

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-000970-MR

ROBERT COBB

APPELLANT

v. APPEAL FROM FULTON CIRCUIT COURT
HONORABLE WILLIAM L. SHADOAN, JUDGE
ACTION NO. 01-CR-00073

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** **

BEFORE: DIXON, MOORE, AND TAYLOR, JUDGES.

DIXON, JUDGE: Appellant, Robert Cobb, appeals from an order of the Fulton Circuit Court denying his motion for post-conviction relief pursuant to RCr 11.42. Because we conclude that Appellant's motion was not properly considered, we vacate the trial court's order and remand this matter for further proceedings.

In July 2001, Appellant was indicted on three counts of trafficking in a controlled substance (cocaine), second offense; possession of a controlled substance (cocaine); and for being a persistent felony offender. Appellant's trial was scheduled on

February 26, 2002. On the morning of trial, the Commonwealth moved to sever the charges and to only try Appellant on two of the trafficking charges.

The Commonwealth's evidence established that Appellant sold cocaine to a confidential informant during two separate controlled buys. Fulton County Sheriff Robert Hopper and Deputy David Weatherly testified to the procedures and surveillance employed in both buys. In addition, audio and videotape of both buys were played to the jury. At the conclusion of the trial, the jury returned a guilty verdict on both charges and recommended two twenty-year sentences, to be served consecutively. The trial court thereafter sentenced Appellant to forty years' imprisonment.

On appeal, the Kentucky Supreme Court affirmed Appellant's convictions but remanded the case for a new sentencing hearing on the grounds that the jury was incorrectly instructed to recommend a sentence within the enhanced penalty range without finding Appellant guilty of being a subsequent offender. On remand, Appellant was sentenced to two consecutive ten-year terms of imprisonment.

On January 5, 2005, Appellant filed a *pro se* motion to vacate his sentence pursuant to RCr 11.42, alleging various claims of ineffective assistance of trial counsel. Appellant also filed motions for an evidentiary hearing and the appointment of counsel. A brief hearing was held on January 13, 2005, during which neither Appellant nor any counsel on his behalf was present. Despite the fact that the Commonwealth had not filed a response to Appellant's motion, the trial court entered an order denying all of

Appellant's motions on January 20, 2005. Appellant thereafter filed a motion to proceed *in forma pauperis* on appeal.

The record indicates that over the next year, Appellant wrote several letters to the circuit court clerk inquiring about his motion to proceed *in forma pauperis* on appeal of the denial of his RCr 11.42 motion. During several hearings pertaining to the disposition of other charges, reference was made to the motion. During one such hearing, the trial court directed the Commonwealth to file a response to Appellant's RCr 11.42 motion, despite having denied that motion a year earlier. The Commonwealth thereafter filed a response and submitted an unsigned affidavit that it had prepared on behalf of Appellant's trial counsel. Following a brief hearing on April 27, 2006, the trial court again entered an order denying Appellant's motion for RCr 11.42 relief. This appeal ensued.

At the outset, we feel it necessary to note that the Commonwealth has misconstrued the procedural nature of this case and, as a result, has failed to substantively respond to any of the issues herein. In its brief to this Court, the Commonwealth argues that all issues in Appellant's RCr 11.42 motion became moot when he pled guilty to the charges. A review of the record, however, indicates, that the Commonwealth has confused the relevant charges at issue in this appeal.

On June 23, 2005, Appellant pled guilty to one charge of possession of a controlled substance and was sentenced to one year imprisonment, to be served concurrently with the twenty-year sentence imposed for the two trafficking charges. The

record indicates that in exchange for Appellant's plea, one charge of trafficking in a controlled substance and a charge of being a first-degree persistent felony offender were both dismissed. These three charges represent Counts III (Trafficking in a Controlled Substance), IV (Possession of a Controlled Substance), and V (First-Degree Persistent Felony Offender) of the original indictment, and for which the Commonwealth elected not to prosecute during the February 2002 trial. Thus, the guilty plea is not in any manner relevant to the two trafficking charges that are the subject of this appeal. As a result, Appellant did not waive his right to assert claims of ineffective assistance of counsel relating to his February 2002 trial simply by pleading guilty to the remaining charges in the indictment.

In his appeal to this Court, Appellant alleges that the trial court erred in denying his motion for post-conviction relief without an evidentiary hearing because factual issues could not be resolved from the face of the record. Appellant contends that his trial counsel was ineffective by (1) failing, despite Appellant's repeated requests, to move for a suppression hearing to determine the credibility of the audio and video tapes; (2) failing to conduct any investigation or obtain defense witnesses; (3) failing to request a *Batson* hearing; and (4) failing to appear at Appellant's sentencing hearing. However, we do not reach the merits of Appellant's claims because after carefully reviewing the record in the case, we reach the inescapable conclusion that Appellant's RCr 11.42 did not receive even a cursory review in the trial court.

The standard of review for claims raised in a motion filed pursuant to RCr 11.42 alleging ineffective assistance of counsel at trial is limited to issues that were not and could not be raised on direct appeal. The movant in an RCr 11.42 proceeding has the burden of establishing convincingly that he or she was deprived of some substantial right which would justify the extraordinary post-conviction relief. *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001), *cert. denied*, 534 U.S. 998 (2001) (*citing Dorton v. Commonwealth*, 433 S.W.2d 117 (Ky. 1968)). An evidentiary hearing is not required about issues refuted by the record of the trial court. *Stanford v. Commonwealth*, 854 S.W.2d 742 (Ky. 1993), *cert. denied*, 510 U.S. 1049 (1994).

Nevertheless, “[t]he purpose of RCr 11.42 is to provide a method by which a prisoner's claim of constitutional infringement can be effectively settled in one proceeding for all time. In order for this to be possible, that is, in order for the resolution of the factual basis of the claim to be accepted in the federal courts as final and conclusive, it is necessary that the movant be given a full and fair opportunity to litigate the claim.” *Coles v. Commonwealth*, 386 S.W.2d 465, 466 (Ky. 1965). In discussing the procedural aspects of RCr 11.42, our Supreme Court in *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001), noted,

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. . . . 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).

Id. at 452-53. (Citations omitted).

It is plainly apparent from the video record that during the January 2005 hearing on Appellant's motion, neither the Commonwealth nor the trial court had reviewed the motion. After finally remembering that Appellant was the “one with the gold tooth,” the prosecutor briefly perused the motion and announced that he saw nothing of substance. The trial court then summarily denied the motion. Notably, the Commonwealth at that point had not even filed a response.

Over a year later, the trial court inexplicably directed the Commonwealth to file a response to Appellant's motion. Although the Commonwealth tendered the response during the hearing, the trial court again denied Appellant's motion without ever reviewing such response. And to make matters worse, Appellant's appointed counsel spent the entirety of the hearing discussing scheduling dates on an unrelated matter of another client.

While we do not speak to the merits of Appellant's claims of ineffective assistance, we are compelled to conclude that his RCr 11.42 motion received no consideration by the trial court. Certainly, there was no determination that his allegations could be refuted from the face of the record. *Stanford, supra*. Even the Commonwealth's response was based upon an unsigned affidavit of trial counsel prepared by the Commonwealth's Attorney's office. Although the prosecutor represented that his office

had prepared the affidavit after speaking with trial counsel by phone and that a signed copy was forthcoming, such was never made part of the record.

Quite simply, a defendant is entitled to a fair opportunity to litigate his RCr 11.42 claims in the trial court. *Coles, supra*. That opportunity includes adequate participation by the Commonwealth and due consideration by the trial court. Appellant herein did not receive that opportunity.

The order denying Appellant's motion for relief pursuant to RCr 11.42 is vacated. This case is remanded to the Fulton Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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