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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001151-MR

SHANNON D. GARLAND

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 05-CR-00079

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JOHNSON, TAYLOR, AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Shannon D. Garland appeals from an order of the Letcher Circuit Court denying his motions pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 and Kentucky Rules of Civil Procedure (CR) 60.02.

Garland makes the following arguments on appeal: (1) he was entitled to an evidentiary hearing on his claim of ineffective assistance of post-

conviction appellate counsel; (2) post-conviction appellate counsel failed to raise issues regarding Garland's mental health; and (3) the initial circuit court judge erred by failing to recuse.¹

Some of the relevant procedural history of this case is found in Garland's first RCr 11.42 appeal to this Court:

In April 2005, a Letcher County Grand Jury indicted [Garland] and his girlfriend, Rosemary McClain, for complicity to commit murder, complicity to first-degree robbery, complicity to theft by unlawful taking over \$300, complicity to theft of a controlled substance, and tampering with physical evidence. [Garland] was also indicted for being a second-degree persistent felony offender [(PFO)]. The charges stemmed from the robbery and brutal stabbing death of Lisa Jenkins. Following the indictments, the Commonwealth filed its notice of aggravating circumstances and intent to seek the death penalty. Prior to trial, however, [Garland] filed a motion to enter a guilty plea. Pursuant to the plea agreement, [Garland] gave a statement to the Commonwealth that detailed the crimes and agreed to testify against McClain in exchange for the Commonwealth's dismissal of the PFO charge and recommendation of a sentence of life imprisonment. The agreement further stipulated that [Garland] could not seek parole for twenty years. On July 14, 2008, the trial court sentenced [Garland] accordingly.

On March 9, 2010, [Garland] filed a motion to vacate his convictions and sentence pursuant to RCr 11.42 raising various claims of ineffective assistance of counsel. Specifically, [Garland] alleged that counsel

¹ To the extent Garland alleges that his attorneys and the circuit court judge coerced his guilty plea, we decline to address this issue because it was raised for the first time in Garland's reply brief. *Caldwell v. Chauvin*, 464 S.W.3d 139, 145 n.9 (Ky. 2015). We also note that Garland alleged that counsel coerced his guilty plea in his first RCr 11.42 appeal. *Garland v. Commonwealth*, No. 2011-CA-000478-MR, 2012 WL 3538318, 1 (Ky.App. 2012)(unpublished).

failed to investigate and present an extreme emotional disturbance (EED) defense; pursue suppression of his statements to police; and file a motion to sever the trial from his co-defendant. Finally, [Garland] claimed that counsel used manipulation and coercion to force him to plead guilty. On February 4, 2011, the trial court denied [Garland's] motion without an evidentiary hearing.

Garland v. Commonwealth, No. 2011-CA-000478-MR, 2012 WL 3538318, 1 (Ky. App. 2012) (unpublished) (footnote omitted). Garland appealed to this Court claiming that his counsel coerced him into pleading guilty. *Id.* We affirmed. *Id.* at 3.

On June 2, 2015, Garland filed a second motion under RCr 11.42 alleging that his inmate litigation aide and his post-conviction appellate attorney provided ineffective assistance. While that motion was pending, Garland filed a motion to recuse the circuit court judge alleging that a close relative of the judge had been convicted of sexually abusing Garland's sister. The circuit court denied Garland's motion to recuse, stating the judge had "no such relationship with" the person Garland claimed to be the judge's relative. That same day, the circuit court denied Garland's RCr 11.42 motion finding that it was untimely, successive, and meritless.

On September 10, 2015, Garland filed a motion under CR 60.02² arguing the circuit court failed to make findings regarding whether his claims

² Garland entitled this document "Motion for Further Written Findings of Facts and Conclusions of Law on All Issues Raised in Appellant's RCr 11.42 / CR 60.02 Post Conviction Motion Pursuant to CR 52.01; 02; 03; 04[.]" For clarity, we refer to this motion as one under CR 60.02.

“were permissible under CR 60.02[.]” Subsequently, a special judge was assigned in Garland’s case. The court denied Garland’s motion because, in part, Garland failed to allege any extraordinary circumstance justifying relief. Garland filed a motion to alter, amend, or “correct” the judgment under CR 59.05. The circuit court also denied that motion. This appeal follows.

Garland’s motions under RCr 11.42 and CR 60.02 are procedurally improper. Garland fails to provide any reason why he could not have sought relief in his previous RCr 11.42 motion on the grounds he now raises. *See Gross v. Commonwealth*, 648 S.W.2d 853, 856–57 (Ky. 1983). Additionally, the fact that Garland filed a motion requesting findings under CR 60.02 does not save his successive RCr 11.42 motion. “The language of RCr 11.42 forecloses the defendant from raising any questions under CR 60.02 which are ‘issues that could reasonably have been presented’ by RCr 11.42 proceedings.” *Gross*, 648 S.W.2d at 857 (quoting RCr 11.42(3)). Because Garland’s RCr 11.42 motion was successive, and his CR 60.02 motion contained issues that were litigated in his previous RCr 11.42 motion, the circuit court’s order denying Garland post-conviction relief was not erroneous.

Moreover, Garland’s RCr 11.42 motion was untimely. Under Kentucky law, a “judgment of conviction is not final until judgment has been entered in the final appeal of the case.” *Palmer v. Commonwealth*, 3 S.W.3d 763, 765 (Ky.App. 1999). However, when there is no direct appeal taken, a judgment

of conviction becomes final at the time it is entered. *Id.* RCr 11.42(10) contains a three-year limitation providing as follows:

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.

In *Roach v. Commonwealth*, 384 S.W.3d 131, 137 (Ky. 2012)

(quoting CR 15.03(1)), the Kentucky Supreme Court held that new claims asserted in amended RCr 11.42 motions were untimely if filed outside the three-year period set forth in RCr 11.42(10) unless the amended claims amplified or clarified the original claims or “[arose] from the same ‘conduct, transaction, or occurrence’” as claims set out in the original motion.

Garland’s final judgment was entered on July 14, 2008. He filed his second RCr 11.42 motion on June 2, 2015, almost seven years after his judgment. However, Garland claims the issues in his second motion “relate back” to his first motion under RCr 11.42.

Unlike the appellant in *Roach*, Garland’s motion was not filed before the court entered a final judgment on the matter. Garland cannot claim his amendment relates back to his original motion when this Court has already decided

his appeal of that judgment. “An amended petition can only be filed in a pending action or proceeding.” *Meredith v. Ingram*, 465 S.W.2d 38, 39 (Ky. 1971) (quoting *Craig v. Welsh-Hackley Coal & Oil Co.*, 35 Ky.L.Rptr. 1853, 78 S.W. 1122 (1904)). Therefore, the circuit court correctly determined that Garland’s RCr 11.42 motion was untimely.

Furthermore, Garland filed his CR 60.02 motion requesting additional findings on September 10, 2015, over seven years after his judgment became final. Motions under CR 60.02(f) must be filed “within a reasonable time[.]” This Court has previously held that a circuit court did not abuse its discretion when it determined that a seven-year delay between a guilty plea and a CR 60.02 motion was unreasonable under CR 60.02(f). *Graves v. Commonwealth*, 283 S.W.3d 252, 257 (Ky.App. 2009). Therefore, the circuit court “would certainly have been within its discretion had it held that the motion was not brought within a reasonable time.” *Reyna v. Commonwealth*, 217 S.W.3d 274, 276 (Ky.App. 2007).

Even if Garland’s motions were not procedurally improper, we would affirm. To prove ineffective assistance of counsel, a defendant must show: (1) that counsel’s representation was deficient in that it fell below an objective standard of reasonableness as measured against prevailing professional norms; and (2) that he was prejudiced by counsel’s deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2064-65, 80 L.Ed.2d 674 (1984). “On appeal, the reviewing court looks *de novo* at counsel’s performance

and any potential deficiency caused thereby.” *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008). However, we defer to the findings of fact and determinations of witness credibility made by the circuit court. *Commonwealth v. Bussell*, 226 S.W.3d 96, 103 (Ky. 2007). An evidentiary hearing is required only “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.” *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001).

Garland claims that his post-conviction appellate counsel for his first RCr 11.42 motion was ineffective. However, because there is no right to effective assistance of post-conviction appellate counsel, *Hollon v. Commonwealth*, 334 S.W.3d 431, 437 (Ky. 2010), this claim is without merit.

Next, Garland claims that his counsel was ineffective for failing to argue that he was mentally incompetent to stand trial. This claim is refuted by the record. Prior to his indictment, the Kentucky Correctional Psychiatric Center performed a mental health evaluation on Garland. That evaluation determined Garland’s full-scale intelligence quotient (I.Q.) score to be 73. However, after Garland was indicted, the parties agreed to have Garland submit to a second competency evaluation performed by Dr. Stephen Free. During the subsequent competency hearing, Dr. Free testified that Garland had a full-scale I.Q. of 80 and it was his professional opinion Garland was competent to stand trial. Following

the hearing, the circuit court found Garland competent, consistent with Dr. Free's opinion.

Garland's attorneys fully pursued the defense of incompetency. They requested discovery over the matter and filed a notice of intent to introduce evidence relating to it at trial. Instead of proceeding to trial, however, Garland elected to plead guilty. One of Garland's attorneys signed an affidavit stating that the attorneys in Garland's case reviewed documents pertaining to his I.Q. testing but still believed it was in Garland's best interests to plead guilty. It is not ineffective assistance of counsel for an attorney, after investigating the case, to advise his client to plead guilty in order to obtain a lesser sentence. *Osborne v. Commonwealth*, 992 S.W.2d 860, 864 (Ky.App. 1998).

Garland also contends that the circuit court erred when it denied his motion to recuse. Because Garland's other arguments for relief are refuted by the record, any action by the circuit judge which allegedly may have been improper is irrelevant. *See James v. Wilson*, 95 S.W.3d 875, 884–85 (Ky.App. 2002).

Therefore, we need not consider Garland's claim that the circuit court erroneously denied his motion to recuse.

Finally, Garland claims that he is entitled to an evidentiary hearing. However, because Garland's claims are conclusively disproved by the record, no evidentiary hearing is warranted. *Fraser*, 59 S.W.3d at 452.

Based on the foregoing, the order of the Letcher Circuit Court denying
Garland's post-conviction relief is affirmed.

ALL CONCUR.

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