RENDERED: APRIL 1, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001418-MR

FRANK ELDRED — APPELLANT

v.

APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NOS. 90-CR-00073 & 90-CR-00076

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, NICKELL, AND STUMBO, JUDGES.

KELLER, JUDGE: Frank Eldred (Eldred) appeals from an order of the Russell Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. For the following reasons, we affirm.

FACTUAL BACKGROUND

On June 27, 1991, Eldred was found guilty of murder and first-degree arson, and was sentenced to life without the possibility of parole for twenty-five years and

life, respectively. The jury trial conviction was subsequently reversed by the Supreme Court of Kentucky in *Eldred v. Commonwealth*, 906 S.W.2d 694 (Ky. 1994). Prior to retrial, Eldred entered an *Alford*[1] plea to murder and first-degree arson, with a sentence of 25 years on each charge to run consecutively for a total of fifty years' imprisonment.

Having reviewed the record, we adopt the following facts from the Supreme Court's decision in *Eldred*, 906 S.W.2d at 697-99:

> On July 23, 1988, Herbert Cannon was killed when his automobile was burned. The automobile was completely destroyed by the extremely hot fire, which also incinerated the body, although the official cause of death was smoke inhalation and carbon monoxide intoxication. The Commonwealth's theory of the case was that the decedent was killed by Appellant and a confederate, Tommy Perdue, at the request of Cannon's ex-wife, Sue Melton, for the sum of $5,000.
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> The Commonwealth's case was premised initially upon the testimony of Appellant's girlfriend, Cynthia Moore. She came forward in August 1990 and accused Appellant of the murder based upon statements he had made to her during the course of their relationship. There was additional evidence derived from the investigation of the crime, although it apparently was insufficient to make a case since no indictment was sought until after Moore came forward.
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> In any event, Appellant was arrested on November 15, 1990. An indictment was filed the next day charging Appellant, Melton, and Perdue, each with murder as a principal, complicity to murder, first degree arson as a principal, and complicity to first degree arson . . . .
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> On December 7, 1990, a trial was scheduled to begin on June 10, 1991. Eventually, the trials of the three co-

[1] *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

> defendants were severed, and Appellant's was slated to go first.

Prior to trial, Melton entered into a plea agreement and agreed to testify against Eldred. A jury convicted Eldred of murder and first-degree arson, and Eldred appealed his conviction. The relevant issue raised on appeal was whether the trial court erred in denying Eldred's request to discover the medical and psychiatric records of Melton and Moore, because their mental health issues called into question their credibility. The Court concluded that the trial court abused its discretion in denying the discovery sought by Eldred and remanded the case with instructions for the trial court to conduct an *in camera* hearing "in the presence of the prosecutor and defense counsel" to determine which information would be both relevant and material to each witness's credibility. *Id*. at 702.[2]

The *in camera* review was conducted on August 13, 1996. On November 22, 2005, Eldred entered a guilty plea and was sentenced on January 19, 2006. On June 26, 2008, Eldred filed a *pro se* RCr 11.42 motion. On October 9, 2008, Eldred filed a motion to supplement his RCr 11.42 motion. Without holding an evidentiary hearing, the trial court entered an order on June 22, 2009, denying Eldred's RCr 11.42 motion. It is from this order that Eldred appeals.

STANDARD OF REVIEW

[2] In *Commonwealth v. Barroso*, 122 S.W.3d 554, 564 (Ky. 2003), the Kentucky Supreme Court partially overruled *Eldred* regarding when to conduct a review of psychotherapy records. Specifically, the Court held that an "*in camera* review of a witness's psychotherapy records is authorized only upon receipt of evidence sufficient to establish a reasonable belief that the records contain exculpatory evidence." The Court also concluded that the review must be conducted by the trial judge alone. *Id*.

In order to prevail on a claim of ineffective assistance of counsel, the defendant must satisfy the two-part test set forth in *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). *See Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). Under this standard, a party asserting such a claim is required to show: (1) that the trial counsel's performance was deficient in that it fell outside the range of professionally competent assistance; and (2) that the deficiency was prejudicial because there is a reasonable probability that the outcome would have been different but for counsel's performance. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064.

When a movant has pled guilty, the *Strickland* test is slightly modified. In such instances, the second prong of the *Strickland* test includes the requirement that a defendant demonstrate that, but for the alleged errors of counsel, there is a reasonable probability that he would not have entered a guilty plea, but rather would have insisted on proceeding to trial. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985); *Sparks v. Commonwealth*, 721 S.W.2d 726, 727-28 (Ky. App. 1986).

There is no automatic entitlement to an evidentiary hearing with regard to an RCr 11.42 motion. Rather, a hearing is required only if there is an "issue of fact that cannot be determined on the face of the record." RCr 11.42(5); *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993). Furthermore, "[w]here the movant's allegations are refuted on the face of the record as a whole, no

evidentiary hearing is required." *Sparks*, 721 S.W.2d at 727 (*citing Hopewell v. Commonwealth*, 687 S.W.2d 153, 154 (Ky. App. 1985)).

ANALYSIS

On appeal, Eldred argues that he received ineffective assistance of counsel because his counsel: (1) failed to inform him that Moore passed away prior to the entry of his guilty plea; (2) mistakenly told him that the psychiatric records of Melton and Moore would not help him in defending his case; (3) violated his right to a speedy trial; (4) failed to investigate and prepare for trial; (5) provided misadvice to his alibi witnesses, which caused him to plead guilty; and (6) failed to advise him about his right to appeal. Eldred also contends that the trial court erred in not holding an evidentiary hearing.

We note that in its order denying Eldred's RCr 11.42 motion, the trial court only addressed two issues raised by Eldred in his motion. Those issues were counsel's failure to advise Eldred about his right to appeal, and that counsel misled him about Melton's psychiatric records. RCr 11.42(6) provides, in pertinent part, that

> [a] final order shall not be reversed or remanded because of the failure of the court to make a finding of fact on an issue essential to the order unless such failure is brought to the attention of the court by a written request for a finding on that issue or by a motion pursuant to Civil Rule 52.02.

Kentucky Rule of Civil Procedure (CR) 52.02 provides that, within ten days after entry of a judgment, a party may ask the court to make additional findings of fact and amend its judgment accordingly. "[A] trial court conducting a hearing to

vacate sentence must make findings on all material issues of fact. Such findings are required if there is to be meaningful appellate review . . . ." *Lynch v. Commonwealth*, 610 S.W.2d 902, 905 (Ky. App. 1980) (*citing Blankenship v. Commonwealth,* 554 S.W.2d 898, 903 (Ky. App. 1977)). If a party does not seek those additional findings of fact, we cannot reverse or remand the court's judgment. CR 52.04; *see also Vinson v. Sorrell*, 136 S.W.3d 465, 471 (Ky. 2004).

Because Eldred did not file a written request asking the trial court to make additional findings of facts on the remaining issues, we cannot reverse or remand on those issues. Therefore, we only address the issues addressed by the trial court in its order.

Eldred argues that he received ineffective assistance of counsel because his counsel failed to inform him that he would not retain the right to appeal by entering an *Alford* plea. However, Eldred's claim that his trial counsel failed to advise him of his right to appeal is refuted by the record. While the plea hearing is not in the record on appeal, his signed Motion to Enter Guilty Plea is. That motion specifically states that Eldred agreed that he understood that the Constitution guarantees him the right to appeal his case to a higher court, and that by pleading guilty, he waived that right. Thus, the trial court did not err in denying this claim.

Next, Eldred contends that he received ineffective assistance of counsel because his counsel mistakenly told him that the psychiatric records of Melton and Moore were not helpful to his case. First, we note that the trial court

only addressed Melton's medical records. Thus, we will only address Melton's records. Additionally, the trial court only concluded that Eldred was aware of the content of Melton's psychiatric records, and it did not address Eldred's argument that his counsel misled him as to the usefulness of Melton's records.

Because Eldred was present in the room when the trial court conducted an *in camera* review of Melton's records on August 13, 1996, we believe that the trial court was correct when it determined that Eldred was aware of the content of Melton's psychiatric records. Even though the trial court did not address the issue of whether Eldred's counsel misled him about the usefulness of Melton's records, we believe that Eldred cannot prevail on this argument. First, Eldred has failed to show how any of Melton's record would be admissible. Even if they were admissible, he failed to assert how they would be helpful to his case. It is well-established that a motion made pursuant to RCr 11.42 must specifically state the grounds for relief and the facts to support those grounds. *Stanford*, 854 S.W.2d 742. Thus, the trial court did not err in denying this claim.

Next, we note that intertwined within many of Eldred's claims is his argument that he was forced to enter into the guilty plea. Having reviewed the trial court's order and the limited record before us, we conclude that the trial court was correct when it rejected this assertion. Although we do not have a copy of the plea colloquy, in its order, the trial court noted that prior to accepting the plea, Eldred answered that he was not entering the plea under any coercion or duress.

Additionally, Eldred signed the Motion to Enter Guilty Plea on November 22, 2005, which provides, in pertinent part, the following:

> In return for my guilty plea, the Commonwealth has agreed to recommend to the Court the sentence(s) set forth in the attached "Commonwealth's Offer on a Plea of Guilty." Other than that recommendation, no one, including my attorney, has promised me any other benefit in return from my guilty plea nor has anyone forced or threatened me to plead "Guilty."
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> . . . .
>
> I declare my plea of "GUILTY" is freely, knowingly, intelligently and voluntarily made; that I have been represented by counsel; that my attorney has fully explained my constitutional rights to me as well as the charges against me and any defenses to them; and that I understand the nature of this proceeding and all matters contained in this document.

Therefore, the trial court was correct when it concluded that Eldred was not forced to plead guilty.

Finally, Eldred contends that the trial court erred by denying his motion for an evidentiary hearing. Because the record refutes the allegations raised in Eldred's RCr 11.42 motion that are properly before this Court, the trial court did not err when it denied his motion for an evidentiary hearing. *See Stanford*, 854 S.W.2d at 743-44.

CONCLUSION

For the foregoing reasons, the order of the Russell Circuit Court denying Eldred's RCr 11.42 motion is affirmed.

ALL CONCUR.

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