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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001617-MR

ERIC B. HICKS — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 02-CR-00364

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, STUMBO AND VANMETER, JUDGES.

ACREE, JUDGE: Eric B. Hicks appeals two orders of the McCracken Circuit Court which combine to deny his Rule of Criminal Procedure (RCr) 11.42 motion in its entirety. Finding the performance of Hicks' trial counsel was not deficient and the circuit court's findings of fact were adequate, we affirm.

On November 22, 2002, Hicks was indicted on one count of theft of property over $300 and one count of possession of burglary tools. His attorney entered negotiations with the Commonwealth to reduce the theft charge to a misdemeanor. During this time, the Commonwealth offered Hicks a recommended sentence of three years' imprisonment in exchange for a guilty plea. Hicks now claims he instructed his trial counsel to accept the Commonwealth's offer on his behalf; no plea agreement was entered, however.

A superseding indictment was entered against Hicks on February 7, 2003, charging him as a Persistent Felony Offender (PFO) in the first degree in addition to the charges of theft and possession of burglary tools. The PFO charge was based on prior felony convictions in Arkansas and Louisiana. Following the second indictment, the Commonwealth offered a recommended sentence of five years' imprisonment in exchange for Hicks' guilty plea. Hicks asserts he again instructed his attorney to accept the offer. Again, no plea agreement was entered.

Hicks proceeded to trial. A jury found him guilty of all charges. He was sentenced to imprisonment for fifteen years, probated for two years plus time served. Hicks filed a direct appeal. This Court affirmed the conviction, and the Supreme Court denied Hicks' motion for discretionary review on May 10, 2006. After his probation was revoked on October 20, 2005, Hicks filed a motion to modify the judgment pursuant to Kentucky Rule of Civil Procedure (CR) 60.02. It was denied, and Hicks did not appeal.

Hicks filed his RCr 11.42 motion on May 11, 2009, which included a request for more specific findings of fact.[1] There was initially some confusion at the circuit court regarding the timeliness of Hicks' motion, but the court ultimately concluded he had filed it within the deadline established by RCr 11.42(10). The circuit court then partially denied the motion, conducted an evidentiary hearing, and entered an order denying the remaining portions of Hicks' motion.

On appeal, Hicks argues the circuit court improperly failed to make more specific findings of fact following his CR 52.02 motion. He also contends, as he did before the circuit court, that his trial counsel was ineffective in failing to accept the Commonwealth's plea offers on his behalf and failing to investigate his prior felony conviction in Louisiana, for which he was pardoned. Hicks also now maintains his trial attorney's performance was deficient because she failed to object to improperly authenticated evidence of his convictions in Louisiana and Arkansas.

The Commonwealth contends Hicks' motion should properly have been dismissed for two procedural reasons: (1) because it was time-barred pursuant to RCr 11.42(10) and (2) because it is his second post-conviction motion.

RCr 11.42 (10) requires a criminal defendant to file his motion within three years of the date his conviction becomes final, with certain limited exceptions which are not at issue here. As noted previously, Hicks' conviction became final on May 10, 2006, and he filed his RCr 11.42 motion on May 11, 2009. At first

[1] The timing of the motion for additional findings suggests Hicks was requesting the circuit court to make findings supplemental to its Order of Judgment.

glance, the motion appears to be one day late. Further examination, however, reveals May 10, 2009, fell on a Sunday. The next business day was May 11. Kentucky Revised Statute (KRS) 446.030(1)(a) provides that when a filing deadline falls on a weekend or holiday, the deadline is extended to the next day the court is open to the public. Hicks' motion was therefore not late.

According to the Commonwealth's second theory, a defendant is entitled to only one post-conviction motion. That is not the rule. Defendants are barred from using various post-conviction motions to repeatedly raise the same grounds for appeal (or grounds they could and should have raised in previous motions). *Hampton v. Commonwealth,* 454 S.W.2d 672 (Ky. 1970).

While there is room for overlap between the two motions, RCr 11.42 and CR 60.02 have different purposes, and in many cases a defendant may permissibly move to vacate a sentence using both devices. "The purpose of CR 60.02 is to bring before a court errors which (1) had not been put into issue or passed on, and (2) were unknown and could not have been known to the moving party by the exercise of reasonable diligence and in time to have been otherwise presented to the court." *Young v. Edward*, *Technology Group, Inc.*, 918 S.W.2d 229, 231 (Ky. App. 1995) (citing *Davis v. Home Idem. Co.*, 659 S.W.2d 185 (Ky. 1983)). On the other hand, "[t]he purpose of an RCr 11.42 proceeding is to review a judgment and sentence for constitutional validity of the proceedings prior to judgment or in the sentence and judgment itself." *Bowling v. Commonwealth*, 981 S.W.2d 545, 552 (Ky. 1998). So long as the issues addressed are different in each

motion, and would not have been better addressed in a previous motion, a defendant is not precluded from filing motions pursuant to both CR 60.02 and RCr 11.42.

In Hicks' case, he properly filed motions pursuant to both CR 60.02 and RCr 11.42. His CR 60.02 motion addressed the valuation of the property Hicks stole. He argued the items were erroneously valued at greater than $300; had this motion been granted, the theft charged would have been reduced to a misdemeanor and there would be no basis for a PFO charge. Hicks' RCr 11.42 motion, on the other hand, alleged he received ineffective assistance of counsel. The two motions therefore addressed distinct issues, and it would not have been more appropriate for Hicks to raise his ineffective assistance claim in the CR 60.02 motion. The RCr 11.42 motion was not barred.

Request for more specific findings of fact

Also in his RCr 11.42 motion, Hicks included a request that the circuit court enter more specific findings of fact pursuant to CR 52.02. That rule provides in relevant part, "Not later than 10 days after entry of judgment the court of its own initiative, or on the motion of a party made not later than 10 days after entry of judgment, may amend its findings or make additional findings and may amend the judgment accordingly." CR 52.02. CR 52.04 prohibits appellate challenges to a

court's order on the basis of insufficient findings of fact in the absence of such a motion.

On appeal, Hicks asserts the circuit court improperly failed to enter more specific findings in its order denying his RCr 11.42 motion. More precisely, he claims the circuit court should have made more detailed findings of fact regarding his prior convictions in Louisiana and Arkansas. This argument fails.

Failure to file a post-judgment motion requesting more specific findings of fact "constitutes a waiver and precludes appellate review." *Crain v. Dean*, 741 S.W.2d 655, 658 (Ky. 1987) (citing CR 52.04 and *Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982)). While Hicks did make a motion for more specific findings after his conviction, he filed that motion *prior* to the order he now appeals. He did not request more specific findings from the trial court on the issue of his prior out-of-state convictions, in the context of his RCr 11.42 motion, and he raises the alleged lack of specificity of that order now for the first time. The circuit court's order is not erroneous for failure to make specific findings.

Ineffective assistance: plea offers

The Sixth Amendment entitles criminal defendants to competent representation by counsel during adversary proceedings. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Defendants who do not receive competent representation are entitled to have their sentences vacated and to receive a new trial. *Id*. To be successful, a criminal defendant must demonstrate (1) that counsel's performance was deficient when measured against

an objective standard, and (2) that the deficient representation caused the defendant prejudice. *Id.* It is the defendant's burden of proof to show he received ineffective assistance from his trial attorney. *Jordan v. Commonwealth*, 445 S.W.2d 878, 879 -880 (Ky. 1969). "[W]hen the trial judge [conducts] an evidentiary hearing, a reviewing court must defer to the determination of the facts and witness credibility made by the trial judge." *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001) (overruled on other grounds by *Leonard v. Commonwealth*, 279 S.W.3d 151, 158-59 (Ky. 2009)).

Hicks contends his trial counsel was ineffective for twice failing to communicate to the Commonwealth that he wished to accept a plea offer. The circuit court did not find Hicks' contentions persuasive.

With respect to the five-year offer, the record supports the circuit court's conclusion. Hicks can be seen shaking his head "no" on the video of a pretrial hearing on March 7, 2003, when the circuit judge asks whether the parties have come to an agreement. Hicks' trial attorney also testified that Hicks had instructed her to reject the offer the day before the hearing. Based on this evidence, it was not error for the circuit court to find trial counsel's performance was adequate. Hicks did not meet his burden.

It was likewise proper for the circuit court to conclude Hicks' trial counsel performed adequately in not accepting the offer of three years' imprisonment.[2]

[2] The testimony of Hicks' trial attorney was that she did not remember Hicks accepting the three-year offer, but that she did remember trying to negotiate the theft charge to a misdemeanor. If, in fact, Hicks had expressed his desire to accept the agreement, and his trial counsel continued attempting to negotiate a reduced charge without communicating Hicks' acceptance, that would

The circuit court did not find it credible that Hicks had wanted to accept a plea deal at any point in the negotiations because doing so would have required that Hicks admit guilt; instead, Hicks maintained his innocence all along. We are bound by the circuit court's determination of facts and credibility, and the evidence did not overcome the strong presumption that the performance of Hicks' counsel was not deficient.

Ineffective assistance: failure to investigate

In providing effective assistance, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. 668, 691, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984).

Hicks argued before the circuit court that his trial counsel was ineffective for improperly investigating a prior felony conviction in Louisiana. He contended that because he was pardoned for the Louisiana crime, that offense should not have been counted toward his PFO conviction.

On appeal, Hicks has added another basis on which he believes his trial counsel's assistance was ineffective. He now asserts his trial counsel's failure to

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have constituted deficient performance.

properly research and apply the law led to the inclusion of inadmissible evidence. More specifically, Hicks argues evidence of his prior convictions was not properly authenticated, and it was erroneous for his trial attorney to fail to object to its admission.

First, the performance of Hicks' trial counsel was not deficient for failing to investigate the prior felony convictions. The relevant portion of Kentucky's first-degree PFO statute provides:

> A persistent felony offender in the first degree is a person who is more than twenty-one (21) years of age and who stands convicted of a felony after having been convicted of two (2) or more felonies, or one (1) or more felony sex crimes against a minor as defined in KRS 17.500, and now stands convicted of any one (1) or more felonies. As used in this provision, a previous felony conviction is a conviction of a felony in this state or conviction of a crime in any other jurisdiction provided:
>
> (a) That a sentence to a term of imprisonment of one (1) year or more or a sentence to death was imposed therefor; and
>
> (b) That the offender was over the age of eighteen (18) years at the time the offense was committed; and
>
> (c) That the offender:
>
> 1. Completed service of the sentence imposed on any of the previous felony convictions within five (5) years prior to the date of the commission of the felony for which he now stands convicted[.]

KRS § 532.080(3). Notably, the statute does not limit PFO convictions to only those felonies for which a defendant has not been pardoned. Further, in Kentucky "a pardon does not preclude the pardoned offense from enhancing punishment for

a habitual criminal." *Leonard v. Corrections Cabinet*, 828 S.W.2d 668, 673 (Ky. App. 1992) (citing *Stewart v. Commonwealth*, 479 S.W.2d 23 (Ky. 1972)).

It is true that Louisiana law provides for an automatic pardon for certain felony offenders: "A first offender never previously convicted of a felony shall be pardoned automatically upon completion of his sentence without a recommendation of the Board of Pardons and without action by the governor." LSA-R.S. 15:572B(1). However, Louisiana law permits felonies for which one has been pardoned to be considered in PFO-type prosecutions: "Notwithstanding any provision herein contained to the contrary, any person receiving a pardon under the provisions of [LSA-R.S. 15:572B(1)] may be charged and punished as a second or multiple offender as provided in R.S. 15:529.1." LSA-R.S. 15:572(E).

Under the law of both states, then, the fact of Hicks' pardon would not have eliminated the Louisiana felony conviction from consideration for a PFO charge. It was not deficient for Hicks' trial counsel to fail to investigate the matter any further, and additional investigation of the Louisiana charge would not have changed the outcome of Hicks' PFO conviction.

We will likewise not reverse the circuit court's denial of Hicks' RCr 11.42 motion on the basis that trial counsel's failure to investigate led to the consideration of inadmissible evidence. Hicks has presented this issue for the first time on appeal, and the matter is therefore not properly preserved. We review the matter for palpable error only. RCr 10.26.

Even if it was technically inappropriate to admit records from Louisiana and Arkansas, Hicks cannot show he was prejudiced by his attorney's failure to object to their admission.[3] Had Hicks' trial counsel objected to the omission of the foreign records, the result of such objection would not have been acquittal on the PFO charge. Rather, the Commonwealth would have been given the opportunity to gather competent evidence of the prior convictions and present it. *See Merriweather v. Commonwealth,* 99 S.W.3d 448 (Ky. 2003). Hicks has not denied that he was convicted of felonies in both Louisiana and Arkansas, and he has not alleged properly authenticated records of his convictions in those states cannot be produced. He has failed to meet his burden to demonstrate his trial attorney's actions, if deficient, caused him prejudice.

Conclusions

Hicks' RCr 11.42 motion to vacate the sentence was timely, but he was not entitled to relief under that rule or under CR 52.01. We therefore affirm.

STUMBO, JUDGE, CONCURS.

VANMETER, JUDGE, CONCURS IN RESULT ONLY WITHOUT SEPARATE OPINION.

[3] "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Strickland v. Washington*, 466 U.S. 668, 697, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674 (1984).

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