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Post Conviction Remedy--Habeas Corpus--Kentucky Rule of Criminal Procedure 11.42

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Recent Cases

POST CONVICTION REMEDY-HABEAS CORPUS—KENTUCKY RULE OF CRIMINAL PROCEDURE 11.42—Appellant petitioned for a writ of habeas corpus, principally on the ground that his constitutional rights had been violated because his court-appointed counsel had an adverse interest in the proceeding and had failed to represent him effectively in presenting his defense. Appellant chose the habeas corpus proceeding although he also had a remedy under *Kentucky Rule of Criminal Procedure* 11.42 [hereinafter cited as *RCr*]. From a dismissal of the petition on the ground that it failed to state facts upon which relief could be granted, the petitioner appealed. *Held*: Affirmed. Justice Montgomery dissented.¹ The petition for habeas corpus was properly dismissed where there was no showing that the remedy by motion to vacate or correct the sentence was inadequate to test the legality of the petitioner's detention. *Ayers v. Davis*, 377 S.W.2d 154 (Ky. 1964).

As a general rule, the writ of habeas corpus will not be granted where there is another adequate remedy.² A Kentucky case, decided in 1937, held that a writ of habeas corpus will issue where the imprisonment is illegal and no other remedy is available to secure release.³ A later Kentucky case held that the use of the writ of habeas corpus should be restricted within narrow limits, and the procedure to obtain a new trial after judgment, valid on its face, should be by direct application to the court which rendered judgment, rather than by resort to habeas corpus.⁴ Previously, even though another remedy existed, it was not necessarily exclusive. In light of these decisions, the holding of the court of appeals in *Ayers* was a logical, and by no means surprising, step forward.

RCr 11.42 combined with *RCr* 10.06 is designed to replace the writ of coram nobis.⁵ A more precise description would be that the coram nobis remedy is incorporated into the rules, since the relief prescribed is much broader. *Rice v. Davis*⁶ expanded the traditional role of habeas corpus relief to include as grounds radical irregularities other than the lack of jurisdiction of the offense or person. The *Ayers* decision not only made *RCr* 11.42 the exclusive remedy in this area,

¹ *Ayers v. Davis*, 377 S.W.2d 878 (Ky. 1964).

² 39 C.J.S. *Habeas Corpus* § 7 (1936).

³ *Jones v. Commonwealth*, 269 Ky. 772, 108 S.W.2d 812 (1937).

⁴ *Sharpe v. Commonwealth*, 292 Ky. 86, 165 S.W.2d 993 (1942).

⁵ *RCr* 11.42, explanatory comment (1962).

⁶ 366 S.W.2d 153 (Ky. 1963).

but also incorporated the broadened habeas corpus remedy of *Rice* within its scope.

In *Ayers*, the Kentucky Court of Appeals held that RCr 11.42 is similar to relief provided federal prisoners by 28 U.S.C.A. section 2255, and that the purpose of the rule plainly implies that the remedy precludes habeas corpus unless it is not adequate, as is stated expressly in section 2255. Thus, it is clear that RCr 11.42, as interpreted in *Ayers*, provides a post conviction review procedure which is consistent with federal standards. The rule was designed to be in conformity with federal standards and recent Supreme Court pronouncements.⁷ Thus, the *Ayers* decision was not unwarranted.

RCr 11.42 provides for a *direct* attack upon any conviction which would otherwise be subject to a *collateral* attack.⁸ An RCr 11.42 motion is a resumption or continuation of the criminal proceeding on which the movant is entitled to appointed counsel upon a showing that he is financially unable to employ one. Since the motion is in the same court wherein the conviction was rendered, the records are available. A habeas corpus action, on the other hand, is essentially civil in nature.⁹ More often than not, it is brought in a different court from the one in which the judgment under attack was rendered. Hence, neither the records nor the witnesses are readily available, and the state is not obliged to furnish an indigent prisoner a copy of the record or to appoint counsel. These factors prompted the court in *Ayers* to proclaim that: "RCr 11.42 is intended to provide a more satisfactory form of remedy for this type of case than is practicable under habeas corpus."¹⁰

In *Hobbs v. Stivers*,¹¹ decided after the *Ayers* case, the court of appeals denied a petition for a writ of mandamus on the ground that the petition disclosed on its face that ultimately the relief sought would prove fruitless. The court reasoned as follows:

Should we direct the respondent to pass on petitioner's motion it would be incumbent on him to overrule it. Petitioner's only recourse then would be an appeal to this court. To obviate such useless circuitry of motion it is preferable that we say now what would eventually have to be said anyway.¹²

One week after the *Hobbs* decision the court ruled upon a habeas corpus petition in *Langdon v. Thomas*¹³ and used the *Hobbs* case as

⁷ RCr 11.42, explanatory comment (1962).

⁸ *Tipton v. Commonwealth*, 376 S.W.2d 290 (Ky. 1964).

⁹ *Crady v. Cranfill*, 371 S.W.2d 640 (Ky. 1963).

¹⁰ 377 S.W.2d at 154; see also, *Tipton v. Commonwealth*, 376 S.W.2d 290 (Ky. 1964); *Higbee v. Thomas*, 376 S.W.2d 305 (Ky. 1963).

¹¹ 385 S.W.2d 76 (Ky. 1964).

¹² *Id.* at 77.

¹³ 384 S.W.2d 508 (Ky. 1964).

precedent. The court reviewed the merits of the habeas corpus petition and affirmed the lower court's dismissal of the petition. The court reviewed the merits of the petition in order to eliminate the circuitry of action that would have occurred had the court simply held that the petitioner's exclusive remedy was under *RCr 11.42*. Had the court so held, the petitioner's sole recourse would then have been to resort to *RCr 11.42* to present the same question which was then before the court. Since the grounds set forth in the petition were not sufficient to justify relief from the judgment by habeas corpus or under *RCr 11.42*, the court, under the authority of *Hobbs*, considered the merits of the petition and affirmed the dismissal on that basis.

Kentucky has taken two important steps forward in 1964 in the area of post conviction remedy. The first was the holding in *Ayers* that *RCr 11.42* is exclusive in the absence of a showing that it is inadequate. The second was the holding in *Langdon*, which qualified the *Ayers* decision by incorporating the *Hobbs* decision within its scope. The Kentucky rule, in light of these decisions, is that where the validity of a petitioner's imprisonment can be tested by a motion to vacate judgment, filed pursuant to *RCr 11.42*, such procedure is exclusive. However, if the allegation in the petition for habeas corpus is taken as true, and such allegation does not render the original judgment void, the court will not only affirm the necessity of proceeding pursuant to *RCr 11.42*, but will also negatively dispose of the merits of the allegation just as if it had arisen on appeal from a denial of a motion to vacate judgment.

Ralph R. Kinney

TRADE REGULATION—SALE BELOW COST—EVIDENCE OF INTENT.—Plaintiff laundry brought an action against defendant laundry for alleged violation of *Ky. Rev. Stat. 365.030(1)* [hereinafter cited as *KRS*]. Defendant's salesmen, in efforts to expand the firm's linen rental service among motels and nursing homes, solicited some of plaintiff's regular customers by offering two weeks' free service. Plaintiff does ordinary laundry and dry cleaning only. Two of the customers switched to defendant, thus causing plaintiff to lose accounts totaling some 160 dollars per week. Defendant admitted giving the free service and, strictly as a conciliatory gesture, promised to cease this practice. The trial court, on the basis of pre-trial depositions, opening statements of counsel, and the testimony of plaintiff's president, entered a summary judgment for defendant after agreement that no