RENDERED: February 12, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002455-MR

S. PETER PLYS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE EDWIN A. SCHROERING, JR., JUDGE
ACTION NO. 96-CR-001034

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
* * * * * * * * * *

BEFORE: BUCKINGHAM, DYCHE, AND GARDNER, JUDGES.

GARDNER, JUDGE. S. Peter Plys (Plys), appeals an order of the Jefferson Circuit Court entered on September 11, 1997, denying his motion to vacate, set aside or correct judgment brought pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42, without an evidentiary hearing on the motion. We affirm.

On May 7, 1996, Plys was indicted for first degree burglary, first degree rape, and first degree sodomy. On the day of his scheduled trial, appellant accepted the Commonwealth's offer on a plea of guilty and filed a motion to enter a guilty plea. Pursuant to the plea agreement, the appellant admitted guilt to each of the indicted charges in exchange for a

recommended sentence of fifteen years on each charge, to run concurrently for a total of fifteen years to serve. The trial court subsequently accepted the plea agreement and sentenced Plys in accordance with its terms. Following an unsuccessful attempt to gain shock probation, on August 25, 1997, the appellant filed the present motion to vacate his sentence pursuant to RCr 11.42. On September 10, 1997, the trial court denied the motion. This appeal followed.

RCr 11.42 allows individuals in custody under sentence to raise a collateral attack to the judgment entered against them. RCr 11.42(2) requires the movant to "state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds." It is well-established that an allegation of ineffective assistance of counsel does not state grounds for relief under RCr 11.42 unless the petition presents sufficient facts to show that the representation of counsel was inadequate. See Thomas v. Commonwealth, Ky., 459 S.W.2d 72 (1970); Mullins v. Commonwealth, Ky., 454 S.W.2d 689, 691 (1970).

In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing that counsel's performance was deficient and that the deficiency resulted in actual prejudice affecting the outcome. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985), cert. denied, 478 U.S. 1010, 106 S. Ct. 3311, 92 L. Ed. 2d 724 (1986). The movant bears the burden of overcoming a strong

presumption that counsel's assistance was constitutionally sufficient and outside the wide range of professionally competent assistance. Strickland v. Washington, 466 U.S. at 689-90, 104 S. Ct. at 2065-66; Wilson v. Commonwealth, Ky., 836 S.W.2d 872, 878 (1992), cert. denied, 507 U.S. 1034, 113 S. Ct. 1857, 123 L. Ed. 2d 479 (1993). Counsel's performance is based on an objective standard of reasonableness. Strickland v. Washington, 466 U.S. at 688, 104 S. Ct. at 2064. Prejudice is defined as proof that there is a reasonable probability that, but for counsel's unprofessional errors, the results would have been different. Id., 466 U.S. at 694, 104 S. Ct. at 2068; Commonwealth v. Gilpin, Ky., 777 S.W.2d 603, 605 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland v. Washington, 466 U.S. at 694, 104 S. Ct. at 2068.

Appellant's first contention is that his "employer had critical exculpatory evidence as to [appellant's] innocence." However, Plys does not identify this witness or what the alleged "exculpatory evidence" is. Failing to produce a witness for the defendant is not error absent an allegation that the testimony of the witness would have compelled acquittal. Robbins v. Commonwealth, Ky. App., 719 S.W.2d 742, 743 (1986). Broad general allegations, such as this, are insufficient to vacate a judgment. Adkins v. Commonwealth, Ky., 471 S.W.2d 721, 722 (1971). The contention, as stated, fails to meet either the deficient performance or the prejudice prong of the Strickland test.

Plys' second contention is that his trial counsel told him that he "had no opportunity to 'win' at trial and that he had to enter a plea of guilt (sic)," and told him "to admit the allegations or face sixty years incarceration." If trial counsel's assessment of the case was that the appellant had little chance of winning at trial, and he told the appellant as much, this does not constitute deficient performance. The advice by a lawyer for a client to plead guilty is not an indication of any degree of ineffective assistance. Beecham v. Commonwealth, Ky., 657 S.W.2d 234, 236-237 (1983). Similarly, trial counsel's admonition to "admit . . . or face sixty years" does not constitute deficient performance. Plys was charged with three Class B felonies. The maximum imprisonment authorized for a Class B felony is twenty years, and it is possible that the sentences would have been run consecutively. Hence, the appellant "faced" sixty years, in the sense that he "risked" a sixty year sentence if convicted of all charges, received the maximum sentence, and the sentences were run consecutively.

Appellant's next contention relates to trial counsel's failure to call, at the sentencing hearing, a Dr. Wagner, who helped developed an alternative sentencing plan, or any character witnesses. However, Plys was sentenced in accordance with his plea agreement, so we discern no prejudice from any failure to call these witnesses. Further, a capable witness was called to present the alternative sentencing plan to the court, so additional testimony by Dr. Wagner is of questionable significance.

Appellant next contends that his trial counsel told him, in essence, that if he pled guilty he would only serve six months before being "probated." However, in his motion to plead guilty, appellant stated, "[o]ther than [the Commonwealth's offer on a plea of guilty], no one, including my attorney has promised me any other benefit in return for my guilty plea[.]" Moreover, in the course of his guilty plea, the following colloquy occurred:

> Trial Court: Now have any threats been made to you or any promises or assurances been made to you by anybody that if you plead guilty that this court's gonna go easy on you or will probate the sentence or will otherwise give any special treatment. Anything like that?
>
> Plys: No your Honor.

Hence the record directly contradicts the appellant's allegation that he was assured that he would be "probated", after serving six months.

Lastly, appellant alleges the trial court erred by denying his RCr 11.42 motion without conducting an evidentiary hearing. Where the movant's allegations are refuted on the face of the record as a whole, no evidentiary hearing is required and movant is not entitled to relief. Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726, 727 (1986). An evidentiary hearing on an RCr 11.42 motion is not required if the record refutes movant's factual allegations or if movant's unrefuted allegations do not establish a right to relief. Skaggs v. Commonwealth, Ky., 803 S.W.2d 573 (1990). Here, appellant's allegations are refuted

from the face of the record. Therefore it was proper for the trial court to render its order without an evidentiary hearing.

Having found no error in the order of the trial court, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

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