

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000337-MR

PHILLIP CAIN

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JAMES R. SCHRAND, II, JUDGE
ACTION NO. 05-CR-00496

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: MOORE AND NICKELL, JUDGES; HARRIS,¹ SENIOR JUDGE.

NICKELL, JUDGE: Phillip Cain (Cain), *pro se*, appeals from an order of the Boone Circuit Court's denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 post-conviction motion based upon alleged ineffective assistance of counsel.

The trial court denied his motion, finding the performance of Cain's attorney did

¹ Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

not fall outside the wide range of professionally competent assistance. After review, we affirm, holding that Cain failed to show that but for the alleged ineffectiveness of his trial counsel, he would have reasonably insisted on going to trial rather than entering into a plea agreement.

On July 5, 2005, Cain and Mark Jackson (Jackson) spent the day ingesting heroin and alcohol, at the end of which they stole a car, drove to a nearby hotel, and stole \$300.00 while holding the hotel clerk at knifepoint. The hotel clerk's phone call to the police led to the arrest of Cain and Jackson along I-75 with the money and knife in their possession. Also, the hotel clerk was willing to testify about the robbery at trial. After Cain's arrest, the Boone County grand jury returned a four-count indictment charging him with: (1) complicity² to commit robbery in the first degree;³ (2) operating a motor vehicle while license revoked or suspended;⁴ (3) receiving stolen property with a value of \$300 or more;⁵ and (4) being a persistent felony offender in the first degree (PFO I).⁶ If convicted and given the maximum sentence allowed on each count, Cain could have been imprisoned for twenty-five years or more.

Following plea negotiations, the Commonwealth offered Cain a plea agreement whereby it would recommend a sentence of ten years' imprisonment in

² KRS 502.020.

³ KRS 515.020, a Class B felony.

⁴ KRS 186.620, a Class B misdemeanor.

⁵ KRS 514.110, a Class D felony.

⁶ KRS 532.080.

exchange for a guilty plea and his testimony against Jackson. Cain accepted the plea agreement. During the guilty plea hearing, Cain stated in open court, he was satisfied with the legal counsel he had received prior to entering into the plea agreement and that he was entering into the agreement “freely, knowingly, intelligently and voluntarily.” Furthermore, after the trial court reviewed the plea agreement, he reviewed documents Cain had signed stating his attorney had “fully explained” the case to him, he understood the “charges” against him, and a “Certificate of Counsel” signed by Cain’s attorney stating she had discussed the case with Cain and he understood his rights. The trial judge then accepted Cain’s plea of guilty and subsequently sentenced him in accordance with the plea agreement.

Almost three years later, Cain filed a motion pursuant to RCr 11.42 seeking to vacate his conviction due to receiving ineffective assistance of counsel. After reviewing the record, the trial court denied the motion, finding Cain had failed to provide any evidence that his attorney had provided ineffective counsel. This appeal followed.

The standard of review for denial of a motion for post-judgment relief under RCr 11.42 is well-settled. Generally, to establish a claim for ineffective assistance of counsel, a movant must meet the requirements of a two-prong test by proving: 1) counsel's performance was deficient; and 2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985),

cert. denied, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). Under *Strickland*, the standard for attorney performance is reasonable, effective assistance. A movant bears the burden of establishing his counsel's representation fell below the objective standard of reasonableness. In doing so, he must overcome the strong presumption that counsel's performance was adequate. *Jordan v. Commonwealth*, 445 S.W.2d 878 (Ky. 1969); *McKinney v. Commonwealth*, 445 S.W.2d 874 (Ky. 1969).

If an evidentiary hearing was held, we must determine whether the trial court erroneously found Cain received effective assistance of counsel. *Ivey v. Commonwealth*, 655 S.W.2d 506 (Ky. App. 1983). When, as here, an evidentiary hearing was not held, our review is limited to “whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction.” *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967). *See also Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986).

When a movant enters a guilty plea, the *Strickland* standard of review is slightly modified in that he must first show his counsel's performance was deficient, and then show “a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203, (1985); *see also Sparks*, 721 S.W.2d at 727-28 (Ky. App. 1986). With these standards in mind we address Cain's three allegations of error.

Cain first argues his conviction should be vacated because his attorney failed to develop a diminished capacity defense prior to negotiating the plea agreement and allowing Cain to enter into such agreement. In his brief to this Court, Cain makes several unsupported allegations regarding his attorney's failure to develop such a defense and how these alleged failures fell below professional standards. However, even if we were to assume these unsubstantiated allegations sufficiently satisfied the first prong of the *Sparks* test, Cain has failed to satisfy the second prong. Cain has not affirmatively shown that had his attorney developed this defense he would have reasonably insisted on going to trial. As stated previously, a defendant has the burden of showing why his plea agreement should be vacated. *Sparks*, 721 S.W.2d at 727. Cain has failed to meet that burden. Thus, we agree with the trial court that counsel's actions did not fall outside the wide range of professionally competent assistance that is constitutionally guaranteed. Based on the record before us, we discern no ineffectiveness of counsel, nor any prejudice to Cain.

Next, Cain alleges his conviction should be vacated because of an alleged personality conflict between himself and his attorney which prevented his attorney from providing effective assistance of counsel. According to his brief, Cain and his attorney had a strained relationship caused by several tense encounters marked by name calling. As a result of these encounters, Cain alleges his attorney intentionally refused and failed to take his phone calls, did not interview certain witnesses, and did not properly inform him of the parole

eligibility requirements. However, once again, assuming *arguendo* that these alleged failures fell outside the wide range of professionally acceptable conduct, Cain still fails to show he would have reasonably insisted on going to trial, thereby taking the risk of being sentenced to a prison term of twenty-five years or more as opposed to accepting a ten-year plea agreement, regardless of the applicable parole eligibility. Moreover, along with filing a number of motions on Cain's behalf, Cain's attorney also managed to convince the trial court to dismiss one charge and obtained a favorable plea agreement. Therefore, we hold the alleged conflict between Cain and his attorney does not mandate a finding of ineffectiveness of counsel and is insufficient to require this Court to vacate Cain's conviction and sentence.

Finally, Cain argues the trial court erred in denying his motion for an evidentiary hearing on the grounds that newly discovered evidence⁷ *could* have affected his decision to enter into his plea agreement. However, a movant is not automatically entitled to an evidentiary hearing on his RCr 11.42 motion; there must be a genuine issue of fact which cannot be determined on the face of the record. *Stanford v. Commonwealth*, 854 S.W.2d 742 (Ky. 1993). Further, “[n]ewly discovered evidence is not a basis for RCr 11.42 relief.” *Foley v. Commonwealth*, 17 S.W.3d 878, 887 (Ky. 2000) (citing *McQueen v.*

⁷ This new “evidence” concerned possible impeachment testimony about Jackson's involvement in a similar instance of criminal conduct in Ohio. Cain alleges this new evidence showed Jackson had a propensity for inducing others to commit crimes and subsequently “telling big a lie” to exonerate himself. Without further explanation, Cain contends this evidence could have aided in his defense.

Commonwealth, 949 S.W.2d 70 (Ky. 1997)). Cain merely asserted this impeachment evidence could, not would, have changed his decision to plead guilty. Cain has failed to show that without the newly discovered “evidence” he now advances there is a reasonable probability the outcome below would have been different or that he would have reasonably insisted on going to trial. The totality of the circumstances militates against such a conclusion. Therefore, the trial court did not err in denying Cain’s motion for an evidentiary hearing.

For the foregoing reasons, the order of the Boone Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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