

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001880-MR

MARK T. ROUNTREE

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 05-CR-00556

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND STUMBO, JUDGES; LAMBERT,¹ SENIOR JUDGE.

ACREE, JUDGE: Without conducting an evidentiary hearing or appointing counsel to represent the indigent criminal defendant, the Hardin Circuit Court denied Mark Rountree's Rule of Criminal Procedure(s) (RCr) 11.42 motion.

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute(s) (KRS) 21.580.

Rountree contends on appeal that the circuit court's failure to appoint counsel was a violation of KRS 31.110 and further asserts as error the determination that his counsel's performance does not warrant vacating the conviction. Finding no error, we affirm.

Facts and procedure

Rountree, accompanied by his associate John Lindsey,² was driving a car containing many of the ingredients and equipment necessary for the production of methamphetamine when police officers pulled him over. The officers discovered the drug-making supplies, in addition to small quantities of methamphetamine and hydrocodone, and arrested Rountree and Lindsey.

In custody, Rountree exercised his right to remain silent and gave no statement to the police; Lindsey, however, gave a full confession which implicated Rountree. Lindsey informed police that he and Rountree had purchased pseudoephedrine tablets from several pharmacies with the goal of manufacturing methamphetamine.

The matter was submitted to the grand jury. Among the evidence presented by the Commonwealth was the testimony of Detective Chris Thompson. Rountree was indicted for complicity to manufacture methamphetamine, complicity to first-degree possession of a controlled substance, complicity to second-degree possession of a controlled substance, complicity to possess drug paraphernalia, and

² The parties disagree on the proper spelling of Lindsey's name, so we have adopted the spelling used by the circuit court.

a persistent felony offender charge. Detective Thompson later testified at Rountree's preliminary hearing as well.

Believing police had lacked sufficient suspicion to justify the traffic stop and probable cause to search Rountree's vehicle, Rountree's trial attorney filed a motion to suppress the fruits of the search. Detective Thompson did not testify at the hearing and Rountree's attorney did not subpoena him. The circuit court denied the motion.

Rountree and the Commonwealth subsequently reached a plea agreement conditioned on Rountree's right to appeal the circuit court's denial of the motion to suppress. On direct appeal, this Court affirmed the denial, finding the stop of Rountree's vehicle and the ensuing search were proper. *Rountree v.*

Commonwealth, 2008 WL 4601285 (Ky. App. Oct. 17, 2008)(2007-CA-001950-MR).

Rountree pursued a collateral attack of his conviction under the authority of RCr 11.42, which the circuit court denied. On appeal, he has raised only two issues: whether the circuit court erred in declining to appoint an attorney to represent him during RCr 11.42 proceedings and whether it was error to conclude he did not receive ineffective assistance of counsel.³

³ One "ARGUMENT" heading in Rountree's appellate brief also asserts that the circuit court erred in failing to conduct an evidentiary hearing, and the brief recites the legal standards governing the requirement that such hearing be conducted. The body of the argument does not, however, assert that Rountree was entitled to an evidentiary hearing, nor does it attempt to apply the law governing conduct of an RCr 11.42 hearing to the facts of Rountree's case. This matter has not been properly brought before us, and we will not consider it.

The circuit judge was not obligated to appoint counsel to represent Rountree

Rountree first argues that KRS 31.110⁴ renders erroneous the circuit judge's refusal to appoint counsel to represent him in pursuit of his RCr 11.42 motion. The Supreme Court has held otherwise: "We conclude . . . that RCr 11.42(5) establishes when a judge *must* appoint counsel for an indigent movant and that KRS 31.110(2)(c) establishes when the [Department of Public Advocacy] *may* provide legal services even without judicial appointment." *Fraser v. Commonwealth*, 59 S.W.3d 448, 456 (Ky. 2001). As a result, an indigent criminal

⁴ The relevant portions of KRS 31.110 provide:

(1) A needy person who is being detained by a law enforcement officer, on suspicion of having committed, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, or who is accused of having committed a public or status offense or who has been committed to the Department of Juvenile Justice or Cabinet for Health and Family Services for having committed a public or status offense as those are defined by KRS 610.010(1), 610.010(2)(a), (b), (c), or 630.020(2) is entitled:

- (a) To be represented by an attorney to the same extent as a person having his or her own counsel is so entitled; and
- (b) To be provided with the necessary services and facilities of representation including investigation and other preparation. The courts in which the defendant is tried shall waive all costs.

(2) A needy person who is entitled to be represented by an attorney under subsection (1) of this section is entitled:

....

- (c) To be represented in any other post-conviction, or, if a minor under the age of eighteen (18), post-disposition proceeding that the attorney and the needy person considers appropriate. However, if the counsel appointed in such post-conviction, or, if a minor under the age of eighteen (18), post-disposition remedy, with the court involved, determines that it is not a proceeding that a reasonable person with adequate means

would be willing to bring at his or her own expense, there shall be no further right to be represented by counsel under the provisions of this chapter.

defendant is entitled to appointment of counsel for a collateral challenge of his conviction only when his case meets the standard described in RCr 11.42(5).⁵ *Id.*

The Supreme Court's conclusion in *Fraser* was based on the separation of powers doctrine and the practical difficulties which would arise were the literal language of KRS 31.110 given effect. *Id.* at 453-56. Although the holding of *Fraser* explicitly addresses only one subsection of KRS 31.110, the high court's analysis supports application of the rule to the entire statute. KRS 31.110 does not entitle a defendant to appointment of counsel in pursuit of a collateral attack on his conviction.

Rountree does not assert that RCr 11.42(5) entitles him to the appointment of counsel, so we need not analyze his argument under that standard.

The performance of Rountree's trial counsel was not deficient, and Rountree suffered no prejudice

To succeed in an ineffective assistance of counsel claim following entry of a plea agreement, a defendant must demonstrate that his trial counsel's performance was deficient and that he suffered prejudice such "that there is 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, 60, 106 S.

Ct. 366, 371, 88 L. Ed. 2d 203 (1985). The performance of a trial attorney may be

⁵ RCr 11.4(5) provides for the appointment of counsel under the following circumstances:

If the answer raises a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing and, if the movant is without counsel of record and if financially unable to employ counsel, shall upon specific written request by the movant appoint counsel to represent the movant in the proceeding, including appeal.

deemed deficient if he neglects his “affirmative duty to make reasonable investigation for mitigating evidence or to make a reasonable decision that particular investigation is not necessary.” *Hodge v. Commonwealth*, 68 S.W.3d 338, 344 (Ky. 2001) (citing *Strickland v. Washington*, 466 U.S. 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

On appeal, Rountree argues his trial attorney should have “looked at and investigated every piece of evidence or discovery before advising Rountree to enter a guilty plea.” Appellant’s brief, 13. Rountree identifies only one specific basis for his claim that his trial attorney failed to conduct an adequate investigation, namely that he did not review grand jury proceedings or the preliminary hearing prior to the suppression hearing and, therefore, failed to identify inconsistencies in Detective Thompson’s grand jury testimony.⁶ Had his trial counsel conducted a thorough investigation, Rountree contends, he could have subpoenaed Detective Thompson for the suppression hearing and identified the inconsistencies in his previous testimony. The result, argues Rountree, would have been the suppression of the evidence collected following the traffic stop, and the Commonwealth would have been left without a viable case.

Rountree identifies only one inconsistency in Detective Thompson’s testimony. Without citing to the record, the appellant’s brief states as follows:

At the grand jury hearing, Detective Thompson testified that Rountree “gave a confession, during taped

⁶ The attorney who represented Rountree at the suppression hearing and at entry of his guilty plea did not represent him at the preliminary hearing or at the time the grand jury was convened.

interviews of their involvement in the manufacturing of meth.” During the preliminary hearing, Detective Thompson’s testimony changed to “They both stated they were uses [sic] of meth. . . . Rountree invoked his rights and refused to say anything after he was a meth user.”

The failure of Rountree’s trial counsel to raise this “inconsistency” in Detective Thompson’s testimony does not warrant reversal of the circuit court’s denial of Rountree’s RCr 11.42 motion for a number of reasons.

First, Rountree’s brief does not cite to a video recording or transcript of the grand jury hearing, and we have not located either in the record on appeal.⁷ “To the extent that the record is incomplete, the reviewing court must presume that the omitted portions support the . . . judgment.” *Roberts v. Fayette County Board of Education*, 173 S.W.3d 918, 923 (Ky. App. 2005) (citing *Commonwealth, Department of Highways v. Richardson*, 424 S.W.2d 601, 603 (Ky.1968)).

The purpose behind that rule is especially salient here because the circuit court’s order presents the course of events significantly differently than the above-quoted passage from Rountree’s brief does:

Thompson told the grand jury that Lindsey had waived his rights and given a taped confession. While Thompson initially indicated that both defendants had waived their rights and confessed, he corrected this misstatement and informed the grand jury that [Rountree] had refused to waive his rights, was not interrogated, and did not give a confession.

⁷ We must acknowledge that our search of the record was cursory. We are not obligated to search the record at all when a party fails to provide us with the proper citation. *See Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 53 (Ky. 2003).

The circuit judge found Detective Thompson corrected his mistake during his grand jury testimony, rather than waiting to make the correct statement at the preliminary hearing, as Rountree represents on appeal. The circuit court's denial of Rountree's RCr 11.42 motion was based in part upon the conclusion that, because Detective Thompson corrected his mistake so soon after making it, the incorrect statement was not "unfairly prejudicial." Without the recording of Detective Thompson's grand jury testimony hearing, we are unable to review the full sequence of events to ascertain who is correct. If Rountree believed the events at the grand jury supported his argument, he should have supplemented the record with a video or transcript and directed our attention to it. RCr 5.16. ("any person indicted by the grand jury shall have a right to procure a transcript of any stenographic report or a duplicate of any mechanical recording relating to his or her indictment or any part thereof upon payment of its reasonable cost."). *See also Roberts*, 173 S.W.3d at 123 (citation omitted) ("It is the duty of the appellant to see that the record is complete on appeal.").

We therefore presume the recording of the grand jury proceedings supports the circuit court's finding that the performance of Rountree's trial counsel was not deficient.

We are also not inclined to reverse the denial of Rountree's motion because he has not identified any persuasive reason why the detective's mistaken grand jury testimony would have had any impact on the outcome of the suppression hearing. Whether Rountree confessed his intent to manufacture methamphetamine

subsequent to his arrest, and even whether Detective Thompson had lied about obtaining a confession, has no bearing on whether the traffic stop and search of the vehicle were lawful. Detective Thompson testified at the preliminary hearing that he did not conduct the stop of the vehicle, and in his brief Rountree admits that another detective ordered the traffic stop. Detective Thompson's propensity for truth telling, then, was not relevant to whether the stop was appropriate. The information Rountree contends his trial counsel should have elicited at the suppression hearing would have made no difference in the outcome.

Conclusions

KRS 31.110 did not require the circuit court to appoint counsel to assist Rountree in pursuing his RCr 11.42 motion. Further, Rountree has raised no reason on appeal to support his claim that the performance of his trial counsel was deficient or that he was prejudiced by counsel's alleged deficiencies. The order of the Hardin Circuit Court denying Rountree relief from the judgment pursuant to RCr 11.42 is affirmed.

ALL CONCUR.

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