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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000750-MR

ISHMAEL POWELL — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 05-CR-00220-003

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND NICKELL, JUDGES; KNOPF,[1] SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Ishmael Powell, proceeding *pro se*, appeals from the denial of his motion for post-conviction relief brought pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Powell claims that the Kenton Circuit Court

[1] Senior Judge William L. Knopf 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.

erred when it denied his RCr 11.42 motion without an evidentiary hearing. However, after our review, we affirm that decision.

Facts and Procedural History

In April 2005, Powell was indicted on two counts of first-degree robbery along with Kareem Derkson and Cameron Daniels.[2] A charge of being a second-degree persistent felony offender (PFO) was later added by separate indictment. After he entered a "not guilty" plea, Powell's case was tried before a Kenton County jury in December 2005. The following facts come from testimony given at that trial.

In the early-morning hours of January 7, 2005, Covington Police Officer Brian Kane was on patrol when he came upon three men who appeared to be in the process of robbing two other men at gunpoint. One of the men was standing over a victim later identified as Joshua Thompson, who was lying prone on the ground, and the other two were flanking a man named Donald Dixon. Dixon testified that while he was talking to Thompson in his front yard, the three men had appeared out of nowhere, brandished guns, and told him and Thompson to empty their pockets. Dixon indicated that he could see the men's faces and that he recognized Powell from the neighborhood. While one of the men was rifling through Dixon's wallet, Officer Kane came driving out of an alley in his police cruiser, which caused the robbers to flee.

[2] Daniels also has an appeal pending before this court regarding a denial of his own RCr 11.42 motion for post-conviction relief. *Daniels v. Commonwealth*, No. 2009-CA-000683-MR.

Officer Kane subsequently called for backup and gave chase on foot and, as the men fled, he heard the crack of a firearm being discharged. He testified that Daniels was found soon after the robbery hiding behind a large garbage can and that he matched the description of one of the persons who had been flanking Dixon during the robbery. Powell was stopped by another police officer and apprehended soon thereafter after Officer Kane saw him walking down a nearby street. No proceeds from the robbery were recovered from him. A third individual, Derkson, was also apprehended. Two handguns were found in the vicinity of the robbery scene the following day.

Derkson ultimately entered a guilty plea to second-degree robbery (with a pending PFO charge being dismissed) and agreed to testify against Powell and Daniels at trial. He indicated that he, Powell, and Daniels had gone to a bar in Newport on the night of the subject incident and had left at approximately 1:00 a.m. to go to the home of Powell's girlfriend. However, when they spotted two men standing outside on 13th Street, they pulled their car over, brandished guns, told the men not to move, and proceeded to rob them. Derkson also testified that after he entered his guilty plea, Powell threatened to kill his mother and to rape his little sister.

The jury ultimately acquitted Powell of one of the robbery charges but found him guilty of one count of complicity to first-degree robbery. The jury also found Powell guilty of being a second-degree PFO and recommended a sentence of twenty years' imprisonment. However, the Commonwealth subsequently moved

that the PFO count be dismissed and that Powell be sentenced to thirteen years' imprisonment on the robbery count in exchange for Powell's cooperation and sworn statement regarding a pending murder investigation. The court sentenced Powell accordingly. Powell appealed his conviction to this Court, and the conviction was upheld. *Powell v. Commonwealth*, 237 S.W.3d 570 (Ky. App. 2007).

On September 16, 2008, Powell filed a motion to vacate, set aside, or correct judgment pursuant to RCr 11.42. As grounds for his motion, Powell presented the following claims: (1) that his arrest was without a warrant or probable cause and that any evidence obtained as a result of that arrest should have been suppressed; (2) that the evidence presented at trial was insufficient to support a conviction; (3) that his attorney allowed evidence to be admitted showing that a prosecution witness who had also been indicted for the subject crime had entered a guilty plea; (4) that he was erroneously required to serve 85% of his sentence before being eligible for parole even though death or serious physical injury had not been inflicted on a victim; and (5) that he was denied the effective assistance of counsel. Powell also filed a corresponding motion for an evidentiary hearing. However, on March 31, 2009, the circuit court entered an order denying Powell's motion for RCr 11.42 post-conviction relief without an evidentiary hearing. This appeal followed.

Analysis

On appeal, Powell argues that the circuit court erroneously denied his motion for RCr 11.42 post-conviction relief without a hearing. In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court set forth a two-pronged analysis to be used in determining whether the performance of a convicted defendant's trial counsel was so deficient as to merit relief from that conviction.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id., 466 U.S. at 687, 104 S.Ct. at 2064. Here, the circuit court denied Powell's RCr 11.42 motion without an evidentiary hearing. Accordingly, "[o]ur review is confined 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). RCr 11.42 requires an evidentiary hearing "[i]f the answer raises a material issue of fact that cannot be determined on the face of the record[.]" RCr 11.42(5); *see also Stanford v. Commonwealth*, 854 S.W.2d 742, 743 (Ky. 1993). However, there is no need for an evidentiary hearing if the record refutes the claims of error or if the defendant's allegations, even if true, would not be sufficient to invalidate the conviction. *Harper v. Commonwealth*, 978 S.W.2d 311, 314 (Ky. 1998).

Powell first claims that he was entitled to RCr 11.42 relief because he was tried and convicted of complicity to first-degree robbery even though the Commonwealth failed to prove all of the elements of that offense. This claim must fail, however, because "[i]t is not the purpose of RCr 11.42 to permit a convicted defendant to retry issues which could and should have been raised in the original proceeding, nor those that were raised in the trial court and upon an appeal considered by this court." *Thacker v. Commonwealth*, 476 S.W.2d 838, 839 (Ky. 1972). Our courts have specifically held that a claim of insufficient evidence for a conviction is not a basis for RCr 11.42 relief. *See Johnson v. Commonwealth*, 473 S.W.2d 823, 824 (Ky. 1971); *Boles v. Commonwealth*, 406 S.W.2d 853, 855 (Ky. 1966). Thus, this claim was rightfully rejected without a hearing.

Powell also contends that he was entitled to RCr 11.42 relief because his arrest was made without a warrant or probable cause and because evidence obtained as a result of that illegal arrest was used to convict him. Once again, our courts have held that Powell's claims are not a basis for relief under RCr 11.42 since they are of the sort that can be raised on direct appeal. *See Carter v. Commonwealth*, 450 S.W.2d 257, 258 (Ky. 1970); *Triplett v. Commonwealth*, 439 S.W.2d 944, 945 (Ky. 1969); *Wahl v. Commonwealth*, 396 S.W.2d 774, 775 (Ky. 1965). Consequently, they were rightfully rejected.

Powell also raises a related contention that he "was denied the effective assistance of counsel, when trial counsel failed to move to suppress his illegal arrest." It is somewhat unclear what Powell means by this statement, but

even assuming – as Powell argues – that his arrest was unsupported by probable cause and was consequently illegal, "[a]n illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction." *United States v. Crews*, 445 U.S. 463, 474, 100 S.Ct. 1244, 1251, 63 L.Ed.2d 537 (1980); *see also Howell v. Commonwealth*, 445 S.W.2d 123, 123 (Ky. 1969). While an invalid arrest may call for the suppression of a confession or other evidence, it does not entitle a defendant to be discharged altogether from responsibility for the offense. *O'Riordan v. State*, 665 S.W.2d 255, 257 (Ark. 1984). Thus, an illegal arrest, without more, is not a basis for a motion to suppress.

It appears likely that Powell is actually contending that his trial counsel should have filed a motion to suppress any evidence that resulted from his allegedly illegal arrest. However, he has directed us to nothing that would indicate that the arrest and subsequent search produced a confession by him or any other evidence of a crime that was used in his prosecution. Consequently, there is nothing that a motion to suppress would have accomplished in this case since the exclusionary rule was inapplicable under these circumstances. *Cf. Crews*, 445 U.S. at 470-74, 100 S.Ct. at 1249-51. Powell argued below that since the police illegally arrested him without probable cause, they "should not have been entitled to the fruits of Derkson's confession." However, Powell's arrest and Derkson's confession have no relation to one another for suppression purposes since the confession did not result from Powell's arrest and was instead obtained

independent of it. Accordingly, the circuit court did not err in denying this claim for relief without a hearing.

Powell further contends that he was entitled to post-conviction relief because he was denied his Sixth Amendment right to confront and to cross-examine Joshua Thompson, who did not testify at trial, but – again – this is an issue that could have and should have been raised on direct appeal. Powell also raises a related argument that his counsel was ineffective for failing to object to the denial of his right to confront and to cross-examine Thompson. However, "[t]he right of confrontation is limited to witnesses" at trial and nothing "requires the Commonwealth to produce at the trial all witnesses, or any particular witness, to a crime." *Flatt v. Commonwealth*, 468 S.W.2d 793, 794 (Ky. 1971); *see also Harris v. Commonwealth*, 315 S.W.2d 630, 632 (Ky. 1958). Powell makes no allegation that any out-of-court statements from Thompson were used against him at trial, so there was essentially nothing to which his trial counsel could offer an objection. Thus, these claims were also properly rejected without an evidentiary hearing.

Powell next argues that his trial counsel was ineffective for failing to object to the Commonwealth's questioning of Derkson with respect to Derkson's entry of a guilty plea to second-degree robbery in the subject incident and his agreement to provide truthful testimony as a witness against Powell and Daniels. We agree with Powell that ordinarily it is "improper for the Commonwealth to show during its case-in-chief that a co-indictee has already been convicted under the indictment[.]" *St. Clair v. Commonwealth*, 140 S.W.3d 510, 544 (Ky. 2004).

However, it is apparent from the record before us that Powell's trial counsel attempted to use this information as part of her trial strategy in order to attack Derkson's credibility by showing that he was testifying in exchange for a more lenient sentence. Derkson was extensively cross-examined about his deal with the Commonwealth, and he acknowledged that he was facing the possibility of life in prison as a persistent felony offender prior to entering his guilty plea and that he received only a five-year sentence. Our Supreme Court has recently reaffirmed that use of a co-indictee's plea agreement in this manner is appropriate trial strategy, holding: "[I]f it is apparent from the record that the defendant did not object to the introduction of this evidence and that the defendant tried to use that information as part of his trial strategy, no reversible error occurred." *King v. Commonwealth*, 276 S.W.3d 270, 277 (Ky. 2009). Clearly the use of Derkson's plea agreement was trial strategy on the part of Powell's counsel. Accordingly, counsel was not ineffective, and an evidentiary hearing was not warranted.

Powell finally contends that he was denied his right to due process when his trial counsel failed to object to the trial court's determination that he must serve 85% of his sentence before being eligible for parole without indicating in its judgment that a victim had suffered death or serious physical injury. He claims that such is required pursuant to KRS 439.3401(1), which provides that "[t]he court shall designate in its judgment if the victim suffered death or serious physical injury." This argument lacks merit.

Powell seems to believe that he could only be classified as a violent offender if his crime actually caused "death or serious physical injury." However, he was convicted of complicity to first-degree robbery, which is considered a violent offense under KRS 439.3401(1)(l) even if the victim does not suffer death or serious physical injury. The trial court specifically noted in its judgment that complicity to robbery in the first degree "is a violent offense as defined by KRS 439.3401, requiring the service of at least 85% of the sentence imposed before parole eligibility" pursuant to KRS 439.3401(3). Nothing more was required. *See Fambrough v. Dep't of Corr.*, 184 S.W.3d 561, 562-63 (Ky. App. 2006). Therefore, Powell's claim of error was rightfully rejected without a hearing.

Conclusion

For the foregoing reasons, the judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ishmael Powell, *pro se*
Burgin, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General

Ken W. Riggs
Assistant Attorney General
Frankfort, Kentucky