

RENDERED: MARCH 25, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000525-MR

ROY MACE

APPELLANT

v. APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE DAN KELLY, JUDGE
ACTION NO. 04-CR-00234

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON AND MOORE, JUDGES; ISAAC,¹ SENIOR JUDGE.

ISAAC, SENIOR JUDGE: Roy Mace appeals *pro se* from a Taylor Circuit Court order which denied his motion made pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. The sole issue on appeal is whether the circuit court

¹ Senior Judges Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

correctly determined that Mace was not entitled to an evidentiary hearing. Having reviewed the record, we affirm.

Mace was charged with two counts of first-degree sodomy and one count of being a first-degree persistent felony offender. According to the citation, he placed a foreign object inside the buttocks and vagina of a six-year-old girl who lived in the same home as Mace. He had previously been found guilty of failing to comply with the sex offender registration requirements.

The circuit court ordered Mace to be evaluated for competency to stand trial, insanity, mental illness and mental retardation. A competency hearing was held at which testimony was heard from Dr. Frank DeLand of the Kentucky Correctional Psychiatric Center. The competency evaluation report submitted by Dr. DeLand stated that Mace “does not by reason of mental illness or mental retardation lack substantial capacity to understand the procedures against him or meaningfully participate in his own defense.” At the hearing, Dr. DeLand testified that Mace has an I.Q. of 81 with strong verbal skills and had no problems at all discussing the court system and was “sharper” than Dr. DeLand thought he would be considering his I.Q. Dr. DeLand noted that Mace had a significant substance abuse problem and a history of attention deficit disorder. Mace’s trial counsel cross-examined Dr. DeLand regarding Mace’s previous psychiatric treatment; medication; auditory hallucinations; substance abuse; suicide attempts and self-

mutilation; and educational level. The circuit court found Mace competent to stand trial.

Mace states that he told his attorney that he had a long history of severe mental, emotional and behavioral problems. He asked her to contact his previous psychiatrists and psychologists to testify at the hearing and to have his psychiatric records produced as evidence that his psychopathic and psychotic behavior causes him to be impulsive and unable adequately to control his emotions and actions. He claims that she did not act on any of these requests and instead persuaded him that it was in his best interest to accept the Commonwealth's offer on a guilty plea, pursuant to which the charges against Mace were amended to two counts of first-degree criminal abuse and one count of being second-degree persistent felony offender. Judgment was entered on December 12, 2005, and Mace received a total sentence of fourteen years.

On August 13, 2008, Mace filed a *pro se* motion pursuant to RCr 11.42. He asserted that he entered his plea involuntarily due to his attorney's refusal to present any witnesses, evidence or arguments to rebut Dr. DeLand's opinion. The circuit court appointed post-conviction counsel who filed a supplemental motion and memorandum and a motion for an evidentiary hearing. The circuit court denied the motions. This appeal followed.

Mace argues that his counsel was ineffective for failing to investigate his case and that he was forced to enter a plea of guilty due to her failings. He asserts that she misadvised him that that he could not raise a defense of insanity at

trial because the circuit judge had ruled that he was competent to stand trial. He argues that because these allegations are not refuted by the record, it was an abuse of discretion for the circuit court to deny an evidentiary hearing.

The standard governing review of claims of ineffective assistance of counsel in the context of a guilty plea 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.

Sparks v. Commonwealth, 721 S.W.2d 726, 727 -728 (Ky.App. 1986), *citing Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 370, 80 L.Ed.2d 203 (1985).

Whether an RCr 11.42 movant is entitled to an evidentiary hearing is determined under a two-part test.

First, the movant must show that the alleged error is such that the movant is entitled to relief under the rule. In other words, the court must assume that the factual allegations in the motion are true, then determine whether there has been a violation of a constitutional right, a lack of jurisdiction, or such a violation of a statute as to make the judgment void and therefore subject to collateral attack. If that answer is yes, then an evidentiary hearing on a defendant's RCr 11.42 motion on that issue is only required when the motion raises an issue of fact that cannot be determined on the face of the record. To do this, the court must examin[e] whether the record refuted the allegations raised (and not whether the record supported the allegations, which is the incorrect test).

Parrish v. Commonwealth, 272 S.W.3d 161, 166 (Ky. 2008) (internal citations and quotation marks omitted).

In denying Mace's motion for an evidentiary hearing, the circuit court found that the record refuted his allegations. Specifically, the report of Dr. DeLand went beyond an assessment of Mace's competency to stand trial to evaluate Mace's mental state as it relates to criminal responsibility including mental illness, mental retardation and criminal insanity at the time the offense was committed. The record further showed that Dr. DeLand interviewed Mace, conducted tests on his mental condition and had access to earlier evaluations of his mental state. Mace's counsel obtained the evaluation of Dr. DeLand, and cross-examined him regarding its contents. The circuit court noted that Dr. DeLand's report noted an improvement in Mace's mental functioning from the time of his first evaluation to the more recent evaluation. The circuit court concluded that the actions of Mace's counsel were not outside the wide range of professionally competent assistance to which he was entitled and that the record refuted his allegations. We agree.

Mace's attorney had full access to Dr. DeLand's report which contained no indication that an insanity defense could succeed. Furthermore, Mace was facing charges of first-degree sodomy, a class A felony, the penalty for which is twenty to fifty years or life imprisonment. KRS 532.060(2). The first-degree PFO charge carries the possibility of life imprisonment without parole for twenty-five years for a sex crime committed against a minor. KRS 532.080(6)(a). Under

these circumstances, the decision of Mace’s attorney to recommend acceptance of the Commonwealth’s plea offer was well within the range of professionally competent assistance. “As so often happens, a plea of guilty resulted in a lighter sentence than might have been imposed. To influence a defendant to accept this alternative is proper.” *Commonwealth v. Campbell*, 415 S.W.2d 614, 616 (Ky.1967).

Because the record clearly refutes Mace’s allegations of ineffective assistance of counsel, the Taylor Circuit Court did not err in refusing to grant an evidentiary hearing. Its order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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