

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-000612-MR

DENNIS SCOTT MOE

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 01-CR-00200

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: LAMBERT AND STUMBO, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

STUMBO, JUDGE: This appeal comes from the denial of an RCr. 11.42 motion to vacate a judgment due to ineffective counsel. In the underlying case, Appellant was convicted of first-degree manslaughter, assault under extreme emotional disturbance, and first-degree assault. He was sentenced to a total of thirty-four years in prison. Appellant claimed below that his trial counsel was ineffective due to a failure to investigate and adequately prepare for trial, failure to retain expert witnesses, and failure to tender proper

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 KRS 21.580.

jury instructions. On appeal, Appellant raises only the propriety of the trial court's denial of appointed counsel and failure to hold an evidentiary hearing.

The Kentucky Supreme Court has spoken at length about the appointment of counsel and evidentiary hearings in matters of post-conviction relief. Most recently, Justice Cooper outlined the process by which a trial court should determine whether an RCr 11.42 motion merits counsel and a hearing. In *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2003), the Supreme Court described the steps that should be taken as follows:

1. The trial judge shall examine the motion to see if it is properly signed and verified and whether it specifies grounds and supporting facts that, if true, would warrant relief. If not, the motion may be summarily dismissed. *Odewahn v. Ropke*, Ky., 385 S.W.2d 163, 164 (1964).
2. After the answer is filed, the trial judge shall determine whether the allegations in the motion can be resolved on the face of the record, in which event an evidentiary hearing is not required. A hearing is required if there is a material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record. *Stanford v. Commonwealth*, Ky., 854 S.W.2d 742, 743-44 (1993), *cert. denied*, 510 U.S. 1049, 114 S.Ct. 703, 126 L.Ed.2d 669 (1994); *Lewis v. Commonwealth*, Ky., 411 S.W.2d 321, 322 (1967). The trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them. *Drake v. United States*, 439 F.2d 1319, 1320 (6th Cir.1971).
3. If an evidentiary hearing is required, counsel must be appointed to represent the movant if he/she is indigent and specifically requests such appointment in writing. *Coles v. Commonwealth*, Ky., 386 S.W.2d 465 (1965). If the movant does not request appointment of counsel, the trial judge has no duty to do so *sua sponte*. *Beecham v. Commonwealth*, Ky., 657 S.W.2d 234, 237 (1983).
4. If an evidentiary hearing is not required, counsel need not be appointed, “because appointed counsel would [be]

confined to the record.” *Hemphill v. Commonwealth*, Ky., 448 S.W.2d 60, 63 (1969). (However, the rule does not preclude appointment of counsel at any stage of the proceedings if deemed appropriate by the trial judge.)

Fraser at 452.

The record reflects that once the trial court reviewed the motion, an order was entered directing trial counsel to supplement the record with an affidavit responding to the concerns raised by Appellant. The affidavit was filed and Appellant was granted from January 9, 2006 to February 15, 2006 to respond. The final order was entered on March 1, 2006, some two weeks after the time to respond expired without a filing by Appellant.

In the affidavit, trial counsel provided the following information: 1) the number of visits made to Appellant while he was held pending trial, supported with copies of the jail logs; 2) the contents of the conversations they had; 3) the investigation that he made into the case; 4) that he visited the crime scene on two occasions, and; 5) the manner in which he evaluated the need for expert testimony. He further stated that he was satisfied that the instructions submitted were consistent with the defense presented and that he was able to argue that Appellant acted in defense of himself and his wife. Counsel noted that he was able to elicit from the Commonwealth's experts evidence addressing the gunpowder residue, blood spatter and bullet flight path that was relevant to the defense.

The trial court then reviewed the record as a whole, determined that a hearing would be unnecessary and denied the motion.

Having reviewed the record as a whole, we agree with the trial court's determination that no hearing was necessary. Appellant's RCr 11.42 motion was well researched and comprehensive. The record was replete with evidence that trial counsel was competent in his representation of Appellant. The trial record reflects that counsel sought and received discovery, filed multiple motions *in limine* to limit the evidence that could be presented at trial, and tendered lengthy and detailed instructions, all of which support the affidavit he filed at the court's request. The motions *in limine* demonstrate that counsel investigated the events surrounding the charges against Appellant thoroughly. As the trial court noted, the need for expert testimony is a matter of trial strategy which is the purview of counsel. It is clear from our review of the record that the Appellant herein not only was not entitled to counsel and an evidentiary hearing on his motion, but was represented by effective competent counsel at his trial. The judgment of the Christian Circuit Court is hereby affirmed.

ALL CONCUR.

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