

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001399-MR

JOSEPH P. HANCOCK

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 05-CR-002757

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KELLER, NICKELL, AND STUMBO, JUDGES.

NICKELL, JUDGE: Joseph P. Hancock has appealed from the Jefferson Circuit Court's denial of his RCr¹ 11.42 for post-conviction relief without holding an evidentiary hearing. For the following reasons, we affirm.

On September 15, 2005, Hancock was charged with two counts of robbery in the first degree² stemming from two separate crimes committed on

¹ Kentucky Rules of Criminal Procedure.

² Kentucky Revised Statutes (KRS) 515.020, a Class B felony.

different dates. The facts supporting the indictment were set forth in the Commonwealth's response to discovery requests.

On August 22, 2005, Hancock entered Oscar's Hardware armed with a handgun and forced the two employees to the front of the store demanding money from the cash register. After obtaining \$311.00, Hancock ordered the employees to exit the front of the store with their hands up. He then fled the rear of the store. Both employees were able to give a physical description of Hancock.

On September 2, 2005, Hancock entered Patrick's Bar armed with a handgun and wearing a camouflage ski mask. He handed an employee a black bag and told him to place all of the money inside. The employee informed Hancock he was merely a clean-up person and had no access to any of the bar's money. Hancock led the employee to the register but noticed a filing cabinet in an adjoining room. The cabinet was locked and Hancock forcibly opened it, revealing cash in one of the drawers. Hancock had the employee place the money in the bag and forced him to lie on the ground. Hancock fled the scene. The employee was able to give a physical description of Hancock as was an employee of a neighboring business.

After reviewing the video surveillance footage from Patrick's Bar, one of the bartenders recognized Hancock from an image captured prior to Hancock donning his mask. The bartender noted he was one hundred percent sure he recognized the person on the video as being Hancock, a regular patron of the bar, and whom he knew was nicknamed "Fat Joe." The bartender was aware of

Hancock's address and the make and model of the vehicle Hancock drove. A vehicle matching the bartender's description could be seen in the surveillance footage.

The following day, officers went to Hancock's residence in an attempt to locate him after receiving a tip from the owner of Patrick's Bar that Hancock's car was in the driveway at the residence. Hancock answered the door and was arrested. After being informed of the charges and being given his constitutional rights, Hancock stated that "no one could identify me" before invoking his right to an attorney. He refused to consent to a search of the home and his vehicle.

Officers observed items in the home matching the description of items used during the robberies, and therefore prepared a request for a search warrant of the residence and Hancock's vehicle. While awaiting return of the warrant, Hancock's roommate arrived at the residence and identified Hancock as the person captured in a photograph made from a frame of the video surveillance footage. Upon obtaining the search warrant, officers discovered numerous items of incriminating evidence in the home and Hancock's vehicle, including a revolver, clothing and a black bag matching descriptions given by the victims of the robberies.

On February 8, 2006, Hancock filed a motion to enter a guilty plea based upon a sentencing recommendation from the Commonwealth. According to the terms of the negotiated plea, Hancock would plead guilty to one count of robbery in relation to the crime at Patrick's Bar. The remaining robbery count was

to be dismissed. In return for his plea, the Commonwealth agreed to recommend a sentence of ten years' imprisonment. Hancock also voluntarily agreed to revocation of a five-year sentence from a previous, unrelated case for which he was on diversion, with the sentence from that case running concurrently with his new sentence, for a total term of imprisonment of ten years.

After Hancock formally waived his right to a separate sentencing hearing and preparation of a presentence investigation report (PSI), the trial court conducted a thorough guilty plea colloquy. Therein, Hancock admitted to the facts underlying the charge against him, stated he was satisfied with the advice received from his counsel, and acknowledged his plea was being freely, knowingly and voluntarily entered. The trial court accepted the plea, found Hancock had waived separate sentencing and preparation of a PSI, found he was statutorily ineligible for probation, and ultimately sentenced Hancock in conformity with the Commonwealth's recommendation to serve a ten year term of imprisonment. A written judgment of conviction was entered on February 15, 2006.

On November 6, 2006, Hancock filed a motion for post-conviction relief pursuant to CR³ 60.02 contending his guilty plea was "unknowing" because of "newly discovered evidence." He alleged his rights under the Fourth Amendment to the United States Constitution had been violated because officers had conducted an unlawful search and seizure of his residence and vehicle. Hancock alleged he had recently learned from his roommate that officers had

³ Kentucky Rules of Civil Procedure.

begun their search prior to the issuance and return of the search warrant. He attached affidavits from his roommate and two neighbors in support of his allegations. The Commonwealth filed a written response in opposition to Hancock's motion. On January 12, 2007, the trial court denied the motion for relief. Hancock appealed the denial to this Court. An unpublished opinion affirming the trial court was rendered on June 25, 2008.⁴

On February 16, 2009, Hancock filed the instant *pro se* motion for post-conviction relief pursuant to RCr 11.42, asserting his counsel was ineffective in: encouraging him to plead guilty; failing to move to suppress evidence; failing to interview witnesses or otherwise conduct a thorough investigation and prepare defenses; and misinforming him regarding parole eligibility. He included similar arguments regarding the search of his home and vehicle which had been rejected in his earlier CR 60.02 motion. Hancock also alleged the cumulative effect of these errors warranted the vacation of his conviction and sentence. He requested the appointment of counsel and a full evidentiary hearing. The Commonwealth filed a notice with the trial court indicating it would wait to respond to Hancock's substantive arguments until after the trial court ruled on his motion for the appointment of counsel.

On March 30, 2009, the trial court entered an opinion and order finding Hancock's plea had been voluntarily entered, he had failed to demonstrate counsel was ineffective, and that no evidentiary hearing was warranted. The

⁴ *Hancock v. Commonwealth*, 2007-CA-000298-MR.

opinion denied all of Hancock's pending motions. This appeal followed. We affirm.

On appeal, Hancock alleges his counsel was ineffective for failing to file a pretrial motion to suppress the evidence seized as a result of the unlawful search of his home and vehicle, and for failing to interview witnesses to the unlawful search. He contends the trial court erred in failing to so find. He alternatively argues the trial court should have granted him an evidentiary hearing on the issues raised.

The standard of review for denial of an RCr 11.42 motion for post-judgment relief is well-settled. To establish a claim for ineffective assistance of counsel, a defendant must generally prove two prongs: 1) counsel's performance was deficient; and 2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). Pursuant to *Strickland*, the standard of attorney performance is reasonable, effective assistance. The defendant bears the burden of proof in showing his counsel's representation fell below an objective standard of reasonableness and must overcome a strong presumption that his counsel's performance was adequate. *Jordan v. Commonwealth*, 445 S.W.2d 878 (Ky. 1969); *McKinney v. Commonwealth*, 445 S.W.2d 874 (Ky. 1969).

In *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986), this Court addressed the validity of guilty pleas:

The test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 164, 27 L.Ed.2d 162 (1970). There must be an affirmative showing in the record that the plea was intelligently and voluntarily made. *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969). However, ‘the validity of a guilty plea is determined not by reference to some magic incantation recited at the time it is taken but from the totality of the circumstances surrounding it.’ *Kotas v. Commonwealth*, Ky., 565 S.W.2d 445, 447 (1978), (citing *Brady v. United States*, 397 U.S. 742, 749, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747 (1970)).

The *Sparks* Court further addressed the two-part test used to challenge a guilty plea based upon allegedly ineffective assistance of counsel.

A showing that counsel’s assistance was ineffective in enabling a defendant to intelligently weigh his legal alternatives in deciding to plead guilty has two components: (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. *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 370, 80 L.Ed.2d 203 (1985). Cf., *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970).

Sparks, supra, 721 S.W.2d at 727-728. See also *Bronk v. Commonwealth*, 58 S.W.3d 482 (Ky. 2001). Finally, we review a trial court’s findings of fact under the clearly erroneous standard of review. CR 52.01.

In the case *sub judice*, Hancock first alleges his counsel was ineffective in failing to file a motion to suppress the evidence seized from his home and automobile. As before the trial court, he persists in his argument that police unlawfully conducted the search prior to the issuance of a search warrant. He contends that but for his counsel's failure to seek suppression of the evidence seized as a result of this infirm search, he would not have pled guilty and the outcome of the proceeding would have been different. We disagree.

Under *Strickland*, Hancock must show that but for the alleged ineffective assistance there is a reasonable probability that the outcome would not only have been different, but would have been more favorable to him. Nothing in the record supports Hancock's theory that but for his counsel's failure to seek suppression of the seized items the outcome would have been more favorable to him. The police determined to search Hancock's residence and vehicle following his arrest in furtherance of their investigation into the robberies after they observed items matching the description of objects used in the robberies in plain sight in Hancock's residence. It is undisputed that officers remained in the residence while awaiting the issuance and return of a search warrant. The affidavit supporting issuance of the search warrant was signed at 8:52 p.m. The police log of the items seized during the search indicates the search occurred between 9:40 p.m. and 10:50 p.m. and that the items seized were located between 10:14 p.m. and 10:33 p.m. Apart from the self-serving affidavits tendered by Hancock, nothing in the record

indicates there were any improper acts performed by any of the police officers involved in the search.

Furthermore, given the other overwhelming evidence against Hancock, *i.e.*, the video surveillance tapes which showed him in the act with his car in the background, and the witnesses' identification of him, including that of his roommate when the police came to their apartment, Hancock makes no showing that even absent the evidence seized in the search of the apartment, "the verdict most probably would not have been rendered and there is a strong probability of a miscarriage of justice."

Hancock, Slip Op. at *1 (quoting *Harris v. Commonwealth*, 296 S.W.2d 700, 702 (Ky. 1956)).

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*, 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 Hancock's allegations, unsupported by evidence, failed to rebut this presumption. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. Hancock's argument on this issue is without merit.

Hancock next contends his counsel was ineffective in failing to conduct interviews of potential witnesses to the allegedly unlawful search. He alleges this error was so egregious it casts doubt on the validity of his guilty plea. We disagree.

When inadequate investigation is raised as a basis for post-conviction relief, the standard

is not whether counsel could have done more, *Waters v. Thomas*, 46 F.3d 1506, 1514 (11th Cir. 1995) (en banc), but rather whether counsel's errors undermined the reliability of the trial. *McQueen [v. Scroggy]*, 99 F.3d 1302, 1311-12 (6th Cir. 1996)]. . . .

Trial counsel has a clear 'duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.' *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984). A reasonable investigation is not, however, the investigation that the best defense lawyer, blessed not only with unlimited time and resources but also with the inestimable benefit of hindsight, would conduct. *Kokoraleis v. Gilmore*, 131 F.3d 692, 696 (7th Cir. 1997); *Stewart v. Gramley*, 74 F.3d 132, 135 (7th Cir. 1996); *Waters, supra*, at 1514.

Baze v. Commonwealth, 23 S.W.3d 619, 625 (Ky. 2000), *cert. denied*, 531 U.S. 1157, 121 S.Ct. 1109, 148 L.Ed.2d 979 (2001).

As previously stated, a careful review of the record indicates nothing untoward occurred during the search of Hancock's home and vehicle. While officers may have remained in or around Hancock's apartment while awaiting a search warrant, nothing indicates they conducted any sort of search of the premises prior to its issuance. Every indication in the record reveals this was a valid search and seizure pursuant to a lawful search warrant. Hancock is not entitled to relief under RCr 11.42 because, absent any knowledge of the potential testimony of either Hancock's neighbors or roommate, counsel could not reasonably have been expected to know of any need to interview them. The only potential reason to interview any of them would have been to determine the

circumstances surrounding Hancock's roommate's identification of him as the perpetrator. However, in light of the surveillance videotape evidence, such an interview would likely have been fruitless. Moreover, "[t]he mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not sufficient ground to prove ineffectiveness of counsel." *Hodge v. Commonwealth*, 116 S.W.3d 463, 470 (Ky. 2003) (quoting *Waters v. Thomas*, 46 F.3d 1506 (11th Cir. 1995)).

The evidence Hancock alleges would have been uncovered had counsel investigated and interviewed the witnesses he suggests is insufficient to warrant a reversal of his conviction. Therefore, based upon the record before us, counsel's strategic decisions and failure to conduct interviews with alleged eyewitnesses were well within the bounds of reasonably professional assistance and were "reasonable under the circumstances." *Haight, supra*, 41 S.W.3d at 446. *See also Burger v. Kemp*, 483 U.S. 776, 794-95, 107 S.Ct 3114, 3126, 97 L.Ed.2d 638 (1987). Thus, Hancock failed to prove the first prong of the *Strickland* test as to this allegation.

In addition to challenging the trial court's rejection of his various claims, Hancock contends that the trial court erred in failing to conduct an evidentiary hearing on his RCr 11.42 motion. A movant is not automatically entitled to an evidentiary hearing on an RCr 11.42 motion; there must be an issue of fact which cannot be determined on the face of the record. *Stanford v. Commonwealth*, 854 S.W.2d 742 (Ky. 1993). "Where the movant's allegations are refuted on the face of the record as a whole, no evidentiary hearing is required." *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986) (citing *Hopewell*

v. Commonwealth, 687 S.W.2d 153, 154 (Ky. App. 1985)). Our review indicates all of Hancock's allegations are clearly refuted on the face of the record, and thus the trial court did not err in refusing to hold an evidentiary hearing.

Therefore, for the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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