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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000405-MR

ANTHONY WAYNE HEFLIN — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 84-CR-00378 & NO. 84-CR-00411

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, J., MAZE, AND TAYLOR, JUDGES.

J. LAMBERT, JUDGE: In this post-conviction action, Anthony Wayne Heflin has appealed from the opinion and order of the Fayette Circuit Court, entered *nunc pro tunc* February 23, 2015, denying his motion for Kentucky Rules of Criminal Procedure (RCr) 11.42 relief without an evidentiary hearing. We affirm.

On July 9, 1984, more than thirty years ago, Heflin was charged by the Fayette County grand jury with third-degree burglary, two counts of second-degree burglary, second-degree criminal possession of a forged instrument, and receiving stolen property, all related to events that took place between December 1983 and June 1984 (Indictment No. 84-CR-00378, "the burglary indictment"). He was released on a partially secured bond in June 1984. Heflin, represented by attorney David Van Horn, entered a not guilty plea at the arraignment on July 13, 1984. A trial was scheduled for July 30, 1984.

On July 23, 1984, the Fayette County grand jury returned a second indictment against Heflin, charging him with second-degree burglary, first-degree rape, and first-degree sodomy that occurred on May 4, 1984, and attempted burglary on June 6, 1984 (Indictment No. 84-CR-00411, "the rape indictment"). Heflin also pled not guilty to these charges.

Rather than holding a trial as scheduled, the court held a pre-trial hearing on July 30, 1984, addressing both indictments. The next day, the court entered a pre-trial order in the burglary indictment indicating that the Commonwealth had offered to recommend a five-year sentence on count 3 (the second-degree burglary charge related to Rita Bowers' residence) and dismiss the remaining charges. In a separate pre-trial order for the rape indictment, the court indicated that the Commonwealth had offered to recommend twenty years on count 2 (the first-degree rape charge) and twelve months on the attempted burglary charge, and to dismiss counts 1 and 3. The offer would be open for one week after

the defense received the results of the lab tests. In addition, the court granted the Commonwealth's motion to obtain blood, hair, and saliva samples from Heflin related to the rape and sodomy charges. As of September 1984, Heflin had been placed into custody, and the bond was released to the surety. A trial was scheduled for September 17, 1984.

A few days before the scheduled trial, the Commonwealth moved to continue the trial date in the rape indictment, and the court held a hearing in chambers on September 14, 1984, related to this motion. The Commonwealth requested the continuance to obtain the laboratory test results. During the hearing, with Heflin present, his trial counsel stated "we are going to enter pleas on the other burglary charges that we are going to try Monday." Defense counsel objected to the continuance, stating that he wanted "to force the Commonwealth into a trial Monday on [the other indictment]." The court granted a continuance and continued both cases. There was additional discussion about entering a plea to the charges in the burglary indictment. The court stated: "I understand and if he is convicted of the others, he would want to plead and get them out of [his] way and he may change his mind but I'll give him the opportunity to see what happens on the more serious first, be fair to him on that." Heflin asked questions about having his bond lowered and having contact visitation with his daughter. The jury trial was ultimately held on October 1, 1984.

On October 3, 1984, the court entered a trial verdict and judgment related to the charges set forth in both indictments. Pursuant to the jury's verdict,

the trial court found Heflin guilty as charged in the burglary indictment and fixed his sentences at one year on the third-degree burglary conviction; at eight and nine years, respectively, on the second-degree burglary convictions; at three years on the second-degree criminal possession of a forged instrument conviction; and at twelve months on the receiving stolen property conviction. Under the rape indictment, the court found him guilty as charged and fixed his sentences at nine years on the second-degree burglary conviction; at twenty years on the first-degree rape conviction; at twenty years on the first-degree sodomy conviction; and at twelve months on the criminal attempt to second-degree burglary conviction. The final judgment was entered October 29, 1984. The circuit court ordered the felony convictions in each case to run consecutively with each other[1] and the misdemeanor convictions to run concurrently with the felony convictions. The sentences imposed in the two cases were ordered to run consecutively with each other for a total of seventy years.

Heflin directly appealed his conviction to the Supreme Court of Kentucky (Appeal No. 85-SC-000330-MR), alleging errors related to the sufficiency of the evidence to establish the third-degree burglary charge in the burglary indictment; the failure to instruct on the lesser-included offense of criminal trespass; the sufficiency of the evidence to support his attempted burglary, rape, and sodomy convictions; and whether his *Miranda* rights were violated in obtaining his confessions on two of the burglary charges. In an unpublished

[1] Heflin was sentenced to a total of twenty-one years in the burglary indictment and to a total of forty-nine years in the rape indictment.

opinion rendered October 31, 1985, the Supreme Court affirmed the final judgment.

On July 18, 1986, Heflin filed *pro se* motions for RCr 11.42 relief, for appointment of counsel, and for an evidentiary hearing. In his RCr 11.42 motion, Heflin alleged ineffective assistance of counsel, citing his attorney's failure to investigate defenses, interview or call witnesses, or preserve trial errors. The trial court appointed Legal Aid to represent Heflin. Appointed counsel filed a supplemental motion, which included the argument that trial counsel was ineffective for failing to move for separate trials on the two indictments. The Commonwealth objected to the motion, and the trial court denied the RCr 11.42 motion in an opinion and order entered November 25, 1986. Heflin's appeal to this Court (Appeal No. 86-CA-002897-MR) was dismissed in 1988 for failure to file a brief, and he unsuccessfully sought to reinstate the appeal in 1990.

On January 21, 1987, Heflin filed a motion to modify his sentence from seventy years to twenty years pursuant to Kentucky Revised Statutes (KRS) 532.070, which was denied. On January 29, 1987, the court also denied Heflin's motion to suspend further execution of his sentence and place him on probation pursuant to KRS 439.265. In 1991, Heflin filed a Petition for Writ of Habeas Corpus in Federal District Court, which was also denied.

In April 1996, Heflin filed a motion for Kentucky Rules of Civil Procedure (CR) 60.02(f) relief, in which he raised issues relating to improper comments made by the Commonwealth during trial, the withholding of

exculpatory material from the defense, the admissibility and integrity of evidence, and the failure to admonish the jury. The trial court denied the motion on May 29, 1996, determining that Heflin's arguments were related to alleged trial or discovery errors, which did not satisfy the extraordinariness required for relief to be granted and should have been raised on direct appeal or in his RCr 11.42 proceeding. Heflin filed a motion for reconsideration, which was denied on June 19, 1996. Heflin appealed the trial court's ruling to this Court (Appeal No. 96-CA-001818-MR). In an opinion rendered October 24, 1997, this Court affirmed the trial court's ruling on the CR 60.02 motion, finding no abuse of discretion.

On January 30, 2006, Heflin filed a motion to amend the 1984 judgment pursuant to CR 59.05, alleging abuse of discretion, excessive punishment, and the existence of prejudicial and plain error. He also alleged that the verdict was not supported by the evidence and that new evidence had surfaced. One of the arguments addressed whether the trial court abused its discretion in refusing to consider concurrent sentencing on the two indictments. In that argument, Heflin stated: "Before the defendant proceeded to trial he was offered a plea bargain of 25 years on his indictment. Once he refused the offer, the Commonwealth consolidated the indictments over the defendants [sic] objection to counsel." On February 7, 2006, the trial court denied Heflin's motion to amend the 1984 judgment, finding that more than ten days had elapsed since the entry of the judgment. Heflin appealed the ruling to this Court (Appeal No. 2006-CA-000614-MR). The appeal was dismissed for failure to file a brief or respond to a show

cause order on October 18, 2006. Heflin was paroled in August 2011, but was arrested and sent back to prison in June 2012.

On June 25, 2014, Heflin filed a *pro se* motion entitled "Successive Motion for Vacatur of Judgment" pursuant to RCr 11.42(10)(a), alleging that his trial attorney had not conveyed a guilty plea offer to him. He explained in the motion that after his trial counsel passed away in the 1990s, his mother was contacted by his attorney's family regarding Heflin's case folder. His mother obtained the folder, and Heflin's father told her he did not want it. His mother kept his file, and her belongings were later placed in storage. Ten years later, his mother's brother transferred the items in the storage unit to his own storage unit and found Heflin's file. Heflin's uncle gave the file to Heflin's father, which he put in his basement. Heflin's mother passed away in 2010 and named Heflin as her executor. In probating the will, Heflin needed some of the documents in his father's basement. In November 2013, Heflin's father went through the documents in the basement and found the July 31, 1984, pre-trial order that included the Commonwealth's offer in the burglary indictment for a recommended sentence of five years. He sent a note to Heflin in prison, stating that he did not understand why he did not take that deal. Heflin claimed that he had never seen this document before and had not known about the plea offer. Heflin contended that he would have accepted the offer and not gone to trial had he been informed about the Commonwealth's offer. He also pointed to the transcript of the September 14,

1984, hearing, in which he stated everyone agreed that he had wanted to plead guilty in the burglary indictment.

When the Commonwealth did not respond within twenty days, Heflin filed a motion for a judgment on the pleadings, arguing that the failure to respond operated as an admission to the facts asserted in the motion as well as the propriety of his right to relief under RCr 11.42(10)(a). The Commonwealth sought an extension of time to respond, noting that the file had been archived. The trial court granted the motion, and the Commonwealth filed its response. In the response, the Commonwealth noted that it had also made a recommendation of twenty years on the rape indictment as set forth in a separate pre-trial order. The Commonwealth argued that Heflin was barred from filing a successive RCr 11.42 motion and that his allegations were refuted by the record, as the offer was in the record, and Heflin had notice of the offer pursuant to his statement in his 2006 motion for CR 59.05 relief.

Heflin filed an objection to the Commonwealth's response, stating that his CR 59.05 motion only referenced the burglary indictment, not the rape indictment. He said he rejected the offer in the rape indictment because he claimed to be innocent of those charges. He went on to state that he had also not known about the July 31, 1984, pre-trial order in the rape indictment related to the twenty-year offer.

On October 22, 2014, the trial court entered an opinion and order denying Heflin's motion for RCr 11.42 relief without an evidentiary hearing. The

court held that Heflin's motion was barred by RCr 11.42(3), which bars successive motions for relief under this rule. The court stated that "Heflin undoubtedly had constructive knowledge, if not actual knowledge, of the offers. Because the offers were filed in the public record, Heflin will be regarded as having knowledge of their contents." In addition, Heflin had in his 1986 RCr 11.42 motion cited to the volume and page numbers of the trial transcript, which indicated that he had access to the record. The court went on to hold that Heflin had failed to establish the two-prong *Strickland* test and that he was not entitled to a judgment on the pleadings due to the late filing of the Commonwealth's response.[2] This appeal now follows.

On appeal, Heflin argues that his motion was timely filed pursuant to RCr 11.42(10)(a), that his motion has merit, that he was entitled to a judgment on the pleadings, and that he was entitled to an evidentiary hearing. The Commonwealth contends that Heflin's arguments have no merit and that the ruling should be affirmed.

The applicable standard of review in RCr 11.42 post-conviction actions is well-settled in the Commonwealth. Generally, in order to establish a claim for ineffective assistance of counsel, a movant must meet the requirements of a two-prong test by proving that: 1) counsel's performance was deficient and 2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466

[2] In January 2015, apparently not having received the trial court's order, Heflin moved the court to submit the matter for a ruling. The court denied the motion as moot, noting that an order had already been entered ruling on the RCr 11.42 motion. Heflin then moved the court to enter an order *nunc pro tunc* ruling on his motion, demonstrating that he had never received the order. The court granted this motion on February 23, 2015, and Heflin timely appealed from this order.

U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *accord Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985), *cert. denied*, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). Pursuant to *Strickland*, the standard for attorney performance is reasonable, effective assistance. The movant must show that his counsel's representation fell below an objective standard of reasonableness and bears the burden of proof. In doing so, the movant must overcome a strong presumption that counsel's performance was adequate. *Jordan v. Commonwealth*, 445 S.W.2d 878, 879 (Ky. 1969); *McKinney v. Commonwealth*, 445 S.W.2d 874, 878 (Ky. 1969). The Supreme Court of Kentucky revisited the law addressing RCr 11.42 proceedings in *Haight v. Commonwealth*, 41 S.W.3d 436, 441 (Ky. 2001) (*overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)), noting that "[s]uch a motion is limited to the issues that were not and could not be raised on direct appeal."

If an evidentiary hearing is held, the reviewing court must determine whether the lower court acted erroneously in finding that the defendant below received effective assistance of counsel. *Ivey v. Commonwealth*, 655 S.W.2d 506, 509 (Ky. App. 1983). If an evidentiary hearing is not held, as in this case, our review is limited to "whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967). *See also Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986).

The first issue we shall address is whether Heflin's motion for RCr 11.42 relief is procedurally barred. RCr 11.42(3) provides that "[t]he 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." *See also McQueen v. Commonwealth*, 949 S.W.2d 70, 71 (Ky. 1997) (The defendant "is precluded from raising issues in a successive RCr 11.42 motion which were or could have been raised in the first motion. RCr 11.42(3)."). Because Heflin filed an RCr 11.42 motion in 1986, in fact identified his 2014 RCr 11.42 motion as successive, and should have had knowledge of the existence of the plea offer, we agree with the Commonwealth that he is procedurally barred from filing a subsequent motion for RCr 11.42 relief.

Heflin contends that he did not know about the grounds for his RCr 11.42 motion until he became aware of the Commonwealth's plea offer in 2013, when his father found the order in Heflin's case file. He claims that he had no reason to go through the record to find the order when he originally sought relief in 1986. In further support, Heflin cites to RCr 11.42(10), which includes a tolling provision:

> 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.
>
> If the judgment becomes final before the effective date of this rule, the time for filing the motion shall commence upon the effective date of this rule. If the motion qualifies under one of the foregoing exceptions to the three year time limit, the motion shall be filed within three years after the event establishing the exception occurred. Nothing in this section shall preclude the Commonwealth from relying upon the defense of laches to bar a motion upon the ground of unreasonable delay in filing when the delay has prejudiced the Commonwealth's opportunity to present relevant evidence to contradict or impeach the movant's evidence.

In order for this argument to be successful, Heflin would necessarily have to persuade the trial court that he did not know about the pre-trial order or the existence of the plea offer.

Unfortunately for Heflin, the record refutes his claim that he did not know about the plea offer until 2013. As the Commonwealth points out in its brief, Heflin had access to the record when he filed his original RCr 11.42 motion in 1986, as he cited to the record in that motion. And the parties mentioned a possible plea to the burglary indictment at the September 14, 1984, hearing. Therefore, we reject Heflin's claim that the time was tolled by application of RCr 11.42(10)(a). Heflin himself mentions in his CR 59.05 motion filed in 2006 that he had rejected a plea deal for twenty-five years prior to trial: "Before the defendant proceeded to trial he was offered a plea bargain of 25 years on his indictment. Once he refused the offer, the Commonwealth consolidated the indictments over

the defendants [sic] objection to counsel." His response that he was only referring to the rape indictment is clearly self-serving, as the record confirms that the Commonwealth offered him twenty years on the rape indictment and five years on the burglary indictment. The trial court was well within its discretion to discount Heflin's claim. Therefore, Heflin should have raised the plea offer issue in his original motion, and he is procedurally barred from raising it in a successive motion pursuant to RCr 11.42(3) and (10).

Because Heflin's claims could all be decided with reference to the record, the trial court was not obligated to hold an evidentiary hearing. *See Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001) ("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.").

Finally, we reject Heflin's claim that he was entitled to a judgment on the pleadings. The Commonwealth is not required to file a response; RCr 11.42(4) merely provides the Commonwealth with twenty days to file a response. *See Polsgrove v. Commonwealth*, 439 S.W.2d 776, 778 (Ky. 1969) ("RCr 11.42 provides that an answer may be filed to a motion to vacate judgment, but it does not require it."). It was also squarely within the trial court's discretion to permit the Commonwealth to file a late response in light of the age of the cases and the fact that the record had been archived.

For the foregoing reasons, the Fayette Circuit Court's order denying Heflin's motion for RCr 11.42 relief is affirmed.

ALL CONCUR.

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