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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000508-MR

MARIO GARR — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 10-CR-00455

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MAZE, AND MOORE, JUDGES.

LAMBERT, JUDGE: Mario Garr appeals from an opinion and order of the Fayette Circuit Court denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to vacate judgment without an evidentiary hearing. Finding no error, we affirm.

Garr was arrested on March 3, 2010, after selling narcotics to a confidential informant (CI). He was arraigned in district court the next day, and his case was sent to the grand jury, which indicted him on two counts of first-degree trafficking in a controlled substance and one count of being a first-degree persistent felony offender. Garr was represented at these proceedings by an attorney from the Lexington Department of Public Advocacy (DPA). The CI had been represented by the DPA since February 5, 2010. When members of the DPA realized that they might face a potential conflict of interest in representing both Garr and the CI who had helped to incriminate him, a private attorney was retained to represent the CI on March 8, 2010. The CI entered a plea of guilty to unspecified charges on March 25, 2010.

Garr's attorney filed a motion to suppress the evidence against him, which was denied. Garr entered a conditional plea of guilty to the charges on November 15, 2010. He received a sentence of five years on the first count of trafficking, enhanced to ten years by the PFO charge, and a sentence of five years on the second count of trafficking, to be run concurrently with the first count.

About a year later, Garr filed a motion pursuant to RCr 11.42, alleging that his counsel was ineffective (1) due to a conflict of interest arising from the DPA's simultaneous representation of Garr and the CI; (2) for failing to pursue an effective defense strategy; and (3) for failing to inform him that he would not be eligible for parole until he had served a minimum term of ten years.

When a defendant argues that his guilty plea was rendered involuntary due to ineffective assistance of counsel, the trial court is required

> to "consider the totality of the circumstances surrounding the guilty plea and juxtapose the presumption of voluntariness inherent in a proper plea colloquy with a *Strickland v. Washington* [466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)] inquiry into the performance of counsel." To support a defendant's assertion that he was unable to intelligently weigh his legal alternatives in deciding to plead guilty because of ineffective assistance of counsel, he must demonstrate the following:
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> > (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.

Rigdon v. Commonwealth, 144 S.W.3d 283, 288 (Ky. App. 2004) (internal citations omitted).

Under the Sixth Amendment to the Constitution of the United States, the right to effective assistance of counsel includes the right to counsel whose loyalty to the defendant is not divided by a conflicting interest. *Bartley v. Commonwealth*, 400 S.W.3d 714, 719 (Ky. 2013) (citing *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978)). RCr 8.30(1) provides in part that in criminal matters where confinement or a substantial fine is at stake, "no attorney shall be permitted at any stage of the proceedings to act as counsel for the defendant while at the same time engaged as counsel for another person or persons accused of the

same offense or of offenses arising out of the same incident or series of related incidents" unless, among other listed conditions, "the trial court explains the attorney's possible conflict of interest to the defendant, and the defendant waives in writing any objection thereto." *Bartley*, 400 S.W.3d at 719.

Even if the RCr 8.30 requirements of warning and waiver are not met, a defendant is not entitled to a new trial unless he shows that his attorney's potential conflict of interest materialized and adversely affected his performance. *Id*. (citing *Kirkland v. Commonwealth*, 53 S.W.3d 71 (Ky. 2001)). The burden of establishing an actual conflict is on the defendant. *Epperson v. Commonwealth*, 809 S.W.2d 835, 844 (Ky. 1990). "Indeed, as a threshold matter, the defendant must demonstrate that the defense attorney was required to make a choice advancing his own interests to the detriment of his client's interests." *Sanborn v. Commonwealth*, 892 S.W.2d 542, 549 (Ky. 1994) (quoting *Beets v. Collins*, 986 F.2d 1478, 1486 (1993)).

In denying Garr's motion, the trial court found that the DPA's simultaneous representation of Garr and the CI lasted for, at most, six days, from March 3, 2010, the date of Garr's arrest, to March 8, 2010, the date on which private counsel was appointed to represent the CI. The trial court concluded that Garr had simply failed to show an actual conflict of interest.

Garr argues that the attorneys conspired to induce him to accept the plea offer. According to Garr, the attorneys wanted to avoid going to trial because it would be revealed that Garr had been entrapped by the CI, who obtained a

favorable plea offer by cooperating with the Lexington Police Department's Drug Task Force. He claims that this entrapment was possible because the CI had been a close family friend of Garr's for years.

Garr's allegations are vague and speculative, and he does not succeed in showing an actual conflict of interest, or how his attorney advanced her own interests to his detriment. The Commonwealth has pointed out that the CI entered a guilty plea and was sentenced long before Garr entered his plea, so her status would not have been affected by any revelations at Garr's trial. "If general allegations . . . were sufficient, RCr 11.42 would easily be turned into a discovery device, a result which . . . is contrary to the rule's purpose." *Roach v. Commonwealth*, 384 S.W.3d 131, 140 (Ky. 2012). A defendant's failure to provide factual support, as RCr 11.42 requires, "provides the basis for summary dismissal" of the claim. *Sanders v. Commonwealth*, 89 S.W.3d 380, 390 (Ky. 2002) (overruled on other grounds by *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)). Garr has failed to show any specific defect in his counsel's "strategy, tactics, or decision making attributable to [the] conflict. . . . Speculative allegations and conclusory statements are not sufficient[.]" *Bartley*, 400 S.W.3d at 719 (internal citation omitted).

Garr further argues that his attorney failed to pursue an effective defense strategy. He acknowledges that she filed a motion to suppress the evidence – narcotics – that was seized from his car, but contends that she should also have pursued an entrapment defense. In order to mount a successful entrapment

defense, a defendant must show he was "tricked or induced into committing a crime at the behest of governmental actor[.]" *Mackey v. Commonwealth*, 407 S.W.3d 554, 559 (Ky. 2013). But if the evidence is that the defendant "otherwise is disposed to engage in the criminal activity, then inducement or encouragement does not constitute entrapment." *Id*. (quoting *Commonwealth v. Sanders*, 736 S.W.2d 338, 340 (Ky. 1987). Garr fails to explain how this defense would have been viable in his case, or how it would have been so definitely exculpatory that he would have rejected the plea offer and insisted on going to trial.

Finally, in reliance on *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), Garr argues that his attorney was ineffective for failing to advise him that, under the terms of Kentucky Revised Statutes (KRS) 532.080(7), he would be ineligible for probation for ten years because he was a first-degree persistent felony offender. Garr claims that his attorney instead told him he would be eligible for parole after serving only six and one-half years. Garr's contention is refuted by the record. At his plea hearing, his attorney stated, in the context of waiving a sentencing hearing, that Garr would become eligible for parole after serving ten years. Garr made no comment and acquiesced completely to her remarks.

Moreover, even if we accept Garr's allegation concerning his counsel's misadvice as true, to make a successful claim under *Padilla*, he also has to show that, if he had been made aware of the effect of the violent offender statute on his parole eligibility, there is a reasonable probability he would have rejected the plea

offer and taken his chances at trial. *Stiger v. Commonwealth*, 381 S.W.3d 230, 237 (Ky. 2012). Garr must show that it would have been a "rational" decision to reject the ten-year plea deal. *Id*. He has not made such a showing. The plea offer which Garr signed stated that he was aware that he faced a possible sentence of twenty years if he went to trial. The rejection of a plea offer which cut this sentence in half can hardly be characterized as a rational decision, especially in light of the fact that the evidence against him was considerable.

An evidentiary hearing on a RCr 11.42 motion is only required "if there is a material issue of fact that cannot be conclusively resolved, *i.e*., conclusively proved or disproved, by an examination of the record." *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001) (internal citations omitted). No such material issues existed in this case, and the trial court did not err in refusing to hold an evidentiary hearing on Garr's motion.

The order denying the RCr 11.42 motion is therefore affirmed.

MAZE, JUDGE, CONCURS.

MOORE, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Mario Garr, *pro se*
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

J. Hays Lawson
Assistant Attorney General
Frankfort, Kentucky