

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002629-MR

GREGORY SAYLOR

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE WILLIAM J. WEHR, SPECIAL JUDGE
INDICTMENT NO. 00-CR-00278

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON AND LAMBERT, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.

LAMBERT, JUDGE: Gregory Saylor appeals from a denial of his RCr 11.42 motion alleging ineffective assistance of counsel and prosecutorial misconduct. After careful review, we affirm.

¹ Senior Judge Paul W. Rosenblum, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and KRS 21.580.

After standing trial before a jury, Gregory Saylor was found guilty of first-degree manslaughter and was sentenced to eighteen years' imprisonment. Saylor appealed and both the Kentucky Court of Appeals and subsequently the Kentucky Supreme Court, on discretionary review, affirmed his conviction and sentence. Thereafter, Saylor filed a *pro se* motion to vacate judgment pursuant to RCr 11.42. On November 29, 2006, the Kenton Circuit Court, without holding an evidentiary hearing or granting counsel, entered an order overruling Saylor's RCr 11.42 motion. This appeal followed.

Saylor first argues that it was improper for the trial court to overrule his RCr 11.42 motion without first conducting an evidentiary hearing. The Kentucky Supreme Court, however, recently 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 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*, 385 S.W.2d 163, 164 (Ky. 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*, 854 S.W.2d 742, 743-44 (Ky. 1993).

....

4. If an evidentiary hearing is not required, counsel need not be appointed *Hemphill v. Commonwealth*, 448 S.W.2d 60, 63 (Ky. 1969).

Fraser, at 452. Saylor's contention that he was entitled to an evidentiary hearing is unfounded. It was within the sound discretion of the court to determine whether the claims could be resolved on the face of the record.

Saylor next alleges that his trial counsel failed to render effective assistance of counsel leading up to and during trial. Specifically, Saylor alleges that his trial counsel was ineffective for: (1) failing to develop an Extreme Emotional Disturbance (“EED”) defense; (2) failing to object to the prosecution's use of only a portion of his taped interview with police; (3) failing to seek suppression of his statement to the police; (4) failing to present testimony of eight witnesses at trial; (5) failing to object to alleged interference with the jury's deliberations; and (6) failing to seek independent testing for DNA and fingerprint evidence.

However, “RCr 11.42 cannot be used to relitigate issues decided on direct appeal, or to raise issues that could have been presented on direct appeal.” *Baze v. Commonwealth*, 23 S.W.3d 619, 626 (Ky. 2000). Clearly Saylor's claims of ineffective assistance of counsel could have been raised on direct appeal. Therefore, the court was correct in finding that his RCr 11.42 claims of ineffective assistance of counsel must be denied.

Accordingly, we affirm the judgment of the Kenton Circuit Court.

DIXON, JUDGE, CONCURS IN RESULT ONLY.

ROSENBLUM, SENIOR JUDGE, DISSENTS AND FILES SEPARATE
OPINION.

ROSENBLUM, SENIOR JUDGE, DISSENTING: I respectfully dissent.

There are material issues of fact that cannot be determined on the face of the record.

Accordingly, I would reverse and remand this case to the trial court with directions to
conduct an evidentiary hearing in conformity with RCr 11.42.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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