RENDERED: OCTOBER 30, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000371-MR

KEITH BARNES — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 06-CR-00178

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND VANMETER, JUDGES; HENRY,[1] SENIOR JUDGE.

LAMBERT, JUDGE: Keith Barnes appeals the McCracken Circuit Court's denial of his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion. After careful review, we affirm.

On April 6, 2006, Barnes was indicted on fourteen offenses. The offenses included: Count 1–First-Degree Fleeing and Evading; Count 2–Operating

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

a Motor Vehicle Under the Influence of Alcohol/Drugs; Count 3–Speeding; Count 4–Disregarding a Stop Sign; Count 5–Receiving Stolen Property over $300; Count 6–First Degree Wanton Endangerment; Count 7–First Degree Possession of a Control Substance-Cocaine, Second Offense; Count 8–Use/Possession of Drug Paraphernalia; Count 9–Tampering with Physical Evidence; Counts 10-12–Second Degree Criminal Possession of a Forged Instrument; Count 13–Theft by Unlawful Taking over $300; and Count 14–First-Degree Persistent Felony Offender (PFO).

Barnes entered into a plea agreement with the Commonwealth on June 2, 2006. As a result of the plea agreement, Counts 3 and 4 were dismissed and Counts 7 and 14 were amended to lower-level offenses. In particular, Barnes' PFO First Degree charge was amended to PFO Second Degree. Barnes was sentenced to five years on Count 1, thirty days on Count 2, five years on Counts 5, 6, and 7, twelve months on Count 8, five years on Counts 9, 10, 11, 12 and 13, and Count 14 enhanced both Counts 12 and 13 to ten years on each to be served consecutively for a total of twenty years. Counts 1, 2, 5, 6, 7, 8, 9, 10, 11, 12, and 13 were to run concurrently for a total of five years, but the trial court ordered that Count 14 was to run in lieu of Counts 1, 2, 5, 6, 7, 8, 9, 10, 11, 12, and 13 for a total of twenty years. Because Barnes pleaded guilty to PFO in the second degree, he was eligible for parole and probation. Barnes was given credit for serving 101 days, and the remainder of his sentence was probated for a period of two and one-half years.

On July 5, 2006, the McCracken Circuit Court revoked Barnes' probation after a warrant for his arrest was issued and the court ordered him to

serve the remainder of his twenty year sentence. On December 12, 2008, Barnes submitted an RCr 11.42 motion to vacate his conviction and sentence due to ineffective assistance of counsel. Barnes raised three issues which he claimed entitled him to relief: (1) counsel's failure to investigate; (2) counsel's failure to request a competency hearing; and (3) counsel's failure to get him a "better deal" through plea bargaining. The trial court denied the RCr 11.42 motion, finding that Barnes failed to identify specifically what counsel failed to investigate and that Barnes failed to allege that a competency hearing would have found him incapable of pleading guilty to the charges. Further, the court found that Barnes' counsel had the First-Degree PFO charge amended down to Second-Degree PFO, which allowed Barnes to receive probation and to receive an earlier parole date. Thus, the trial court found that Barnes' claim that his counsel failed to get him a "better deal" was without merit. Barnes now appeals *pro se* from the McCracken Circuit Court's denial of his RCr 11.42 motion.

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 that 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 that the appellant 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 Barnes' three allegations of error.

First, Barnes argues that his counsel was ineffective by failing to fully investigate his case, thereby causing him to enter into an unknowing, unintelligent,

and involuntary plea agreement. Barnes does not allege any specific actions or inactions by his trial counsel that show how counsel failed to fully investigate the case. Thus, Barnes cannot establish the first requirement of *Strickland*, that his counsel's performance was deficient. Simply making a broad statement that your counsel was defective and then citing a plethora of criminal cases not on point does not satisfy the first prong of *Strickland*. Thus, the trial court properly denied Barnes' claim that his counsel was ineffective for failing to fully investigate his case because Barnes did not allege any specific instances where his counsel failed to investigate his case.

Barnes next argues that his counsel was ineffective because he failed to present mitigating circumstances which would have entitled him to a competency hearing addressing his mental state. Barnes argues that his counsel failed to present evidence to the court that Barnes had a history of substance abuse, suicidal tendencies, and a lack of understanding of the penalty range which could be imposed if he pleaded guilty. The Commonwealth argues on appeal that the trial court properly denied Barnes' RCr 11.42 motion on this issue because Barnes failed to demonstrate any clear incompetency.

While Barnes did allege specific grounds which he claimed rendered him incompetent, the trial court did not find in the record any clear incompetency to justify Barnes' counsel requesting a competency hearing. Furthermore, Barnes did not allege specific reasons why his alleged substance abuse or depression rendered him unable to understand the nature of the proceedings against him. Nor

did Barnes allege any specific reasons why he was unable to understand the penalty range for his charges.

In *Bronk v. Commonwealth*, 58 S.W.3d 482, 487 (Ky. 2001), the Kentucky Supreme Court held, "the trial court must evaluate whether the errors by trial counsel significantly influenced the defendant's decision to plead guilty in a manner which gives the trial court reason to doubt the voluntariness and validity of the plea." In the instant case, the trial court looked at the record and determined there was no indication that Barnes was unable to understand the nature of his guilty plea. We do not find in the record any evidence which would have triggered Barnes' counsel or the court to request a competency hearing, and therefore the record clearly refutes Barnes' allegation that his counsel was ineffective for failing to request a competency hearing.

Barnes next argues that his trial counsel was ineffective for failing to obtain a reduced sentence during plea negotiations with the Commonwealth. The trial court denied this argument, finding that because defense counsel negotiated the PFO First Degree charge down to PFO Second Degree, which rendered Barnes eligible for parole, defense counsel was not ineffective. The Commonwealth argues that originally Barnes would have been eligible for a forty-year sentence on the PFO First Degree charge and that by negotiating the charge down to PFO Second Degree, defense counsel decreased Barnes' total possible sentence by twenty years. We cannot determine how Barnes would have been eligible for a forty-year sentence had he not taken the plea agreement.

KRS 532.080 states:

(1) When a defendant is found to be a persistent felony offender, the jury, in lieu of the sentence of imprisonment assessed under KRS 532.060 for the crime of which such person presently stands convicted, shall fix a sentence of imprisonment as authorized by subsection (5) or (6) of this section.

. . . .

(5) A person who is found to be a persistent felony offender in the second degree shall be sentenced to an indeterminate term of imprisonment pursuant to the sentencing provisions of KRS 532.060(2) for the next highest degree than the offense for which convicted. A person who is found to be a persistent felony offender in the second degree shall not be eligible for probation, shock probation, or conditional discharge, unless all offenses for which the person stands convicted are Class D felony offenses which do not involve a violent act against a person, in which case probation, shock probation, or conditional discharge may be granted. A violent offender who is found to be a persistent felony offender in the second degree shall not be eligible for parole except as provided in KRS 439.3401.

(6) A person who is found to be a persistent felony offender in the first degree shall be sentenced to imprisonment as follows:

(a) If the offense for which he presently stands convicted is a Class A or Class B felony, or if the person was previously convicted of one (1) or more sex crimes committed against a minor as defined in KRS 17.500 and presently stands convicted of a subsequent sex crime, a persistent felony offender in the first degree shall be sentenced to an indeterminate term of imprisonment, the maximum of which shall not be less than twenty (20) years nor more than fifty (50) years, or life imprisonment, or life imprisonment without parole for

> twenty-five (25) years for a sex crime committed against a minor;
>
> (b) If the offense for which he presently stands convicted is a Class C or Class D felony, a persistent felony offender in the first degree shall be sentenced to an indeterminate term of imprisonment, the maximum of which shall not be less than ten (10) years nor more than twenty (20) years.

Looking at the statute, had Barnes been sentenced as a PFO in the first degree, he would have been eligible for a minimum ten year sentence with a maximum sentence of twenty years, given that none of his underlying charges were higher than Class C felonies. Thus, we cannot discern how counsel negotiated down from "forty years" to "twenty years." Even if the charges had been Class B or A felonies, Barnes would have been eligible for a maximum penalty of fifty years to life imprisonment, not "forty years" as claimed by the trial court and the Commonwealth. However, because Barnes pleaded guilty to PFO in the second degree, he was eligible for parole and probation, and in fact received probation immediately after serving 101 days. Had he gone to trial on the charges and been sentenced as a PFO in the first degree, he would not have been eligible for parole or probation and in fact would have been required to serve a minimum of ten years' imprisonment. Thus, we do not see how Barnes' counsel was ineffective in light of this clear benefit to Barnes. Finding clear refutation of Barnes' allegations on the record, we hold that the trial court properly denied Barnes' RCr 11.42 motion on these grounds.

Based on the foregoing, we affirm the February 5, 2009, order of the McCracken Circuit Court denying Barnes RCr 11.42 motion.

HENRY, SENIOR JUDGE, CONCURS.

VANMETER, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Keith Barnes, *Pro Se*
Fredonia, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General

Heather M. Fryman
Assistant Attorney General
Frankfort, Kentucky