

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001206-MR

GREGORY D. SPEARS

APPELLANT

v. APPEAL FROM FULTON CIRCUIT COURT
HONORABLE WILLIAM L. SHADOAN, JUDGE
ACTION NO. 01-CR-00100

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER¹ AND DIXON, JUDGES; PAISLEY,² SENIOR JUDGE.

DIXON, JUDGE: Appellant, Gregory Spears, appeals as a matter of right from the Fulton Circuit Court's denial of his motion for RCr 11.42 relief. Appellant claims that he is entitled to relief due to the ineffective assistance of his trial counsel. We conclude that the allegations contained in Appellant's motion can be refuted from the face of the record and thus, the trial court properly denied the motion.

¹ Judge David A. Barber concurred in this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

² Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

In October 2001, a Fulton County Grand Jury indicted Appellant on two counts of first-degree robbery, one count of first-degree rape, and one count of first-degree burglary. The indictment charged that Appellant unlawfully entered the Kentucky Farm Bureau Agency in Hickman, Kentucky, while armed with a gun. After stealing money from the agency, Appellant robbed and forcibly raped an employee, who was seven months pregnant at the time.

On March 21, 2002, Appellant pled guilty to all charges and was sentenced to a total of sixty years' imprisonment. His convictions and sentence were subsequently affirmed on direct appeal. *Spears v. Commonwealth*, 134 S.W.3d 12(Ky. 2003).

On April 7, 2005, Appellant filed a motion in the Fulton Circuit Court to vacate or set aside the judgment pursuant to RCr 11.42. Appellant claimed that he was entitled to a new trial due to the ineffectiveness of his trial counsel. After consideration of the record, argument and evidence before the trial court, including an affidavit from Appellant's trial counsel directly refuting the majority of Appellant's claims³, the trial court denied the motion. This appeal ensued.

Appellant claims herein that the trial court erred in refusing to hold an evidentiary hearing to resolve his claim that trial counsel's ineffectiveness rendered Appellant's guilty plea involuntary. Specifically, Appellant alleges that trial counsel (1) failed to conduct adequate investigation; (2) failed to sufficiently interact with Appellant; (3) failed to file a motion for a change of venue; (4) provided inaccurate information as to

³ We note that trial counsel's affidavit was not signed at the time the Commonwealth's response was filed on May 13, 2005. In fact, counsel did not sign the affidavit until June 22, 2005. Nevertheless, we are of the opinion that such does not impact the appropriateness of the trial court's ruling.

Appellant's potential sentence and parole eligibility; and (5) failed to investigate and present mitigation evidence.

The two-prong test for evaluating ineffective assistance of counsel claims is well established. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), mandates that a defendant first show that counsel's performance was deficient. This requires errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Id.* at 687, 104 S.Ct. at 2064. The defendant must then show that counsel's deficient performance prejudiced the defense, i.e., that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* As our Supreme Court noted in *McQueen v. Commonwealth*, 721 S.W.2d 694, 697 (Ky. 1986), *cert. denied*, 481 U.S. 1059 (1987), the defendant must demonstrate that "there is a reasonable possibility that, but for counsel's unprofessional errors, the result of the trial would have been different."

A defendant is not guaranteed errorless counsel, but only counsel likely to render reasonably effective assistance. *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997), *cert. denied*, 521 U.S. 1130 (1997). As such, the critical issue in the context of an RCr 11.42 motion is not whether counsel made any errors, but instead whether counsel was so thoroughly ineffective that "defeat was snatched from the hands of probable victory." *Haight v. Commonwealth*, 41 S.W.3d 436, 441 (Ky. 2001), *cert. denied*, 534 U.S. 998 (2001). Further, in an RCr 11.42 proceeding, the movant has the burden of establishing that he was deprived of some substantial right that would justify the extraordinary relief afforded by the post-conviction proceeding. As stated in *Wahl v.*

Commonwealth, 396 S.W.2d 774, 775 (Ky. 1965), *cert. denied*, 384 U.S. 976 (1966), “[T]he moving party on a motion under RCr 11.42 undertakes a heavy burden to overcome the regularity of the conviction. The motion is not a substitute for appeal, and it does not permit a review of all the alleged errors surrounding the trial.”

In considering an ineffective assistance of counsel claim, a reviewing court must consider the totality of the evidence before the court and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. *See United States v. Morrow*, 977 F.2d 222 (6th Cir. 1992), *cert. denied*, 508 U.S. 975 (1993). And a reviewing court must be “highly deferential in scrutinizing counsel’s performance” in determining whether counsel rendered ineffective assistance. *Harper v. Commonwealth*, 978 S.W.2d 311, 315 (Ky. 1998), *cert. denied*, 526 U.S. 1056 (1999).

In the instant case, Appellant has an even more stringent burden in that he entered a valid guilty plea to the charges. Appellant must not only demonstrate that counsel was deficient, but that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pled guilty but would have insisted on going to trial. *Bronk v. Commonwealth*, 58 S.W.3d 482 (Ky. 2001); *See also Centers v. Commonwealth*, 799 S.W.2d 51 (Ky. App. 1990).

A review of the record in this case clearly confirms that Appellant's allegations of ineffective counsel were refuted from the face of the record, and in particular, from the plea colloquy.

Appellant stated during his plea colloquy that he had received no promises in exchange for his plea, and that he understood he could face up to eighty years' imprisonment. Further, Appellant stated that he had adequate time to speak with his attorney, that he felt comfortable entering the plea, that his attorney had answered all of his questions and had looked into the aspects of the case he had asked him to, and that he was satisfied with his attorney's representation. While Appellant's plea was a straight plea, in that there was no agreement as to punishment, Appellant understood that given the nature of the crimes and the overwhelming evidence against him, including his confession, he had a better chance of avoiding the maximum penalty with trial court sentencing than if he went before a jury. And in fact, Appellant received sixty years, rather than the potential maximum of eighty years imprisonment.

The trial court noted in its order denying RCr 11.42 relief, that while Appellant made many bald assertions about counsel's performance, he failed to plead with any specificity what he thought counsel could have or should have done differently.

The court noted:

[B]ased upon a review of the video record maintained by the clerk, there is no question but that Defendant's guilty plea was knowingly, intelligently, and voluntarily made. This Court takes great lengths to establish to its satisfaction that Defendant is aware of his rights, those he is giving up, and the consequences of his guilty plea when accepting a defendant's plea of guilty. Further, the Court finds that

Defendant was adequately afforded the opportunity to present mitigation evidence at his sentencing, but that those persons who could most favorably speak on behalf of defendant, i.e., his family members, declined to do so. No special preparation should be required to stand before the Court and plead for some form of mercy for one's child, sibling, grandchild, etc.

The Court ruled that the record directly refuted Appellant's claims that counsel failed to conduct adequate investigation and failed to interact with Appellant. Further, as evidenced above, the trial court was satisfied that Appellant's plea was knowingly, intelligently and voluntarily made.

With respect to the allegation that counsel failed to file a motion for a change of venue, the trial court commented that Appellant's guilty plea waived his claim. Nevertheless, the record reveals that Appellant did, in fact, file a *pro se* motion for a change of venue, so he cannot now argue that he was prejudiced by counsel's failure to do so.

Finally, the record indicates that the issue of parole eligibility was discussed at the sentencing hearing, at which time trial counsel argued for the minimum and concurrent sentences because of the application of the violent offender statute, which would require Appellant to serve 85% percent of his sentence before being eligible for parole. In any event, the failure to inform a defendant of parole eligibility does not render a guilty plea involuntary under *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). See also *Turner v. Commonwealth*, 647 S.W.2d 500 (Ky. App. 1982).

An evidentiary hearing is not required if the issues raised are refuted by the record. *Strickland* at 687, 104 S.Ct. 2064. Further, conclusory allegations that are not supported by specific facts do not justify a hearing “because RCr 11.42 does not require a hearing to serve the function of a discovery deposition.” *Sanborn v. Commonwealth*, 975 S.W.2d 905, 909 (Ky. 1998), *cert. denied*, 526 U.S. 1025 (1999). A hearing is only required if the motion raises an issue that cannot be determined on the face of the record. RCr 11.42(5); *Stanford v. Commonwealth*, 854 S.W.2d 742 (Ky. 1993), *cert. denied*, 510 U.S. 1049 (1994).

Kentucky law contains a strong presumption that trial counsel’s performance falls within the wide range of reasonable professional assistance. *Commonwealth v. Pelphrey*, 998 S.W.2d 460 (Ky. 1999). The trial court properly determined that all of Appellant’s claims of ineffective assistance of counsel were refuted from the face of the record and he was not entitled to post-conviction relief.

The Fulton Circuit Court’s order denying Appellant’s motion for RCr 11.42 relief is affirmed.

ALL CONCUR.

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