

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001886-MR

RALPH GENTRY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES L. CUNNINGHAM, JUDGE
ACTION NO. 03-CR-001371

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; ACREE, JUDGE; HARRIS,¹ SENIOR JUDGE.

ACREE, JUDGE: Appellant, Ralph Gentry, Jr., appeals a decision of the Jefferson

Circuit Court denying his motion pursuant to Kentucky Rules of Criminal

Procedure (RCr) 11.42 to set aside the criminal conviction based upon his guilty

¹Senior 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 Statute (KRS) 21.580.

plea. The circuit court correctly determined that Gentry's counsel was not ineffective and correctly declined his request for an evidentiary hearing. Therefore, the circuit court's order denying CR 11.42 relief is affirmed.

The Jefferson County Grand Jury handed down Indictment No. 03-CR-1371 on May 22, 2003, charging Gentry with murder, burglary in the first degree, tampering with physical evidence, and criminal mischief in the third degree. On May 27, 2003, Gentry entered a plea of not guilty. Soon thereafter, the Commonwealth, pursuant to KRS 532.025(2)(A)(2), gave Gentry notice of aggravating circumstances and the possibility of the imposition of the penalty of death, or life without the benefit of probation or parole, or life without parole for twenty-five years. The aggravators were that Gentry was alleged to have committed the murder while also engaging in the commission of robbery in the first degree and burglary in the first degree.

Gentry's co-defendant, Rasheno Saunders, pleaded guilty on October 24, 2003. Gentry's case proceeded to trial. However, on April 22, 2005, with the jury waiting, Gentry moved to withdraw his original plea of not guilty and to enter a plea of guilty. Gentry signed the Commonwealth's offer on a plea of guilty in open court. The plea contained the following factual account:

On October 30, 2002, at 4303 Newport Rd in Jefferson Co, Ky, [Appellant,] acting in complicity w/ Rasheno Saunders, killed Maurice Thompson by beating him to death during an argument. [Appellant] then took Mr. Thomson's dog

The circuit court entered its judgment on the guilty plea on April 22, 2005.

Pursuant to the plea agreement, Gentry pleaded guilty to charges of manslaughter in the first degree, burglary in the first degree, tampering with physical evidence, and criminal mischief in the third degree.

As noted by the circuit court, had Gentry's case gone to trial the Commonwealth would have presented, among other evidence, the following: (1) DNA evidence of the victim's blood on Gentry's pants (with only a 1 in 342 trillion chance that this was someone else's blood); (2) a confession from Gentry's co-defendant implicating him; (3) testimony from an eye witness who identified Gentry from a photo-pack; and (4) an incriminating statement from Gentry himself.

On April 26, 2008, the circuit court sentenced Gentry to the Commonwealth's recommendation of fifteen years for the charge of manslaughter, ten years for the charge of burglary, five years for the charge of tampering with physical evidence, and ninety days for the charge of criminal mischief. These sentences were to run concurrently for a total of 15 years. The fifteen-year sentence was to run consecutively with charges brought against Gentry in two other indictments, 03-CR-1962 and 03-CR-2615, bringing Gentry's time to be served to twenty-five years. A fourth felony indictment, 03-CR-0223, resulted in a sentence of five years.

On April 14, 2008, Gentry filed a motion to set aside his judgment pursuant to RCr 11.42. In his motion, Gentry claimed that his plea agreement was

violated, and that he received ineffective assistance of counsel. The circuit court denied his motion without conducting an evidentiary hearing after which Gentry brought this appeal.

In an RCr 11.42 proceeding, the movant has the burden to establish convincingly that he was deprived of substantial rights that would justify the extraordinary relief afforded by the post-conviction proceeding. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). Since Gentry entered a guilty plea, a claim that he was afforded ineffective assistance of counsel requires him to show: (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) 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 pleaded guilty, but would have insisted on going to trial. *Bronk v. Commonwealth*, 58 S.W.3d 482, 486-87 (Ky. 2001); *see also Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Furthermore, an evidentiary hearing on an RCr 11.42 motion is warranted only "if there is an issue of fact which cannot be determined on the face of the record." *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993), *cert. denied*, 510 U.S. 1049, 114 S.Ct. 703, 126 L.Ed.2d 669 (1994); RCr 11.42(5); *see also Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001); *Bowling v. Commonwealth*, 981 S.W.2d 545, 549 (Ky. 1998), *cert. denied*, 527 U.S. 1026, 119

S.Ct. 2375, 144 L.Ed.2d 778 (1999). “Conclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of a discovery deposition.”

Sanders v. Commonwealth, 89 S.W.3d 380, 385 (Ky. 2002), *cert. denied*, 540 U.S. 838, 124 S.Ct. 96, 157 L.Ed.2d 70 (2003), *overruled on other grounds in Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

Where a trial court deems an evidentiary hearing unwarranted, appellate 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. *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky.App. 1986). Thus, the question becomes whether the trial court properly found that Gentry’s claims of ineffective assistance of counsel were refuted by the record. This Court must consider the totality of the evidence before the trial court and must assess trial counsel’s overall performance to determine whether the presumption that counsel afforded reasonable professional assistance is overcome by the identified omissions. *See Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006), *overruled on other grounds in Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

Before this Court, Gentry argues his counsel was ineffective in failing to present his alibi defense and in failing to properly explain to him the terms of his plea as it related to the total time he would serve, including credit for time served

while awaiting trial. He further argues that the circuit court erred in denying his requested relief without conducting an evidentiary hearing.

Gentry never argued to the trial court that his counsel failed to properly explain the terms of the plea. Instead, he argued that the terms of the plea agreement were violated. Gentry is not permitted to raise an argument that he did not present to the trial judge. *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976) (“The appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court.”). Apparently recognizing that this argument was not properly before this court, Gentry avers that his argument should be reviewed for palpable error under RCr 10.26.

Our review does not result in a conclusion that Gentry’s counsel was so ineffective in advising him of the terms of his plea that manifest injustice occurred. Gentry claims to have been misled to believe he would only serve a 25-year sentence, but that the Department of Corrections advised him that he must serve thirty years. The circuit court determined that the plea agreement covered three indictments. However, a fourth indictment was not “wrapped up” in the agreement. The fourth indictment resulted in an additional 5-year sentence. The record is silent, aside from the circuit court’s opinion, as to how the indictments were “wrapped up” in the agreement. A silent record is assumed to support the circuit court’s ruling. *Commonwealth v. Thompson*, 697 S.W.2d 143 (Ky. 1985).

Finding no error as to the sentence itself, it is necessary to determine if Gentry’s counsel was sufficiently ineffective in explaining it as to require a

reversal of the conviction. It is worth noting, as the circuit court noted,² that “since he entered a plea, the trial judge would have inquired if the defendant was satisfied with the advice of his attorney and declined to accept the plea if he was not.”

Gentry did not indicate that his attorney was ineffective and the court accepted the plea. Further, as indicated above, had this case gone to trial, Gentry would have faced persuasive evidence that could have subjected him to the death penalty. It is not reasonable to conclude that any failing in counsel’s explanation of Gentry’s sentence, if corrected, would have resulted in his decision to risk trial under those circumstances. In *Sparks, supra*, the court found that

the appellant’s counsel advised him to plead guilty on the basis of a reasoned evaluation of the strength of the evidence . . . the likelihood of conviction and the probability that Sparks could easily receive a sentence in excess of the Commonwealth's offer of 35 years should Sparks be convicted of both murder and first-degree robbery. Counsel’s advice was not unreasonable under the circumstances, and was therefore not constitutionally defective.

Sparks, 721 S.W.2d at 728. In the case now before us, the circuit court came to the same conclusion. This conclusion is supported by substantial evidence and is not clearly erroneous. Indeed, consideration of the record and the strong evidence against him makes it clear that Gentry received effective assistance of counsel that may have spared his life.

² Judge Denise Clayton presided over Gentry’s case through his conviction, after which she was elected to the Court of Appeals. Judge Charles L. Cunningham presided thereafter, including deciding Gentry’s RCr 11.42 motion.

In support of his argument that his counsel failed to promote an alibi defense, Gentry could point only to a letter from his chiropractor stating that Gentry was in his office on the day of the crime and that he was not contacted by Gentry's attorney. The letter does indicate that the chiropractor was contacted by the police. However, the circuit court determined that this evidence was "woefully inadequate grounds for setting aside the plea in this case." Given that the letter submitted was written six years after the crime and does not give any indication as to the time of day Gentry was in the chiropractor's office, it is insufficient to show that Gentry would not have accepted the plea had the evidence been brought to light. It simply does not provide Gentry with an alibi except through the application of speculation. The inadequacy of this evidence is exacerbated by the fact that the Commonwealth possessed the strong and persuasive evidence of guilt discussed above.

The record itself indicates that counsel in this case was not ineffective. Indeed, Gentry received a favorable plea that he knowingly and voluntarily accepted. Because the circuit court could render a decision regarding Gentry's RCr 11.42 motion on the face of the record, the court did not err in doing so without conducting an evidentiary hearing.

The Jefferson Circuit Court's order denying Gentry's RCr 11.42 motion is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Ralph Gentry, *Pro se*
Central City, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Michael J. Marsch
Assistant Attorney General
Frankfort, Kentucky