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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000325-MR

GERALD R. WOODEN

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NOS. 05-CR-00566 & 06-CR-00266 & 06-CR-00522

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: MOORE, NICKELL, AND WINE, JUDGES.

WINE, JUDGE: Gerald R. Wooden, *pro se*, appeals from an order of the Hardin Circuit Court which denied his Kentucky Rule of Criminal Procedure (“RCr”) 11.42 motion to vacate his conviction. The trial court found that his allegations of ineffective assistance of counsel were refuted by the record. Finding no error, we affirm.

On April 4, 2007, Wooden entered a plea of guilty but mentally ill to two counts of first-degree sodomy; two counts of first-degree rape; one count of incest; and seven counts of first-degree sexual abuse. The charges arose from three separate indictments and were based on allegations involving four children. In exchange for his guilty plea, the Commonwealth recommended sentences totaling thirty years' imprisonment. The trial court imposed this sentence on June 5, 2007.

Thereafter, on December 17, 2008, Wooden filed a motion to set aside his conviction pursuant to RCr 11.42. In support of his motion, he alleged that his trial counsel provided ineffective assistance prior to his guilty plea. The trial court denied the motion on February 2, 2009, finding that the allegations were refuted by the record.

Wooden requested and was granted the appointment of counsel on this appeal. However, the Department of Public Advocacy declined to represent him, stating that the appeal was not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense. *Anders v. State of California*, 386 U.S. 738, 744, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Kentucky Revised Statute ("KRS") 31.110(2)(c). This *pro se* appeal followed.

Wooden argues that he received ineffective assistance from his trial counsel. In order to maintain an ineffective assistance of counsel claim, a movant must satisfy a two-part test showing that his counsel's performance was deficient and that the deficiency caused actual prejudice affecting the outcome of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80

L.Ed.2d 674 (1984); *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). The burden falls on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; *Commonwealth v. Pelfrey*, 998 S.W.2d 460, 463 (Ky. 1999). In cases involving a guilty plea, the movant must prove that his counsel's deficient performance so seriously affected the outcome of the plea process that, but for counsel's errors, there is a reasonable probability that the movant would not have pleaded guilty but would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985); *Phon v. Commonwealth*, 51 S.W.3d 456, 459-60 (Ky. App. 2001).

In particular, Wooden contends that his trial counsel failed to adequately investigate the evidence and failed to request a competency hearing. He also contends that the trial court erred by failing to conduct an evidentiary hearing on his motion. However, an evidentiary hearing is necessary only where the record does not conclusively refute the allegations in the motion. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). We agree with the trial court that the record clearly refutes Wooden's claims.

In his motion before the trial court, Wooden simply made a general allegation that his trial counsel failed to perform an investigation. As the trial court correctly noted, a defendant is required to allege specific facts rather than conclusory allegations in an RCr 11.42 motion. *Sanders v. Commonwealth*, 89 S.W.3d 380, 385 (Ky. 2002), *overruled on other grounds by Leonard v.*

Commonwealth, 279 S.W.3d 151 (Ky. 2009). On appeal, Wooden contends that his trial counsel failed to adequately investigate the ages of the victims at the time the offenses were committed.

This issue is not preserved for review. Moreover, Wooden presents no evidence that a reasonable investigation by trial counsel would have turned up any mitigating evidence. *See Hodge v. Commonwealth*, 68 S.W.3d 338, 344 (Ky. 2002). Consequently, we decline to consider the issue further.

Wooden next argues that his trial counsel failed to request a competency hearing prior to his sentencing. The trial court fully addressed this issue in its order and we adopt its well-written and reasoned findings.

Wooden also complains that his competency was not re-addressed at the time of his sentencing. To address this concern, it is appropriate for the Court to detail some history of this Court's consideration of Wooden's mental condition. Bailey [Wooden's trial counsel] had given notice on behalf of Wooden that there would be a claim with respect to Wooden's mental capacity pursuant to RCr 7.24. The Court ordered a competency evaluation.

A hearing was conducted on February 20, 2007. (Tape 07-66; February 20, 2007 at 8:05:30--8:34:20 and 9:21:15--9:39:22). Based upon the expert testimony of Dr. Noonan, the Court found Wooden to be competent to stand trial. (The Court's detailed oral ruling appears at 9:35:05 – 9:39:22). Dr. Noonan explained his diagnosis of borderline intellectual functioning. Depending upon the particular measuring test, Wooden had an IQ of approximately 70. Wooden could be considered as having mild mental retardation. There is some suggestion from the testimony of Wooden's father that Wooden's abilities were adversely affected by a traumatic brain injury in the 1980's after a motor vehicle accident. Dr. Noonan recognized Wooden's particular

challenges with respect to language skills. Wooden has deficits in articulation, which are apparent from a review of his interaction with counsel and the Court during these proceedings. Even so, Dr. Noonan described Wooden as “clearly competent.”

The issue of competency was again considered at the time of the guilty plea on April 4, 2007. The Court noted the prior testimony of Dr. Noonan as well as the testimony of Dr. Smith, an expert retained by Bailey to challenge the reliability of Wooden’s confession. Dr. Smith’s involvement was limited to that issue, and he did not offer opinions as to criminal responsibility or competency to stand trial. His opinions were expressed during a hearing on a motion to suppress on March 20, 2007. (Tape 07-98 at 15:50:30--16:17:52 and Tape 07-104 at 16:18:39--16:26:35).

During the plea, the Court made sure to explain the questions in detail using less “legal” wording than might be used in a typical plea. The Court noted that Wooden was responding appropriately to the questions and saw no reason to revisit any issue of competency.

Citing KRS 504.140, Wooden argues that he believes the Court erred in not reassessing competency at the time of sentencing. *Moody v. Commonwealth*, 698 S.W.2d 530 (Ky. App. 1985). The application of this statute must be understood in the context of the entire chapter. Mental retardation, as defined by KRS 504.060(7), may provide a defense to responsibility. KRS 504.020(1). It also may be the mental condition which brings into question competency to stand trial. Either by trial or a guilty plea, a finding may be made that a defendant is guilty but mentally ill. KRS 504.130. KRS 504.140 serves the purpose of insuring that competency has been evaluated prior to sentencing a mentally ill person.

The *Moody* case has been held not to require successive competency evaluations. *See Pate v. Commonwealth*, 769 S.W.2d 46 (Ky. 1989). In Wooden’s case, the Court had made a determination of competency approximately six weeks prior to the guilty plea. The Court determined that there was no need to revisit the issue of competency at the time of the plea. No new circumstance was presented to the Court by way

of Wooden's conduct or any other information which would have necessitated another competency evaluation at the time of sentencing just two months after the plea. In these circumstances, Wooden is not entitled to relief because of any failure to revisit competency at the time of his sentencing.

Accordingly, the order of the Hardin Circuit Court is affirmed.

ALL CONCUR.

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