SUPREME COURT OF KENTUCKY
FILE NO. 2010-SC-000222

TOMMY DOTSON — APPELLANT

VS.

ON DISCRETIONARY REVIEW FROM
COURT OF APPEALS
CASE NO. 2009-CA-000441

ON APPEAL FROM PIKE CIRCUIT COURT
INDICTMENT NO. 99-CR-00324-002

COMMONWEALTH OF KENTUCKY — APPELLEE

REPLY BRIEF FOR APPELLANT

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CERTIFICATE OF SERVICE:

I hereby certify that a true copy of this Brief for Appellant has been mailed via first-class postage prepaid to Mr. Samuel Givens, Jr., Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. Steven D. Combs, Pike County Hall of Justice, 172 Division St., Pikeville, Kentucky 41501; Hon. Elizabeth Burchett, Assistant Commonwealth Attorney, 115 Caroline Ave., Pikeville, Kentucky 41501; Hon. Perry Ryan, Assistant Attorney General, Criminal Appellate Division, 1024 Capital Center Drive, Frankfort, Kentucky 40601-8204, and by registered mail to Ms. Susan Stokley Clary, Clerk, Supreme Court of Kentucky, 700 Capital Avenue, Frankfort, Kentucky 40601-3488, on the 28th day of July, 2011.

Meggan Smith
COUNSEL FOR TOMMY DOTSON

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PURPOSE OF THIS REPLY BRIEF

The purpose of this reply brief is to respond to factual allegations and legal arguments offered by the Appellee. Failure to respond to a particular factual allegation or argument should not be taken as an admission of that fact or waiver of that argument.

ARGUMENT

A. Mr. Dotson's RCr 11.42 Motion Was Timely Filed

The Commonwealth incorrectly asserts that Mr. Dotson's RCr 11.42 motion was filed on March 29, 2007, and, therefore was untimely. Appellee Brief pg. 7, 11. Mr. Dotson actually filed his RCr 11.42 motion on January 29, 2007, T.R. Vol. I of I, pg. 32-37, not March 29, 2007, as clearly evidenced by the fact that the Commonwealth filed a response on January 31, 2007. T.R. Vol. I of I, pg. 38-39. Mr. Dotson's RCr 11.42 motion was filed within three (3) years of his conviction and sentence becoming final on February 11, 2004, and was therefore timely. RCr 11.42(10).

B. Scope of this Court's Review

Contrary to Appellee's contentions, see, Appellee Brief pg. 9, 21, Appellant's brief does not address issues outside those on which this Court granted review. This Court granted Appellant's Motion for Discretionary Review, which included the following Questions of Law:

> I. Should this Court's holding in Parrish v. Commonwealth, 283 S.W.3d 675 (Ky. 2009), that the appeal of an RCr 11.42 motion becomes moot when the movant's sentence has been completed, be overturned because it failed to fully consider the plain language of RCr 11.42 and the evolution of remedies available via habeas jurisdiction?
>
> II. Did the Court of Appeals err in ruling that it could not consider the merits of movant's RCr 11.42 claims under CR 60.02 without movant first returning to Circuit Court?

III. Did the Pike Circuit Court err in determining that movant did not receive ineffective assistance of counsel?

Appellant's Brief does not address issues outside the Questions presented.

Appellee also contends that the Court of Appeals did not rule on Mr. Dotson's request to rule on his claims under a CR 60.02 standard. Appellee Brief, pg. 21. Appellee fails to note that the Court of Appeals order states, "Further, any relief appellant [Dotson] may wish to pursue under either CR 60.02 or CR 60.03 must first be brought in the Circuit Court before this Court may review the matter." Court of Appeals Order.

C. Mr. Dotson Presented Sufficient Reasons to Overturn Parrish v. Commonwealth

Mr. Dotson provided ample reasons for this Court to overturn Parrish v. Commonwealth, 283 S.W.3d 675 (Ky. 2009). See, Appellant's Brief, pgs. 8-15. Mr. Dotson will not repeat those arguments here, but will address several misstatements or mischaracterizations made in Appellee's Brief. First, Appellee claims that Mr. Dotson is asking this Court to overturn "over 45 years of Kentucky judicial precedent." Appellee Brief, pg. 12. See also, id. at 19 ("Under Dotson's argument, the Kentucky High Court has misinterpreted its own criminal rule for over 40 years."). Parrish – the first case addressing the question of whether an RCr 11.42 motion becomes moot once the movant is no longer in custody – is a mere two (2) years old, not 45. Sipple v. Commonwealth, 384 S.W.2d 332 (Ky. 1964), and Wilson v. Commonwealth, 403 S.W.2d 710 (Ky. 1966), which the Commonwealth cites for the proposition that an RCr 11.42 motion "would become moot once the defendant has been released from custody," Appellee Brief, pg. 13, actually dealt with the requirement that a defendant be in custody *at the time an RCr 11.42 motion is filed.* Sipple, at 332; Wilson, at 711-712. Parrish was this Court's first

opportunity to speak to the question of whether a defendant had to be in custody at the time RCr 11.42 relief was granted. As such, Mr. Dotson is asking this Court to reconsider a ruling made a mere two (2) years ago which has not become entrenched in the legal system, nor been relied on to anyone's detriment.

Second, the Commonwealth asserts that Parrish is supported by the plain language of RCr 11.42, but completely ignores RCr 11.42(6). Under RCr 11.42(6), if the movant is entitled to relief, "the court shall vacate the judgment and discharge, resentence, or grant him or her a new trial, or correct the sentence as may be appropriate." RCr 11.42(6) contemplates relief other than release from custody. While completion of a sentence moots one remedy available under 11.42(6), it does not moot the others.

In an apparent attempt to confuse the issue before this Court, the Commonwealth spends several pages of its brief comparing 28 U.S.C 2241, 2254, 2255 and RCr 11.42 and CR 60.02. Appellee Brief, pgs. 16-19. These comparisons are wholly irrelevant to the question before this Court. What is relevant is that the Parrish Court relied on federal cases in reaching its ruling, but failed to recognize that those cases were outdated or explicitly overruled. See, Appellant Brief, pgs. 11-14.

In comparing the federal post-conviction system to Kentucky's, the Commonwealth cites to United States v. Bustillos, 31 F.3d 931 (10th Cir. 1994): "The court specifically ruled that Bustillos had made an insufficient showing that he remained 'in custody' on his conviction in order to prove that the court had subject matter jurisdiction over his motion to vacate, set aside, or correct that sentence." Appellee Brief, pg. 15. But Bustillos dealt with the question of whether a petitioner had to be in custody when a 2255 motion was filed, not when relief is granted. Bustillos, at 933 ("[P]etitioner

had fully served the three-year sentence for the challenged conviction *by the time he filed his motion* attacking that sentence.") (emphasis added). Illustrating Mr. Dotson's point, Bustillos explicitly recognized that the principle of Carafas - that a federal court's jurisdiction is not defeated by a petitioner's completion of his sentence – applies to both motions pursuant to 2254 and 2255, upon which RCr 11.42 is modeled.[1] Bustillos, at 933.

Appellee also argues that this Court should not consider Mr. Dotson's offered reasons to overrule Parrish because those reasons were not presented to the Court of Appeals. Appellee Brief, pg. 14. The Court of Appeals does not have the authority to overrule Parrish, a decision of this Court. Therefore, Mr. Dotson was not required to ask that Court to do something it is powerless to do before making that request of this Court.

D. Mr. Dotson Received Ineffective Assistance of Counsel

Appellee asserts that Mr. Dotson's claims of ineffective assistance of counsel turn on who fired the fatal shot – Mr. Dotson or his co-defendant Murphy – and then proceeds

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[1] Appellee also points to Pennsylvania and Arkansas as states other than Kentucky that require a petitioner to be in custody at the time relief is granted. Appellee Brief, pg. 19. Numerous states hold otherwise. See, e.g., State v. Superior Court of Maricopa County, 380 P.2d 1009, 1011 (Ariz. 1963) ("the law recognizes and protects an individual's interest in his reputation and it would be absurdly inconsistent to dismiss as moot a proceeding initiated to clear one's name of the stigma and infamy of an allegedly erroneous conviction on a criminal charge."); Herbert v. Manson, 506 A.2d 98 (Conn. 1986) (collateral consequences are sufficient to combat mootness if the original petition was filed while the petitioner was in custody); People v. Halterman, 359 N.E.2d 1223, 1225 (Ill. App. 1977) ("disabilities and adverse collateral consequences automatically flow from entry of the court's judgment which foreclose on allegation of mootness even though the defendant has served his sentence."); Rader v. State, 393 N.E.2d 199 (Ind. App. 1979) (sentence expiring does not dictate mootness if it is a felony); Bennett v. State, 289 A.2d (Me. 1972) ("once jurisdiction has attached in our post-conviction habeas corpus court by reason of the existence, at the time of the filing of the petition, of the necessary actual or technical physical restraint required by the statute, the unconditional released from custody during the course of the proceedings and prior to final adjudication does not deprive the courts of the jurisdiction to further entertain the issue presented."); Morrisey v. State, 174 N.W.2d 131, 133 (Minn. 1970) ("the consequent disabilities flowing from the stigma of conviction remain. These disabilities, which are real and substantial, may seriously prejudice a wrongfully convicted person in both his social and business life and, among other things, may expose him to impeachment of his credibility should he be a witness in the trial of any action."). Should this Court overrule Parrish, it would not be alone in allowing a post-conviction motion to be litigated to finality despite the movant's release from custody.

to refute that argument. See, Appellee's Brief, pgs. 29, 30, 32, 35-36. However, the Appellee is refuting an argument that Mr. Dotson never made. Indeed, it is hard to understand how this supposed argument would be consistent with Mr. Dotson's claim that counsel was ineffective for failing to call an *alibi* witness.

Mr. Dotson's claims do not rest on whether he or Mr. Murphy fired the fatal shot. As Mr. Dotson made clear in responding to this identical argument from Appellee's Brief in the Court of Appeals, Mr. Dotson has consistently denied even being present with Mr. Murphy and Chad Ratliff when Mr. Ratliff was killed. The relevant question in evaluating Mr. Dotson's claims is whether Mr. Dotson was present at all. The evidence placing Mr. Dotson at the scene (Mr. Murphy's testimony and a jailhouse snitch) would have been extremely undermined by the testimony presented at Appellant's RCr 11.42 evidentiary hearing.

In refuting an argument that Mr. Dotson never made, Appellee unbelievably claims that the testimony offered at the evidentiary hearing would not have conflicted with anything that Mr. Curtis testified to. Appellee Brief pg. 35-36. The testimony offered by Angela Newsome, Julie McCoy Galloway, and Belinda Stiltner would have directly and unquestionably contradicted Mr. Murphy's trial testimony and it is disingenuous, at best, to claim otherwise.

Mr. Murphy testified that Mr. Dotson was present when Mr. Ratliff was killed and that Mr. Dotson shot Mr. Ratliff in the head. Ms. Stiltner testified at the hearing that Mr. Dotson was at home when Mr. Ratliff was killed. Ms. Newsome and Ms. Galloway testified that Mr. Murphy confessed to shooting Mr. Ratliff and told them he planned on framing Mr. Dotson for it. Ms. Galloway even testified that Mr. Murphy told her that he

shot Mr. Ratliff in the top of the head, the shot Mr. Murphy claimed was fired by Mr. Dotson. It is hard to imagine testimony more contradictive of Mr. Murphy's trial testimony.

In arguing that Appellant's trial counsel did not render ineffective assistance of counsel, Appellee notes that Mr. Dotson was initially charged with capital murder, but was convicted of manslaughter in the first degree and was sentenced to "only" 12 years. Appellee Brief, pg. 22. Mr. Dotson's sentence can hardly be considered "only" 12 years if he is innocent of these charges, as he has contended all along. At the RCr 11.42 evidentiary hearing he presented an alibi witness and two entirely disinterested witnesses who testified that Mr. Dotson's co-defendant confessed to killing Mr. Ratliff and told them he planned on framing Mr. Dotson for it. The fact that Mr. Dotson was convicted of a lesser-included offense hardly establishes that trial counsel was effective if, by presenting these witnesses' testimony to the jury, Mr. Dotson could have been acquitted altogether.

In arguing that counsel's failure to elicit exculpatory testimony from witnesses and to present their testimony by avowal was legitimate trial strategy, Appellee cites to trial counsel's testimony that he thought the witnesses had credibility problems due to their involvement with drugs. As discussed more thoroughly in Appellant's Brief, pgs. 17-21, this explanation simply does not hold water. Trial counsel called Ms. Galloway and Ms. Newsome to the stand at Mr. Dotson's trial, so he obviously felt they were credible enough to present to a jury. He **repeatedly** tried to elicit testimony from them regarding Mr. Murphy's inculpatory statements. See chart, Appellee Brief pg. 31. Trial counsel testified that he believed this testimony was so important to Mr. Dotson's defense

that, when he realized that it would no longer be admissible as admissions of a party once Mr. Murphy plead guilty a few days before trial, he "wanted to continue the trial." V.R. 1/10/08 02:55:50-02:56:17.

The Commonwealth conveniently ignores the fact that their own witnesses had similar credibility problems. Both Mr. Murphy and Mr. Estepp, the jailhouse snitch, were admitted drug abusers. Murphy testified that he began taking drugs at the age of 17 or 18. V.R. 06/06/00, 13:12:09-13:15:20. By the time of trial, he was a regular user of cocaine, prescription pain pills, Xanax, and Valium. Id. He often "shot up" pain medications to get high faster. Id. Murphy admitted to being high when he gave his various statements to the police and was visibility intoxicated on the videotaped interrogation. He also admitted being high when Mr. Ratliff was killed. Id. Mr. Estepp, the jailhouse snitch, admitted being high when Mr. Dotson allegedly confessed to him, despite the fact that he was in jail at the time. V.R. 6/6/00, 09:27:00-09:27:30. The Commonwealth cannot rely on the testimony of admitted drug abusers to convict Mr. Dotson and then justify trial counsel's failure to present exculpatory testimony based on the witnesses' alleged history of drug abuse.

Appellee also argues that Mr. Dotson's trial counsel made a legitimate strategic decision not to call Belinda Stiltner as an alibi witness because Karen Dotson's credibility had been destroyed.[2] Appellee Brief pg. 32-33. Inexplicably, Appellee also argues that Mr. Dotson has not shown prejudice from counsel's failure to call Ms. Stiltner because her testimony would have been duplicative of Mrs. Dotson's testimony. Appellee Brief pg. 34. The Commonwealth cannot simultaneously argue that Mrs.

[2] Appellant does not concede that this was a legitimate strategic decision, for the reasons already stated in his Brief. Appellant Brief, pgs. 21-27.

Dotson's credibility had been destroyed **and** that Ms. Stiltner's testimony was unnecessary because it simply confirmed Mrs. Dotson's testimony. It would be precisely because of perceived problems with Mrs. Dotson's credibility that Ms. Stiltner's testimony would have been needed all the more. The presentation of additional alibi witnesses is simply not cumulative. Bigelow v. Williams, 367 F.3d 562, 565 (6th Cir. 2004). See also, Holland v. Commonwealth, 679 S.W.2d 832 (Ky. App. 1984).

That said, the Commonwealth ignores the fact that Mrs. Dotson's credibility was not attacked until rebuttal. Trial counsel acknowledged that the substance of Mr. Dotson's alibi was not undermined during Mrs. Dotson's testimony. Only Mrs. Dotson's general credibility as to collateral matters was impeached through a rebuttal witness. V.R. 1/10/08, 02:45:24-02:45:48. Trial counsel's purported "strategic" reason for failing to call Ms. Stiltner is nothing more than a *post hoc* justification.

Appellee notes that Mr. Dotson's trial counsel testified that he subpoenaed every witness that Mr. Dotson had asked him to. Appellee Brief pg. 33. However, counsel is not simply a passive conduit for a criminal defendant's requests. It is counsel's responsibility to investigate the case against his client and determine for himself what witnesses are necessary to his client's defense. The Commonwealth's argument amounts to saying that counsel cannot be found ineffective for failing to call a witness, no matter how exculpatory their testimony, if the client did not affirmatively request that the witness be called. Strickland simply does not allow for such an argument to prevail.

CONCLUSION

It is important to consider what Mr. Dotson's trial could have looked like had his trial counsel presented the evidence later presented at the evidentiary hearing. Given that

the jury convicted Mr. Dotson of manslaughter in the second degree when Mr. Murphy testified that Mr. Dotson walked up to a wounded Chad Ratliff and shot him in the head, the jury clearly did not believed Mr. Murphy's testimony. In contrast to the ever-changing story told by Mr. Murphy in his pursuit to save himself and frame Mr. Dotson, the jury could have heard from two disinterested witnesses with absolutely no motive to lie – in sharp contrast to Mr. Murphy – who heard Mr. Murphy confess to shooting Mr. Ratliff in the head and state his intention to frame Mr. Dotson for it. The jury also could have heard from an unbiased and unimpeached alibi witness that Mr. Dotson was at home when Mr. Ratliff was killed. Confronted with such testimony, the jury would have even more reason not to credit Mr. Murphy's testimony and to acquit Mr. Dotson of any involvement in Mr. Ratliff's death.

For the foregoing reasons and the reasons offered in his initial Brief, Appellant asks this Court to vacate Mr. Dotson's conviction and sentence.

Respectfully submitted,

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