RENDERED: APRIL 8, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001674-MR

RINGO STAR WHITWORTH — APPELLANT

v.

APPEAL FROM MEADE CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
ACTION NO. 01-CR-00007

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: DIXON AND NICKELL, JUDGES; SHAKE,[1] SENIOR JUDGE.

NICKELL, JUDGE: Ringo Star Whitworth appeals from an order entered by the Meade Circuit Court on July 31, 2009, denying his motion for relief under CR[2] 60.02(e) and (f) alleging ineffective assistance of counsel because he failed to raise

[1] Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

[2] Kentucky Rules of Civil Procedure.

the claim via RCr[3] 11.42. Upon review of the briefs, the record and the law, we affirm.

Whitworth killed his girlfriend, Patricia Hardesty, in December of 2000 by repeatedly stomping her head on the pavement, a crime to which he confessed. He was indicted on a charge of murder[4] and appointed counsel advised him to accept the Commonwealth's recommendation of thirty years and enter a guilty plea.

On March 11, 2002, Whitworth entered a guilty plea. Upon finding his plea was made knowingly, intelligently and voluntarily, the trial court sentenced Whitworth to thirty years in prison on March 21, 2002. Whitworth never filed a direct appeal of the conviction, nor did he seek relief pursuant to RCr 11.42.

On April 30, 2007, Whitworth filed a motion to correct, alter or vacate judgment and sentence pursuant to CR 60.02(e) and (f). The motion alleged ineffective assistance of counsel in that his attorney had misadvised him he needed to plead guilty to avoid the death penalty; he could never appeal; and generally failed to explain to him the law regarding intoxication and domestic violence defenses. Whitworth also moved for a full evidentiary hearing and appointment of counsel. The court entered an order allowing Whitworth to proceed *in forma pauperis* and appointed the Department of Public Advocacy to represent him.

[3] Kentucky Rules of Criminal Procedure.

[4] KRS 507.020.

Ultimately, counsel filed a response saying Whitworth's *pro se* motion was adequate and no supplement would be forthcoming.

The Meade Circuit Court convened an evidentiary hearing. Pursuant to the request of Whitworth's counsel, the hearing was limited to whether Whitworth was denied due process by his attorney's alleged failure to investigate and, thereafter, advise Whitworth about the defenses of voluntary intoxication and domestic violence. The only witness at the hearing was Hon. Steve Mirkin, Whitworth's trial attorney.

Mirkin testified he discussed the impact of alcohol intoxication with Whitworth because the facts indicated the beating was fueled by alcohol. Because the hearing is not included in the record before us, we quote from the trial court's findings of fact:

> Mirkin did not believe an instruction pertaining to voluntary intoxication would be of much benefit to the jury. He testified that he discussed that with [Whitworth] and explained that even if they went to trial and received an instruction on wanton manslaughter, which reduced the charge to a Class B felony, that [Whitworth] was still looking at ten (10) to twenty (20) years and to serving 85 percent of the term of sentence.

Mirkin also discussed a domestic violence defense with Whitworth but doubted its viability because there was no corroborating evidence. Mirkin explained his thought process as follows:

> What I explained to him was that if he got convicted of murder, he ran the risk of a life sentence. His early parole eligibility would be twenty. If he got the minimum on a murder conviction, he would be looking at

twenty and his early parole term would be seventeen. Likewise, if we were able to get this down to a Class B, to a Manslaughter 1, um, he would still be sentenced ten to twenty and my guess was that if we could get it down to a Class B, it would be probably a compromised verdict and he would more than likely end up at the twenty-year range rather than the ten range and he would still serve seventeen. Under the thirty that was offered, and we tried very hard to get you guys to come down a little bit more and had no success, under the thirty that was offered, he'd still see the parole board in twenty, so there was only a difference of three years and his parole term between the minimum and what was offered but, more importantly, he would have an out date. I think he would probably under the terms was calculated at that time he would probably serve out after about 23 and so the discussion we had was, look there's no way you're going to get an acquittal out of this. I just didn't see it and I didn't see anything better being likely to happen than a Class B with a sentence at the high range. I thought there was a real strong substantial, I couldn't put in numbers, but a substantial likelihood of a life sentence or a fifty-year sentence or somewhere along those lines, which would give him absolutely no guarantee of ever walking out of prison. But with the thirty, he knew somewhere between twenty and twenty-three years he'd be out and that is what we talked about. That was my recommendation to him. Of course, it's a recommendation, it's his call. Ultimately, after we had talked about it, he agreed to do it. You know, I did not make that decision for him, I gave him my opinion, which is part of my job. And that was what we had talked about. Basically reserving to Mr. Whitworth the knowledge when he went to prison that he was young at the time, he was twenty, twenty-one, he was a young man. When he was at the latest in his early forties, he would be guaranteed to walk out of the door, whereas if we lost and he was given a life sentence, or fifty-year sentence or forty-five year sentence or something like that, he absolutely had no guarantee to ever walk out the door.

The trial court concluded Whitworth's complaint, that counsel failed to explore intoxication and domestic violence defenses, should have been raised as a collateral attack via RCr 11.42 since, citing *McQueen v. Commonwealth,* 948 S.W.2d 415 (Ky. 1997), "CR 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could 'reasonably have been presented' by direct appeal or RCr 11.42 proceedings." The court went on to say that if CR 60.02 was the appropriate vehicle by which to raise counsel's ineffectiveness, the uncontroverted facts establish that trial counsel:

> (a) Was experienced;
>
> (b) Investigated the defenses of alcohol intoxication and domestic violence;
>
> (c) Discussed these defenses with [Whitworth]; and
>
> (d) Evaluated the defenses and made a decision not to use the defenses.

It is from this order, denying CR 60.02 relief, that Whitworth now appeals.

The standard of review for a claim of ineffective assistance of counsel following a guilty plea is well established in Kentucky. For a defendant to prove ineffective assistance of counsel when a guilty plea has been entered, he must show that: (1) counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) 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, 727-28 (Ky. App. 1986).

We have reviewed the record. As noted by the trial court, Whitworth did not raise the issue of counsel's alleged failure to discuss certain defenses with him until he moved for CR 60.02 relief. However, a party cannot use a motion to alter, amend, or vacate judgment to raise issues that could have been presented via direct appeal or RCr 11.42 motion. *Gross v. Commonwealth,* 648 S.W.2d 853, 856 (Ky. 1983). Having failed to follow the proper procedure, Whitworth is not entitled to relief.

For the foregoing reasons, the order of the Meade Circuit Court denying CR 60.02 relief, is AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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