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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001961-MR

TERRY WAYNE ROACH

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 01-CR-00037

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CAPERTON AND KELLER, JUDGES.

ACREE, JUDGE: Terry Roach appeals the order of the McCracken Circuit Court denying his motions to vacate his sentence and conviction pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 and for a hearing. For the following reasons, we affirm.

On February 16, 2001, Roach was indicted for murder and first-degree robbery, and on June 30, 2002, he entered a guilty plea. At the plea hearing, the trial judge inquired into the knowing and voluntary nature of Roach's plea. The Commonwealth recommended sentences of life without the possibility of parole for twenty-five years for the murder charge and twenty years for the first-degree burglary charge, the sentences to run concurrently. Before he was sentenced on August 8, 2002, Roach attempted to withdraw his plea, claiming he had been forced to enter it. The trial judge was not persuaded and proceeded to sentence Roach as the Commonwealth recommended. Roach's conviction was affirmed by the Kentucky Supreme Court on direct appeal, and the decision became final on January 8, 2004. *Roach v. Commonwealth*, No. 2003-SC-0013-TG (Ky., January 14, 2004).

Roach then filed a motion pursuant to RCr 11.42 alleging he was denied effective assistance of counsel. This original motion was filed on March 5, 2004, well within the three-year time limit of RCr 11.42(10). Roach argued his trial counsel had misinformed him about his potential sentence causing him to enter the guilty plea involuntarily, and that his counsel had improperly failed to move for the suppression of certain evidence. At the same time, Roach filed both a motion for an evidentiary hearing on his RCr 11.42 motion and a motion requesting appointment of counsel. The Commonwealth did not respond to any of these motions.

On March 11, 2004, Roach requested the trial court to hold its ruling on his RCr 11.42 motion in abeyance until appointed counsel could file a supplemental RCr 11.42 motion; the trial court never ruled on this motion.¹ On March 24, 2004, the trial court appointed the Department of Public Advocacy (DPA) to represent Roach. Roach's attorney entered his notice of appearance on May 6, 2004, but did not file the supplement to Roach's original RCr 11.42 motion until September 3, 2008, more than four years after the original motion was filed. The supplemental motion supported Roach's argument that he had been "forced" to enter his guilty plea and referenced Roach's argument regarding his counsel's failure to file a suppression motion; however, it also raised new issues allegedly demonstrating the ineffectiveness of trial counsel's assistance.

The Commonwealth responded to the supplemental motion asserting that both the original and supplemental motions were barred by the three-year limitation established in RCr 11.42(10) and the doctrine of laches. In an order entered September 23, 2008, the trial court ruled the supplemental motion was both untimely and barred by laches and denied Roach's original motion without a hearing. This appeal followed.

Roach asserts neither the original nor the supplemental motion was time-barred, either by the three-year limit of the Rule or by laches, and that the trial court should have conducted an evidentiary hearing before denying either motion.

¹ We need not consider whether the three-year limitation in RCr 11.42 can be "abated" by such a motion because it was Roach's "duty to insist upon a ruling [before expiration of the three-year period], and failure to do so is a waiver." *Brown v. Commonwealth*, 890 S.W.2d 286, 290 (Ky. 1994), citing *Bell v. Commonwealth*, 473 S.W.2d 820 (Ky. 1971).

The Commonwealth responds by contending the supplemental motion was untimely, both motions were barred by laches, and Roach was not entitled to an evidentiary hearing. Additionally, the Commonwealth asserts that, in any event, issues regarding timeliness are moot because the matter was properly dismissed on its merits.

First, we address the Commonwealth's contention that the trial court dismissed both the original motion and the supplemental motion on their merits. The wording of the trial court's order leads us to believe it dismissed the supplemental motion based upon timeliness and laches only, and dismissed the original motion on its merits. The court specifically found the supplemental motion was untimely and was barred by laches. There is no mention of the original motion in the portions of the order which address the timing issues, and the court did not make specific findings or conclusions with respect to the original motion. Taken as a whole, it appears the trial court dismissed only Roach's original motion on its merits. The matters of timeliness and laches, therefore, are not moot, and we address them now.

RCr 11.42(10) requires that a defendant file a motion pursuant to this Rule within three years of the judgment's becoming final, with certain exceptions which toll the running of the three-year period. There has been no argument the limit should be tolled in this case. The same subsection also permits the Commonwealth to urge the application of the doctrine of laches even before expiration of the three-year limitation "when the delay has prejudiced the

Commonwealth's opportunity to present relevant evidence to contradict or impeach the movant's evidence." RCr 11.42(10).

In this case, Roach did all that was required of him to preserve the issues raised in his original motion. He filed that motion within the three-year limit provided by the Rule and promptly requested appointment of counsel. Furthermore, the motion was filed only about two months after the Supreme Court affirmed his conviction and it became final. It is unlikely this two-month lapse caused the Commonwealth any prejudice and, as Roach correctly notes, the Commonwealth has failed to identify how it has been prejudiced. When Roach filed his original motion, the Commonwealth was put on notice of every problem Roach perceived in his trial counsel's representation. Consequently, the Commonwealth had ample opportunity to preserve evidence or take whatever steps it deemed necessary to adequately respond to every issue reasonably ascertainable from that original motion. DPA's failure to file the supplemental motion before the three years expired did not affect the timing of or notice provided by Roach's original motion.

However, the three-year limitation does impact our consideration of the substance of the DPA's supplemental motion. Roach was "required to avail himself of RCr 11.42 as to any ground of which he is aware, or should be aware, during the period when the remedy is available to him." *McQueen v.*

Commonwealth, 948 S.W.2d 415, 416 (Ky. 1997). While those portions of the supplemental motion which support the issues raised in the first motion should be

considered by the trial court, any issues raised for the first time in the supplemental motion should not. This rule does not prejudice Roach. Even a lay person who is a criminal defendant knows generally the reasons he believes the assistance of his counsel was inadequate, and in most cases should be able to relay them in a timely *pro se* RCr 11.42 motion. *See* RCr 11.42(2). Permitting new issues to be raised for the first time after the three-year period has lapsed encourages defendants to file baseless initial motions, move for permission to supplement them, and then urge appointed counsel to formulate new reasons trial counsel was ineffective.

Without some early notice to the Commonwealth of the portions of his case a defendant believes to have been mishandled, evidence on those matters may become more difficult to locate or the Commonwealth may be prejudiced in other ways by the delay. The Kentucky Supreme Court has determined to draw the line at three years and this Court is obligated to enforce that limitation.

Therefore, we hold the circuit court was correct in ruling that it was barred from considering the issues raised in the supplemental motion to the extent those issues were not first raised in the original motion. We are thus left with the substance of the original motion, considering also the legal arguments contained in the supplemental motion that relate only to the points raised in the original motion, and to Roach's motion for an evidentiary hearing. We will turn to the latter first.

A trial judge should conduct an evidentiary hearing on an RCr 11.42 motion when the motion "raises a material issue of fact that cannot be determined on the face of the record[.]" RCr 11.42(5). However, an evidentiary hearing is

unnecessary when there is nothing outside the record which is material to the determination. *Skaggs v. Commonwealth*, 803 S.W.2d 573, 576 (Ky. 1990). Here, the trial court's order determined that "the record conclusively resolves the claims[.]" *Maggard v. Commonwealth*, 394 S.W.2d 893, 894 (Ky. 1965). This is the equivalent of determining that no hearing was necessary. Roach alleges this was error. We disagree with regard to Roach's claim that his plea was not knowing and voluntary because the record affirmatively demonstrates it was. We disagree with regard to Roach's claim that counsel was ineffective in failing to move to suppress recordings of his conversations with his girlfriend because nothing in the record gives rise to any reasonable inference that his girlfriend did not consent to the recordings.

Roach's argument regarding his claim that his plea was not voluntary has a few facets. He is of the opinion there was no aggravating factor that would have justified a punishment equal to the sentence to which he agreed.² This is patently incorrect. The aggravating factor was his robbery of the victim. KRS 532.025(2)(a)2.

Partly because of the foregoing fact, we are not persuaded by the next facet of Roach's argument. That argument is that his counsel's advice that he would face the death penalty was unreasonable if not erroneous, thereby

² He apparently relies on the last sentence of KRS 532.025(3) which states: "In all cases unless at least one (1) of the statutory aggravating circumstances enumerated in subsection (2) of this section is so found, the death penalty, or imprisonment for life without benefit of probation or parole, or the sentence to imprisonment for life without benefit of probation or parole until the defendant has served a minimum of twenty-five (25) years of his sentence, shall not be imposed."

constituting ineffective assistance. We disagree. It is true that *incorrect* advice about the possible sentence, and the reasonableness of accepting a plea offer in light of that sentence, could amount to ineffective assistance of counsel. See *Sparks v. Sowders*, 852 F.2d 882, 885 (6th Cir. 1988). However, the advice in this case was not incorrect. Life without the possibility of parole for twenty-five years and the death penalty were both sentences that could have been imposed upon Roach had he been convicted of murdering and robbing the victim. KRS 532.025(2)(a)2. Given the evidence supporting the accusations against Roach, and after his motion to exclude the death penalty as a possible sentence failed, his trial counsel was justified in advising him that a jury could sentence him to death. There was nothing deficient about this advice, and Roach therefore cannot meet even the first requirement of the *Strickland* test that “the defendant must show that counsel’s performance was deficient.” *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

In the final facet of this argument he claims he was “forced” into the plea agreement by his attorneys. This is the same argument he has already presented to the Supreme Court in his direct appeal. Considering the record, we find nothing to indicate force or coercion was involved. Instead, like the Kentucky Supreme Court, “we are convinced that the trial court correctly determined that Appellant’s guilty plea was voluntary.” *Roach, supra*, at p. 2. However, as Roach points out, review of the denial of an RCr 11.42 motion is not identical to a review of the voluntariness of the plea on direct appeal. See *Martin v. Commonwealth*,

207 S.W.3d 1, 4 (Ky. 2006). Therefore, abundantly cautious, we will again examine the record to determine whether Roach's guilty plea was knowing and voluntary.

In general, a fact placed in issue relative to a plea of guilty can be resolved based on the record where, as here, the trial judge specifically inquired into the knowing and voluntary nature of the entry of Roach's plea. *See Centers v. Commonwealth*, 799 S.W.2d 51, 55 (Ky.App. 1990). For a guilty plea to be upheld there must be an affirmative showing that it was entered knowingly and voluntarily. *Boykin v. Alabama*, 395 U.S. 238, 242-43, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969). The transcript of the colloquy Roach set forth in his original motion demonstrates that, after being sworn, he affirmatively acknowledged the following: he killed the victim of the crime and robbed him; he understood his constitutional rights and that he was waiving them; he knew he was facing the death penalty; the Commonwealth's recommended sentence was as stated earlier in this opinion; his plea was "offered freely, willingly, knowingly, voluntarily, and intelligently, without threat of force"; and he had read, understood and signed the plea agreement.³ "Solemn declarations in open court carry a strong presumption of verity." *Centers* at 54, citing *Blackledge v. Allison*, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). Roach "filed no affidavits in support of his claim of coercion and did not identify any particular instance of the alleged manipulation other than

³ Furthermore, the colloquy showed his counsel had gone over the guilty plea agreement with Roach and had discussed his constitutional rights as well. When asked whether she had any reason to believe Roach's guilty plea was "any less than freely, willingly, knowingly, voluntarily, and intelligently offered" she replied that she did not.

defense counsel's truthful warning that the death penalty was a very real possibility." *Commonwealth v. Elza*, 284 S.W.3d 118, 122 (Ky. 2009). No additional inquiry on the part of the trial judge was necessary to determine whether Roach's guilty plea was knowingly and voluntarily offered and entered. We reach the same conclusion reached by the Supreme Court – Roach's guilty plea was knowing and voluntary.

Roach's second claim of ineffective assistance is that his counsel failed to move to suppress his incriminating statements on grounds that the police obtained them by recording conversations between himself and his girlfriend without her consent. Roach claimed his girlfriend only made the calls as a "result of being coerced and threatened if she did not consent to recording her conversation [and] Counsel was told by [girlfriend] that she had been threatened by police to make the call." If this were true, it may have warranted exclusion of the evidence. *See Wilson v. Commonwealth*, 37 S.W.3d 745, 748 (Ky. 2001).

However, Roach's claim is not supported by affidavit or other evidence. While incarcerated and acting *pro se*, Roach was handicapped in his ability to collect such evidence, but even DPA counsel subsequently assigned to him did not support his argument with any evidence. In the absence of any evidence from which even a reasonable inference could be drawn indicating Roach's girlfriend had not consented to the tape recording of her conversations, it was not error for the trial judge to decide the issue without a hearing. "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)(*overruled on other grounds*), *cert. denied*, 540 U.S. 838, 124 S.Ct. 96, 157 L.Ed.2d 70 (2003). When we assess the reasonableness of the exercise of defense tactics, such as the decision not to move to suppress evidence, we apply “a heavy measure of deference to counsel’s judgments.” *Strickland v. Washington*, 466 U.S. at 691, 104 S.Ct. at 2066. *Strickland* held that there exists a strong presumption in the law that the assistance of counsel was within the range of professional guidelines, and Roach’s allegations, unsupported by evidence, failed to rebut this presumption. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. Roach’s argument on this issue is without merit.

For the foregoing reasons, we affirm the order of the McCracken Circuit Court denying Roach relief pursuant to RCr 11.42.

ALL CONCUR.

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