

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-002427-MR

CARLOS FAULKNER

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE WILLIAM J. WEHR, JUDGE
ACTION NO. 92-CR-00614

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: DIXON AND VANMETER, JUDGES; GRAVES,¹ SENIOR JUDGE.

GRAVES, SENIOR JUDGE: Carlos Faulkner appeals from an order of the Kenton Circuit Court denying his motion for post-conviction relief pursuant to RCr² 11.42.

Because the motion is untimely and raises issues which could have been filed in either of the two previous RCr 11.42 motions filed by Faulkner, we affirm.

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

² Kentucky Rules of Criminal Procedure.

On December 5, 1992, Faulkner was indicted for, among other things murdering Lesly Briede. Faulkner had previously confessed to killing Briede and forensic evidence linked him to the crime. Following the indictment, the Commonwealth entered a notice that it would seek the death penalty against Faulkner. Faulkner eventually entered a guilty plea and received a sentence of life without the possibility of parole for twenty-five years for Briede's murder.

On November 21, 1996, Faulkner filed a motion for post-conviction relief pursuant to RCr 11.42. As grounds for relief, Faulkner claimed his trial counsel's representation was deficient due to counsel's failure to request a change of venue and a competency hearing. Faulkner also claimed his trial counsel coerced him into pleading guilty and that he was incorrectly advised that he would be eligible for parole in 12 years as a result of his guilty plea. On December 20, 1996, the trial court entered an order denying Faulkner's motion.

On August 7, 2001, Faulkner filed a second RCr 11.42 motion. Faulkner alleged various grounds for relief, including that his trial counsel was ineffective for permitting the trial judge to play an active role in the plea agreement process. On November 28, 2001, the trial court entered an order denying Faulkner's motion for relief. Faulkner appealed the denial to this Court, which affirmed the circuit court's opinion in an unpublished opinion rendered on August 29, 2003. *See Faulkner v. Commonwealth*, No. 2002-CA-000435-MR, WL 22025865 (Ky.App. Aug. 29, 2003).

Despite having filed the two previous RCr 11.42 motions in November, on August 1, 2006, Faulkner filed a motion in Kenton Circuit Court captioned “Permission to File a Successive RCr 11.42 Motion.” He also filed the RCr 11.42 motion itself, a motion for an evidentiary hearing, and a motion for appointment of counsel. On August 11, 2006, the trial court entered an order denying the motions. Faulkner subsequently filed a motion to alter, amend, or vacate the denial pursuant to CR³ 59. On October 16, 2006, the trial court entered an order denying the motion.

Faulkner's present RCr 11.42 motion argues, in summary, that trial counsel's performance was deficient for permitting the trial judge to interject himself into the plea bargaining process and for failing to file a motion seeking recusal of the trial judge after he had done so. Faulkner also alleges, in summary, that he should be entitled to file a third RCr 11.42 motion because he received ineffective assistance of counsel in the course of his initial RCr proceedings and because he did not have competent inmate-assistance in filing his second, pro se, RCr 11.42 motion.

RCr 11.42(10) provides that

Any motion under this rule shall be filed within three years after the judgment becomes final, unless the motion alleges and the movant proves either:

(a) that the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence; or

(b) that the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

³ Kentucky Rules of Civil Procedure.

Neither Exception (a) nor (b) is applicable here and, accordingly, Faulkner's motion is procedurally barred for being filed outside of the limitations period for filing an RCr 11.42 motion.

Moreover, RCr 11.42(3) provides that

The motion shall state 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.

The Supreme Court of Kentucky has consistently interpreted this provision as barring successive RCr 11.42 motions. *See Fraser v. Commonwealth*, 59 S.W.3d 448, 454 (Ky. 2001); *Crick v. Commonwealth*, 550 S.W.2d 534, 535 (Ky. 1977); and *Butler v. Commonwealth*, 473 S.W.2d 108, 109 (Ky. 1971). “The courts have much more to do than occupy themselves with successive 'reruns' of RCr 11.42 motions stating grounds that have or should have been presented earlier.” *Hampton v. Commonwealth*, 454 S.W.2d 672, 673 (Ky. 1970) (citing *Kennedy v. Commonwealth*, 451 S.W.2d 158, 159 (Ky. 1970)). As such, Faulkner's motion is procedurally barred as a successive RCr 11.42 motion.

In any event, Faulkner asserted essentially the same substantive argument presented in this case - the participation of the trial judge in the guilty plea negotiations - in his 2001 RCr 11.42 motion. In its August 29, 2003, opinion, this Court addressed the issue as follows:

Faulkner also claims that his constitutional rights were violated when his counsel “erred in his effectiveness, by allowing the presiding judge to play an active role in the plea agreement [process].” Faulkner claims the trial judge suggested that he would be inclined to render a less severe penalty if Faulkner pleaded guilty to the charges contained in the indictment. On September 20, 1993, the trial court did in fact inform Faulkner in open court that it would be inclined to impose a penalty of life without the possibility of parole for 25 years as opposed to death if Faulkner pled guilty; however, the trial court also informed Faulkner that the Commonwealth had the right to a sentencing hearing and that if the court believed that death was an appropriate penalty at the conclusion of such a hearing, Faulkner would be permitted to withdraw his guilty plea. Faulkner has failed to demonstrate that he was prejudiced in any way by the trial court's participation in the plea bargain process.

Faulkner, No. 2002-CA-000435, slip op. at 13-14; 2003 WL 22025865 at *5.

As such, it is the law of the case that Faulkner has no grounds for post-conviction relief upon the issue that the trial court proceedings were flawed on the basis that the trial judge “participated” in the plea agreement process. *Thomas v.*

Commonwealth, 931 S.W.2d 446, 450 (Ky. 1996)

For the foregoing reasons the judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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