. No deficiencies in the record were drawn to this Court's attention at that time. Under these circumstances, "when the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court."

Commonwealth v. Thompson, 697 S.W.2d 143, 145 (Ky. 1985).

Silverburg's first argument on appeal is that the trial court erred in failing to hold a *sua sponte* hearing to determine whether he was competent to stand trial, and he contends that a retrospective competency hearing should now be held.

The test for a defendant's competency to stand trial as set out in *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960), and by this court in *Commonwealth v. Strickland*, Ky., 375 S.W.2d 701 (1964), is whether he has substantial capacity to comprehend the nature and consequences of the proceeding pending against him and to participate rationally in his defense.

Commonwealth v. Griffin, 622 S.W.2d 214, 216-17 (Ky. 1981); RCr 8.06.

KRS 504.100(1) requires a court to appoint a psychologist or psychiatrist "to examine, treat and report on the defendant's mental condition" whenever "the court has reasonable grounds to believe that the defendant is incompetent to stand trial."

"The standard of review in such a case is, whether a reasonable judge, situated as was the trial court judge whose failure to conduct an evidentiary hearing is

being reviewed, should have experienced doubt with respect to competency to stand trial.”

Mills v. Commonwealth, 996 S.W.2d 473, 486 (Ky. 1999)(citations and internal quotation marks omitted).

As support for his contention that the trial court had reasonable grounds to doubt his competency to stand trial, Silverburg has chronicled the lengthy history of his disputes with his numerous court-appointed attorneys. In addition to firing several of his attorneys and filing bar complaints against them throughout the course of the proceedings, he also filed numerous *pro se* motions without counsel’s knowledge. On several occasions, the trial court advised him that he needed to communicate with his counsel and urged him work “as one voice” with his attorney. Silverburg also sent letters to the Commonwealth’s attorney that contained offensive and highly-inappropriate content. Silverburg argues that these actions on his part should have alerted the trial court to the need to hold a competency hearing. Silverburg also points to the conclusion of Dr. Martha Wetter, who evaluated Silverburg during his post-conviction proceedings, that Silverburg has a paranoid mistrust of attorneys, which in her opinion meant that he would not be able to work with an attorney “in a trusting and cooperative manner.” He contends that his mistrust of attorneys was so severe that it rendered him incompetent to stand trial.

We disagree. Silverburg’s behavior may have been perceived as being abrasive, unpleasant and unusually mistrustful of attorneys, but there is little indication that he was unable to assist in his own defense as a result. Admittedly, the numerous *pro*

se motions that he filed, and the delays resulting from the need to appoint attorneys to replace those he had discharged, may have unnecessarily lengthened the proceedings against him, but he has provided little specific explanation of how this behavior harmed his defense. We think it is highly significant that none of the numerous attorneys who represented him ever signaled any doubts as to his competency by filing a motion for a competency evaluation.

Moreover, Silverburg displayed a clear and often sophisticated understanding of the trial process. In his evaluation by Dr. Wetter, he explained that he had assisted over 75 inmates in filing legal documents. Although his mistrust of attorneys may be more severe than that found among the general population, the evidence in the record refutes his contention that it hampered his defense to the extent of constituting a violation of his due process rights.

Silverburg's next argument recasts the issue of his competency to stand trial into a claim of ineffective assistance of counsel for failing to request a competency hearing.

In order to establish ineffective assistance of counsel, the movant must satisfy a two-part test by showing: (1) that counsel's performance was deficient and (2) that the deficiency resulted in actual prejudice affecting the outcome. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Gall v. Commonwealth, Ky.*, 702 S.W.2d 37 (1985). Establishing prejudice requires showing

that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694-95, 104 S.Ct. at 2068.

We have already concluded that the trial court did not err in failing *sua sponte* to order a hearing to determine whether Silverburg was competent to stand trial. The same considerations which informed our decision on that issue are pertinent to this claim. His attorneys were not professionally deficient in failing to request a competency hearing.

Silverburg next argues that his attorney failed to conduct an adequate pretrial investigation of some evidence introduced at his trial, consisting of a videotape and some photographs taken for surveillance purposes at a PNC Bank where one of the robberies occurred. His attorney attempted to view the videotape on her VCR at home, but reported to Silverburg that it was too dark to see anything. She concluded that since the tape did not show clear images it would not be harmful to Silverburg's defense, which was based largely on the theory that the victims had wrongly identified him as the perpetrator of the robberies. Apparently, however, his trial counsel never discovered that the videotape could be viewed with greater clarity on PNC Bank's video equipment. The photographs in question were taken from the surveillance videotape and were misdated. According to Silverburg, these photos could have been used to prove that the robbery of one of the victims, Thaddeus Gambill, had never occurred at all because the videotape did

not show anyone around Gambill's vehicle, and the photographs taken from the videotape showed an arm reaching out of Gambill's truck, rather than into it. Silverburg argues that, had his counsel investigated more fully, these items of evidence could have been used to assist in his defense.

Various claims relating to the videotape and photographs appear to have been extensively explored at the hearing on Silverburg's motion for a new trial, but, as noted by the Commonwealth, the videotaped record of that hearing does not form part of the record on appeal and cannot be reviewed by this Court. Based on what we are able to glean from the record before us, however, Silverburg's arguments regarding this evidence are speculative and ultimately unconvincing. Gambill himself testified with specificity as to the circumstances of the robbery and positively identified Silverburg as his assailant. As the Commonwealth has observed, Gambill never testified that his assailant reached into the truck, merely that he stood about three to four feet from his truck and pointed a gun at him while demanding money. Silverburg's counsel was not ineffective for failing to investigate this evidence more thoroughly since, although it did not directly implicate him in the crimes, it did not exonerate him either. Because the nature of this evidence was ultimately ambiguous, Silverburg has also not met the second prong of the *Strickland* test which requires a showing of actual prejudice affecting the outcome.

Silverburg next argues that the trial court failed to determine whether his limited waiver of counsel was knowing and intelligent by not holding a formal hearing as required under *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)

and *Hill v. Commonwealth*, 125 S.W.3d 221, 226 (Ky.2004). Silverburg has failed to explain, however, why this issue could not have been raised in his direct appeal.

We hold that the proper procedure for a defendant aggrieved by a judgment in a criminal case is to directly appeal that judgment, stating every ground of error which it is reasonable to expect that he or his counsel is aware of when the appeal is taken.

Next, we hold that a defendant is required to avail himself of RCr 11.42 while in custody under sentence or on probation, parole or conditional discharge, as to any ground of which he is aware, or should be aware, during the period when this remedy is available to him. Final disposition of that motion, or waiver of the opportunity to make it, shall conclude all issues that reasonably could have been presented in that proceeding.

Gross v. Commonwealth, 648 S.W.2d 853, 857 (Ky. 1983).

Because this issue could have been raised in the direct appeal, it is barred from review in post-conviction proceedings.

Silverburg next argues that the trial judge should have recused himself from presiding over the post-conviction proceedings. He contends that the lengthy and often contentious proceedings of his case had made the judge biased against him. As evidence for this claim, he points to two letters, dated December 8, 2000, and April 23, 2002, sent by the trial judge to Silverburg's defense counsel and copied to the Commonwealth. The Commonwealth contends that this claim of judicial bias is barred because it has already been considered by various courts on numerous occasions. We agree.

As to the first letter of December 8, 2000, the claim that this letter was indicative of judicial bias was a question that could, and it appears was, raised in his direct appeal. The opinion of the Supreme Court stated that Silverburg's claims of "prosecutorial misconduct, ineffective assistance of counsel, and **judicial bias** are completely without merit and need not be addressed in further detail." (Emphasis supplied.) See *Silverburg v. Commonwealth*, 2001-SC-0400-MR (October 19, 2006).

As to the letter of April 23, 2002, it appears to have been composed by the judge in an attempt to apprise Silverburg's newly-appointed counsel of the current state of the case, and to inform him of the content of various *pro se* motions filed by Silverburg. Since the date of that letter, Silverburg has filed numerous actions seeking to disqualify the trial judge on the grounds of bias. For instance, on March 12, 2004, the Chief Justice of the Supreme Court of Kentucky entered an order denying Silverburg's motion to disqualify the trial judge. The order noted that Silverburg had asked the Court to disqualify the trial judge on "many previous occasions" and stated that "[u]nless defendant demonstrates vastly different grounds than previously alleged, this Court will not consider subsequent disqualification motions filed by defendant in this matter, and the trial court shall retain its jurisdiction and proceed despite any such filings." Silverburg raised the issue again in filings before the Supreme Court which cited the two letters. On August 25, 2004, the Chief Justice again denied the motion to disqualify the trial judge.

Whether these letters were indicative of judicial bias is a question that has already been raised and resolved on numerous occasions before the Supreme Court. In

light of our state's highest court's rulings on this issue, it is barred from our consideration by the operation of the doctrine of res judicata, which precludes a party from relitigating “a fact or matter distinctly put in issue and directly determined by a court of competent jurisdiction[.]” *Barnett v. Commonwealth*, 348 S.W.2d 834, 835 (Ky.1961).

Finally, Silverburg argues that the trial court erred in denying his motion for an evidentiary hearing on his motion. As his claims can either be refuted by reference to the record, *see Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001), or are barred on procedural grounds, the trial court did not err in refusing to grant a hearing.

For the foregoing reasons, we affirm the opinion and order of the Jefferson Circuit Court.

ALL CONCUR.

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