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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002559-MR

BRUCE PASLEY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 02-CR-001203

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: McANULTY AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.[1]

McANULTY, JUDGE: Bruce Pasley appeals the order of Jefferson Circuit Court denying his motion pursuant to RCr 11.42 for correction of sentence. He argues on appeal that his counsel's assistance was ineffective because he failed to sufficiently investigate Pasley's case, that the trial judge abused its

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

discretion by accepting a guilty plea to charges Pasley could not have committed, and the court should have conducted an evidentiary hearing.

In May 2002, Pasley was indicted by a Jefferson County Grand Jury for second-degree escape, theft by unlawful taking over $300.00, first-degree burglary, first-degree wanton endangerment (two counts), first-degree fleeing or evading the police, intimidating a witness, second-degree burglary, fourth-degree assault (two counts), and third-degree terroristic threatening. The charges followed an incident on May 14, 2002 between Pasley, Trina Pasley, his estranged wife, and her two daughters. Pasley allegedly entered Ms. Pasley's home, violating his Home Incarceration Program (HIP) and disobeying a court order of no contact where he threatened his two step-daughters and Trina with two kitchen knives. Trina fled to a neighbor's to call 911. When police arrived, Pasley was sitting in his truck and left the scene. The police chased Pasley, however, called off the pursuit in the interest of public safety. Pasley was arrested two days later.

Pasley, pursuant to counsel initially entered a plea of not guilty on June 3, 2002. On August 28, 2002, after plea negotiations with the Commonwealth's Attorney, Pasley changed his plea to guilty pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). Pursuant to

the offer, Pasley pled guilty to second-degree escape, intimidating a witness, first-degree fleeing and evading the police, third-degree terroristic threatening, and two counts of first-degree wanton endangerment. Pasley also agreed to plead guilty to two counts of first-degree criminal trespass, which were amended from counts of first-degree and second-degree burglary. The charges of theft by unlawful taking and both counts of first-degree assault were dismissed.

The Commonwealth recommended a sentence of three years on each felony charge and twelve months on each misdemeanor, to run concurrently for a term of imprisonment totaling three years. The Commonwealth also agreed to dismiss a first-degree persistent felony offender charge against appellant which arose from a separate indictment. On November 1, 2002, the circuit court sentenced Pasley in accordance with the plea agreement.

On September 26, 2003, Pasley filed a pro se motion pursuant to RCr 11.42 requesting the circuit court to correct his sentence alleging ineffective assistance of counsel and requesting an evidentiary hearing be set. Pasley asserts that defense counsel's failure to fully and properly investigate the facts of the charged offenses resulted in defense counsel misleading him into pleading guilty.

The Commonwealth argues that Pasley entered the guilty plea intelligently, knowingly and voluntarily, therefore

effectively waiving all defenses to the original charges. Without conducting an evidentiary hearing, the circuit court entered an order denying the motion on November 10, 2003. Pasley now appeals.

Pasley argues that there is an issue not refuted by the record as to whether counsel investigated the facts of his case before advising him to plead guilty. Pasley contends that had his attorney conducted a sufficient investigation of the charges before advising Pasley to plead guilty, he would have discovered the alleged mistakes in his indictment and the subsequent plea agreement. Thus, he believes ineffectiveness was shown because if counsel had investigated the facts more thoroughly, he would not have advised him to accept the Commonwealth's plea agreement. Pasley further maintains that due to his counsel's failure to recognize the alleged mistakes, his plea was not entered knowingly, intelligently, and voluntarily.

The Commonwealth asserts that Pasley waived his argument as to ineffective assistance of counsel and sufficiency of evidence by pleading guilty freely and voluntarily. The Commonwealth adds that if we consider his claim of ineffective assistance of counsel, we will find that the attorney's advice to Pasley to accept the plea agreement was proper because he was facing a significantly longer sentence if he went to trial. The

Commonwealth argues that neither an evidentiary hearing nor appointment of counsel was warranted.

The Commonwealth errs in asserting that Pasley cannot raise the issue of attorney effectiveness in a post-conviction motion. It is well settled that a defendant may challenge the effectiveness of counsel despite entering a guilty plea. Centers v. Commonwealth, 799 S.W.2d 51 (Ky.App. 1990). In order to prove ineffective assistance of counsel, the defendant must show, (1) counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance as the counsel was not performing as counsel guaranteed by the first amendment and (2) that the deficient performance prejudiced the defense by so seriously affecting the process that there is a reasonable probability that the defendant would not have pled guilty, and the outcome would have been different. Id. at 55, citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052. 80 L. Ed. 2d 674 (1984). Thus, we review Pasley's claim that he was improperly advised to plead guilty to the allegedly mistaken charges.

The issue upon review of the denial of a RCr 11.42 motion without a hearing is whether the motion on its face states grounds that are not conclusively refuted by the record and which if true would invalidate the conviction. Baze v. Commonwealth, 23 S.W.3d 619, 622 (Ky. 2000); Lewis v.

Commonwealth, 411 S.W.2d 321 (Ky. 1967). We believe the record refutes Pasley's claim that the burglary, escape, wanton endangerment and terroristic threatening charges were allegedly mistakenly made and he was wrongly advised to plead guilty. Thus, we conclude a hearing was not necessary in this case.

The first alleged mistake relates to the burglary and criminal trespass charges. Pasley argues because his name was on the lease he could not have committed burglary or criminal trespass. First-degree criminal trespass is committed when a person "knowingly enters or remains unlawfully in a dwelling." KRS 511.060. The record supports that a judge had issued a no contact order between Trina and Bruce, therefore Pasley entered Trina's residence with the requisite knowledge that his presence was unlawful, consequently committing criminal trespass.

The only evidence to the contrary is the lease supplied by Pasley containing his and Trina Palsey's names. While this may suggest a right to be on the premises, it does not guarantee an absolute right as a court order can suspend the legal rights granted in the contract. Pasley provides no substantiation of his allegations that his counsel never investigated the charges. Moreover the record provides enough evidence for an attorney to effectively conclude that the charge was correctly made.

The second alleged mistake relates to the second-degree escape charge. The record contains a May 7, 2002 agreed order to participate in HIP and a Jefferson County Department of Corrections Home Incarceration Department form notifying Pasley of the definition of escape and the resulting consequences and charges, both signed by Pasley. He offers no evidence contrary to the officers' finding that Pasley was not in compliance with HIP conditions and standards.

The third alleged mistake relates to the wanton endangerment and terroristic threatening charges. Pasley argues the two offenses cannot be charged in the same indictment because one is a lesser offense of the other. A person can be charged with wanton endangerment and terroristic threatening resulting from the same incident when there are multiple victims. The record supports that there were three victims justifying two counts of wanton endangerment and one count of terroristic threatening. Pasley does not offer any evidence to refute the claims that he is responsible for the injuries or the threats.

Therefore, the attorney's advice to plead guilty to these charges was not deficient. Gall v. Commonwealth, 702 S.W.2d 37, 39 (Ky. 1985), cert. denied, 478 U.S. 1010, 106 S. Ct. 3311, 92 L. Ed. 2d 203 (1985) (quoting Strickland, 466 U.S. at 687, 104 S. Ct. at 2064).

RCr 11.42 motions must state specifically the grounds on which the conviction is being challenged as well as state the facts relied on in support of such grounds. Stanford v. Commonwealth, 854 S.W.2d 742 (Ky. 1993). Without a minimum of factual basis in the verified RCr 11.42 motion, the motion should be summarily overruled. Id. At 748.

We conclude that the record in this case adequately refutes Pasley's speculative assertions. Where the movant's allegations are refuted on the face of the record as a whole, no evidentiary hearing or appointment of counsel is required. Hopewell v. Commonwealth, 687 S.W.2d 153, 154 (Ky.App. 1985). For the foregoing reasons, we affirm the order of the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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