

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-001102-MR

DEITRICH WEBSTER

APPELLANT

v. APPEAL FROM CALDWELL CIRCUIT COURT  
HONORABLE BILL CUNNINGHAM, JUDGE  
ACTION NO. 02-CR-00038

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; BUCKINGHAM,<sup>1</sup> SENIOR JUDGE.

KELLER, JUDGE: Deitrich Webster entered a guilty plea to complicity to first-degree robbery and complicity to first-degree assault, for which the Caldwell Circuit Court sentenced him to a twenty-year term of imprisonment. Webster filed a motion to vacate, alter, amend, or set aside the judgment pursuant to RCr 11.42, alleging that he did not

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<sup>1</sup> Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 11-(5)(b) of the Kentucky Constitution and KRS 21.580.

have effective representation. The circuit court denied Webster's motion, and it is from that order of denial that Webster appeals. For the reasons set forth below, we affirm.

## FACTS

On September 10, 2002, an officer from the Princeton Police Department arrested Webster and charged him with complicity to commit robbery and assault, both in the first-degree. The charges arose from the December 12, 2001, robbery of McGregor's Jewelers.

Following Webster's indictment, the court appointed an attorney to represent him. Webster's counsel moved to suppress Webster's confession and for change of venue, citing pre-trial publicity and "public opinion." It is not clear from the record before us how the trial court ruled on those motions. However, on the same day the motions were scheduled for a hearing, Webster accepted a plea deal calling for a sentence of 10 years' imprisonment on each count with no possibility of parole until 85% of the time had been served.

Approximately one month later, Webster filed a motion to withdraw his guilty plea. It appears that the trial court denied that motion and signed a Judgment and Sentence on Plea of Guilty on March 4, 2003, accepting Webster's plea and sentencing him to ten-years' imprisonment on each count, with the sentences to run consecutively.

On June 27, 2003, Webster filed a motion to vacate the judgment pursuant to CR 60.02, arguing that the plea of guilty to first-degree assault should have been merged with the plea of guilty to first-degree robbery. The trial court denied that motion,

finding that the two charges were not duplicative and that the guilty pleas did not constitute double jeopardy. Webster appealed that order, which this Court dismissed as untimely filed.<sup>2</sup>

On March 6, 2006, Webster filed a motion for relief pursuant to RCr 11.42. In that motion, Webster essentially argued that he had not been effectively represented because his counsel: 1) did not preserve the defense of *mens rea*;<sup>3</sup> 2) did not file a motion to suppress Webster's confession; and 3) did not investigate all possible defenses.<sup>4</sup>

In his brief, Webster has listed two issues; however, both delineated issues address whether he had effective assistance of counsel prior to the entry of his guilty plea and the judgment thereon. In its brief, the Commonwealth argues that Webster did not follow the proper steps for attacking the judgment, that Webster failed to specifically state facts that support his claim for relief, and that Webster did receive effective assistance of counsel.

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<sup>2</sup> *Webster v. Commonwealth*, 2005-CA-000545-MR (June 21, 2005).

<sup>3</sup> Webster argues in his brief that he had been asked by an acquaintance, Steve Bryant, to take him shopping. During the shopping trip, Bryant went into McGregor's Jewelers. Because Bryant stayed in the store longer than anticipated, Webster went into the store to check on Bryant. When he went into the store, Webster found Bryant beating the store owner. Webster stopped the beating, but not before Bryant had taken several pieces of jewelry. Based on this version of events, Webster argues that he did not have the intent to rob the jewelry store or to assault the store's owner.

<sup>4</sup> According to Webster, his girlfriend, who gave a statement to police implicating Webster, had a relationship with Bryant. Her relationship with Bryant caused Webster's girlfriend to turn against him, and Webster's attorney allegedly refused to investigate the relationship between Bryant and Webster's girlfriend.

## STANDARD OF REVIEW

Since the trial court denied Webster's RCr 11.42 motion without a hearing, our review is limited to whether the motion states, on its face, grounds not conclusively refuted by the record, that would invalidate the conviction if true. *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967). As noted above, the primary issue raised by Webster in his RCr 11.42 motion and herein is whether he had effective assistance of counsel. Because Webster entered a guilty plea, we must determine whether his counsel

[m]ade errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and [] that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that [the defendant] would not have pleaded guilty, but would have insisted on going to trial.

*Sparks v. Commonwealth*, 721 S.W.2d 726, 728 (Ky.App. 1986).

Before we review the merits of the appeal, we shall first address whether Webster's appeal is so procedurally deficient as to warrant a dismissal without consideration of the merits.

## ANALYSIS

Because the Commonwealth's arguments regarding the technical errors in Webster's motion, if correct, would result in our affirming the trial court without considering the merits, we will address the Commonwealth's arguments first. The Commonwealth's primary argument is that Webster, when he filed his CR 60.02 motion,

put the proverbial cart before the horse. There are three methods to attack a sentence: through direct appeal, through RCr 11.42, and through CR 60.02. In *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983), the Supreme Court of Kentucky set out the procedural framework for challenging a criminal conviction. First, the defendant must file a direct appeal, if applicable, asserting any errors that occurred during trial. Second, the defendant may file for relief under RCr 11.42 asserting “*all* grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude *all* issues that could reasonably have been presented in the same proceeding.” *Gross*, 648 S.W.2d at 856 (emphasis in original). Finally, the defendant may file for relief under CR 60.02 if no relief was available by direct appeal or under RCr 11.42. *Id.* The Commonwealth argues that, because Webster filed his CR 60.02 motion first, he is barred from filing the current RCr 11.42 motion. However, the Commonwealth does not point us to any authority stating that a defendant is barred from filing an RCr 11.42 motion if he has first filed a CR 60.02 motion. The law the Commonwealth cites indicates that a defendant cannot raise through CR 60.02 what he could have or should have raised through RCr 11.42; however, it does not state that filing a CR 60.02 motion is a bar to filing a later RCr 11.42 motion on other grounds. Furthermore, as noted by the trial court, the issues Webster raised in his CR 60.02 motion differ from those raised in his RCr 11.42 motion. Therefore, Webster is not attempting to get a second bite at the apple by raising the same issues in both proceedings, and his RCr 11.42 motion is not barred.

The second argument by the Commonwealth is that Webster failed to specifically state facts that support his claim for relief. RCr 11.42(2) states that "[t]he motion shall be signed and verified by the movant and shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion." Our review of Webster's motion indicates that it contains sufficient facts to comply with RCr 11.42(2).

We shall now address the merits of Webster's appeal; i.e., whether he had effective assistance of counsel. Webster raises three specific concerns regarding the performance of his counsel, including that he failed to preserve the defense of *mens rea*, he failed to file a motion to suppress Webster's confession, and he failed to investigate all possible defenses. Because this is an RCr 11.42 proceeding, Webster has the burden to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceeding. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968).

In support of his claims that his attorney failed to preserve the defense of *mens rea*, Webster offers only his self-serving statements that he had no intention of assaulting or robbing McGregor. He has offered no other evidence. With regard to the failure to develop evidence, Webster again offers only his self-serving statements that his former girlfriend had a relationship with Bryant and that relationship caused her to lie regarding Webster's involvement in the crime. The record indicates that the police had

statements from two witnesses through "Crime Stoppers" identifying Webster as one of the robbers and a statement from a witness claiming he had overheard Bryant and Webster planning the robbery.

Furthermore, we note that, as set forth below, Webster was fully informed by the trial court; he made "a voluntary and intelligent choice among the alternative course of action open to" him, *Centers v. Commonwealth*, 799 S.W.2d 51, 54 (Ky.App. 1990), and he stated on the record that his counsel had adequately represented him.

Court: Are you ill or in any way impaired in your judgment this morning because of consumption of alcoholic beverages, narcotic drugs, home brew, medication, prescription drugs, or anything like that?

Webster: No sir.

Court: Have you talked to Mr. Cripps, your attorney, about this guilty plea?

Webster: Yes sir.

Court: Have you had all the time you need to to [sic] talk to him about it?

Webster: (no audible answer.)

Court: Have you had all the time you need --

Webster: Yes sir.

Court: Do you have any complaints about the legal representation afforded to you by Mr. Cripps?

Webster: No sir.

Court: You're satisfied with the job he's done for you?

Webster: Yeah.

Court: Did you read and understand this motion to enter a guilty plea before you signed it?

Webster: Yes.

Court: Did you sign it voluntarily of your own free will and accord?

Webster: Yes.

Court: Do you know what facts would have to be proven beyond a reasonable doubt for you to be convicted on this offense?

Webster: Sir?

Court: Do you know what facts would have to be proven beyond a reasonable doubt for you to be convicted on this offense?

Webster: (No audible answer.)

Court: Do you understand what facts would have to be proven for you to be found guilty of this offense?

Webster: Yes sir.

Court: Okay. Let me go over those with you. Did you on or before April 12, 2001, either individually or in complicity with, that means assisting or aiding and abetting and working with a Mr. Stephen Bryant, commit a theft against another person, namely, Mr. Roger McGregor, by the use of physical force and with the intent to accomplish that theft you -- he or you were armed with a deadly weapon. Did you commit that offense?

Webster: Yes sir.

Court: Did you also either yourself or in complicity with Mr. Bryant by aiding and assisting and sharing the same criminal

intent cause serious physical injury to Roger McGregor by means of a deadly weapon, to-wit, a hammer. Did you commit that offense?

Webster: Yes sir.

Court: Have you gone over the matter with Mr. Webster, Mr. Cripps, about complicity and how all that works?

Cripps: Yes, your honor.

Court: Do you understand you have the following rights, Mr. Webster? You have a right to a trial by jury and the Commonwealth would have to prove these facts beyond a reasonable doubt?

Webster: Yes sir.

Court: You have a right to have an attorney appointed for you not only at the trial of this matter, but also on appeal if you're convicted. Do you understand you have that right?

Webster: Yes sir.

Court: You have a right to confront and cross-examine witnesses that might be called to testify against you. You have a right to compel the attendance of witnesses you might want to have come and testify in your behalf. Do you understand you have those rights?

Webster: Yes sir.

Court: You have the right against self-incrimination. That means you don't have to say anything and the Commonwealth would have to prove your guilt. You don't have to prove your innocence. The Commonwealth would have to prove your guilt beyond a reasonable doubt. Do you understand you have that right?

Webster: Yes.

Court: Do you realize, Mr. Webster, that you give up all those rights by pleading guilty?

Webster: I know.

Court: Do you understand there won't be any appeal from a guilty plea? If you're not guilty, today is the day to say so. Do you understand that?

Webster: Yes.

Court: Do you understand this felony conviction could be used further down the road if you commit another crime to make the sentence on that crime more severe?

Webster: Yes sir.

...

Court: Other than this recommendation, has the Commonwealth or anybody else done anything to force you to plead guilty?

Webster: No.

Court: Do you plead guilty voluntarily of your own free will and accord?

Webster: Yes.

Court: Knowing these rights the Court has gone over with you this afternoon, Mr. Webster, is it still your desire to waive and give up those rights and enter this guilty plea and let the Court set your sentence in accordance with the plea agreement. Is that what you want to do?

Webster: Yes sir.

In light of the witness statements, Webster's confession, and the preceding statements by Webster in court, we hold that Webster has failed to establish convincingly

that a reasonable probability existed that he would have insisted on going to trial had counsel acted differently.

Finally, we note that Webster's counsel did move to suppress Webster's confession. Therefore, Webster's claim that counsel was ineffective for failure to do so lacks merit.

#### CONCLUSION

Based on the above, we hold that Webster has not met his burden of proof regarding his ineffective assistance of counsel claim. Therefore, we affirm the decision of the Caldwell Circuit Court.

ALL CONCUR.

#### BRIEF FOR APPELLANT:

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#### BRIEF FOR APPELLEE:

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