

RENDERED: October 10, 1997; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 95-CA-1965-MR

CHRISTOPHER OSBORNE

APPELLANT

V. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER CRITTENDEN, JUDGE
ACTION NO. 89-CR-0209

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: ABRAMSON, COMBS, and SCHRODER, Judges.

COMBS, JUDGE: Christopher Osborne appeals from an order entered by the Franklin Circuit Court on July 10, 1995, which denied his motion to vacate his sentence pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. We affirm.

Osborne was indicted for murder on December 27, 1989. Following the presentation of evidence at trial which indicated that Osborne shot and killed Marvin Wynn following a weekend feud, the jury was instructed with respect to intentional murder, wanton murder, first and second-degree manslaughter, and reckless

homicide. The jury found Osborne guilty of wanton murder. Ultimately, he was sentenced to twenty years in prison. Osborne, who maintained that he shot the victim only in self-defense, appealed his conviction directly to the Kentucky Supreme Court. In October 1993, the Supreme Court rendered its opinion affirming Osborne's conviction and sentence.

On December 27, 1994, Osborne filed a motion pro se pursuant to RCR 11.42 requesting the trial court to vacate his sentence. The motion was denied, and this appeal followed.

On appeal, Osborne describes a number of alleged trial errors as well as numerous alleged instances of ineffective assistance of counsel. The assignments of error include the following: that the Commonwealth failed to prove beyond a reasonable doubt that the victim died as a result of the gun shot wound; that the Commonwealth's attorney misstated the law during the penalty phase of trial and that he engaged otherwise in prosecutorial misconduct; that the trial court erroneously permitted hearsay testimony into evidence; that the trial court failed to require a complete chain of custody; and that the trial court made numerous errors in providing instructions to the jury. Last, Osborne contends that trial counsel rendered ineffective assistance by failing to challenge what he perceived to be many trial errors.

With respect to Osborne's numerous assignments of trial error, we note that "[i]t is an established principle that this Court [court of appeals] will not address an [RCr 11.42] issue

which was raised in a direct appeal or which should have been raised in a direct appeal." Brown v. Commonwealth, Ky., 788 S.w.2d 500, 501 (1990). As the trial court concluded, each of Osborne's allegations of trial error was either sufficiently addressed by the Kentucky Supreme Court when it affirmed his conviction or should have been raised on direct appeal. Thus, review under RCr 11.42 is precluded. Commonwealth v. Stamps, Ky., 672 S.W.2d 336 (1984).

Osborne's remaining argument is that he was denied effective assistance of counsel at trial so as to deprive him of his right to counsel under the Sixth and Fourteenth Amendments to the United States Constitution. In effect, he revisits each of the alleged trial errors under the guise of a complaint about counsel. In order to prove that counsel provided ineffective assistance, however, the appellant is required to demonstrate: 1) that counsel made errors so serious that his performance fell outside the wide range of professionally competent assistance, and 2) that, but for these errors, there is a reasonable likelihood that the result of the trial would have been different. Strickland v. Washington 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984); Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); Taylor v. Commonwealth, Ky. App., 724 S.W.2d 223 (1986). To be entitled to relief, Osborne must show that his attorney committed serious and prejudicial error.

Having closely reviewed each of Osborne's allegations, we find that he has clearly failed to show that his trial counsel was ineffective pursuant to the Strickland standard. We have found nothing in the record which could lead us to conclude that counsel made errors so serious that his performance fell outside the wide range of professionally competent assistance. Even if counsel made serious errors which rose to the level of incompetence (which we do not believe to be the case), the evidence of Osborne's guilt was so overwhelming that one could not reasonably conclude that the outcome of the trial would have been different pursuant to Strickland. It is not sufficient simply to allege ineffective assistance; nor is it sufficient even to show that counsel was, in fact, incompetent or ineffective. In order to prevail, Osborne must demonstrate that he would have been found not guilty of the charge against him had his counsel not conducted his defense in an allegedly unprofessional manner. Osborne has failed to meet that burden.

Based upon the foregoing, the denial of appellant's motion for RCr 11.42 relief is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT PRO SE:

Christopher Osborne
LaGrange, KY

BRIEF FOR APPELLEE:

A.B. Chandler III
Attorney General

Todd T. Ferguson
Assistant Attorney General
Frankfort, KY