

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-002202-MR

EDDY D. DELOACH

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE ANTHONY W. FROHLICH, JUDGE
ACTION NO. 03-CR-00449

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: DIXON AND KELLER, JUDGES; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Eddy Deloach appeals from the Boone Circuit Court's October 3, 2008, order denying his motion for relief pursuant to RCr²

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 Statutes (KRS) 21.580.

² Kentucky Rules of Criminal Procedure.

11.42. Because we hold that the trial court did not abuse its discretion in denying Appellant's motion, we affirm.

Appellant was indicted by the Boone County grand jury on October 21, 2003. The indictment charged Appellant with one count each of first-degree rape, first-degree sodomy, and first-degree sexual abuse. Pursuant to a plea agreement made with the Commonwealth, Appellant was convicted of all three crimes and sentenced to a total of thirty-five years imprisonment.³ Thereafter, Appellant filed a motion to vacate his conviction and sentence pursuant to RCr 11.42. An evidentiary hearing was held, and Appellant's motion was denied in an order entered on October 30, 2008. This appeal followed.

Post-conviction motions can be filed pursuant to RCr 11.42 by a party who seeks to vacate, set aside or correct a sentence based on a collateral attack. An RCr 11.42 "motion is limited to [the] issues that were not and could not be raised on direct appeal." *Sanborn v. Commonwealth*, 975 S.W.2d 905, 909 (Ky. 1998) (overruled on other grounds by *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)). A party filing a motion pursuant to RCr 11.42, has the burden "to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceedings provided in RCr 11.42." *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky.

³ Appellant was also being tried on charges in Grant County, where he had entered into a plea agreement several weeks before. The Boone County plea agreement provided that Appellant would serve the sentences of his Boone County charges consecutive with one another and also consecutive with his Grant County sentence, making the total time to be served thirty-five years.

1968). We review a trial court's judgment on an RCr 11.42 motion for an abuse of discretion. *Bowling v. Commonwealth*, 981 S.W.2d 545, 548 (Ky. 1998).

Appellant raises thirteen issues on appeal. Included in these are the following alleged trial court errors: 1) failure to rule that Appellant was denied due process under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); 2) failure to suppress Appellant's statements to the police; 3) failure to suppress statements made by a jailhouse informant; 4) failure to hold that a search warrant obtained through use of an informant's hearsay statements rendered the warrant invalid; 5) failure to grant a continuance when new counsel was appointed to Appellant; 6) failure to conduct a competency hearing and allowing the victim to testify at same; 7) acceptance of guilty plea and plea agreement even though the charges were unsupported by the elements of the crimes; 8) acceptance of Appellant's guilty plea although there was no factual basis to support it; and 9) allowance of tainted evidence that was provided by the Grant County police and prosecutor. These arguments all pertain to matters that were known to the Appellant at the time the judgment was entered on September 17, 2004, and therefore should have been raised on direct appeal rather than a later-filed RCr 11.42 motion. Furthermore, a valid guilty plea generally waives all non-jurisdictional claims unless they are preserved for appellate review either by entering a conditional guilty plea or by moving to withdraw the guilty plea. *See, e.g., Rodriguez v. Commonwealth*, 87 S.W.3d 8 (Ky. 2002); *Bronk v. Commonwealth*, 58 S.W.3d 482 (Ky. 2001) (direct appeal from denial of a motion

to withdraw guilty plea); *Hughes v. Commonwealth*, 875 S.W.2d 99, 100 (Ky. 1994) (“The general rule is that pleading guilty unconditionally waives all defenses except that the indictment did not charge an offense[.]”); and RCr 8.09 and 8.10. Appellant did not preserve any of the aforementioned issues for appeal. Therefore, because they were not preserved and because they are not appropriately brought under RCr 11.42, those arguments will not be considered by this Court.

Appellant’s remaining arguments center around a claim of ineffective assistance of counsel. Appellant alleges that his trial attorney, John Delaney, was ineffective because he didn’t challenge the Commonwealth’s failure to provide exculpatory evidence, in particular the medical records of the victim. Appellant also argues that his trial counsel was ineffective for failing to challenge Appellant’s psychiatric evaluation, which he claims was biased and prejudicial. Finally, Appellant makes a general allegation of cumulative error.

Kentucky has adopted the two-prong test of establishing ineffective assistance of counsel as outlined in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985).

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. Unless a defendant makes both

showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. It is the defendant's burden of establishing ineffective assistance of counsel. *Id.*, 466 U.S. at 690, 104 S.Ct. at 2066. The trial court must determine whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would be different." *Id.*, 466 U.S. at 694, 104 S.Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "It is not enough for the defendant to show that error by counsel had some conceivable effect on the outcome of the proceeding." *Sanders v. Commonwealth*, 89 S.W.3d 380, 386 (Ky. 2002) (*overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)). In the case *sub judice*, there was no trial due to the Appellant's guilty plea. When a defendant enters a guilty plea, that plea may be rendered involuntarily if it is determined that counsel's errors so seriously affected the outcome of the plea process that absent such error there is a reasonable probability that defendant would have instead insisted on going to trial. *Sparks v. Commonwealth*, 721 S.W.2d 726 (Ky. App. 1986). The totality of the circumstances surrounding entry of the plea must be considered upon review. *Kotas v. Commonwealth*, 565 S.W.2d 445 (Ky. 1978).

In support of its decision to deny the Appellant's RCr 11.42 motion, the trial court stated, in relevant part:

Mr. Delaney testified that he advised his client that there were outstanding Motions but that the Defendant insisted he wanted to enter a guilty plea. Mr. Delaney testified that the Defendant said he wanted to plea, he wanted out of the Grant County Jail, he said he had done it and just wanted to get it over. Mr. Delaney testified that there was a lot of evidence against the Defendant, three statements to the Trooper who was investigating the matter, the child's statements and the Defendant's statements to Mr. Delaney were consistent with the statements of the witnesses. Mr. Delaney testified that the Defendant never expressed any indication he wanted to go to trial or that he never committed the acts for which he was charged. Mr. Delaney testified that the reason he let the Defendant plea that day was because he was going to get 35 years concurrent with Grant County and there was a lot of evidence against the Defendant. The Defendant insisted on pleading guilty and the Defendant had already been found competent by this Court. Jacobs v. Commonwealth, Ky., 870 S.W.2d 412 (1994), held that, assuming mental competency to make such a decision, a defendant is "the master of his own defense and pilot of the ship." *There was no evidence presented to the Court contrary to the testimony of Mr. Delaney and the Court record is consistent with the testimony of Mr. Delaney.* The Defendant's claims of ineffective assistance of counsel are completely without merit and have absolutely no basis in fact.

(Emphasis added.)

Upon thorough review of the record, we agree with the trial court's analysis. The record reveals that the Commonwealth's evidence against Appellant was considerable. Appellant has failed to show that his trial attorney erred and has likewise failed to show, or even argue, a reasonable probability that he would have insisted on going to trial but for his counsel's alleged errors. Accordingly, we hold

that the trial court did not abuse its discretion in denying Appellant RCr 11.42 relief.

For the foregoing reasons, the October 30, 2008, order of the Boone Circuit Court is hereby affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Eddy Deloach, *pro se*
West Liberty, Kentucky

BRIEF FOR APPELLEE:

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