

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-001065-MR

DEMETRIUS BRADLEY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 06-CR-002698

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, LAMBERT, AND MOORE, JUDGES.

CAPERTON, JUDGE: The Appellant, Demetrius Bradley, appeals the May 14, 2012, order of the Jefferson Circuit Court denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion without an evidentiary hearing following his plea to charges of criminal syndication, cocaine trafficking, and persistent felony offender pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct.160, 27 L.Ed.2d 162

(1970). Upon review of the record, the arguments of the parties and the applicable law, we affirm.

Bradley is a known associate of Wesley Holt. Detective Aaron Crowell of the Louisville Metro Police Department obtained recorded jail phone calls from various individuals, including Holt, from the Louisville Metro Department of Corrections to the home phone number for 315 North 43rd Street, in Louisville. Those recorded phone conversations included discussions between Holt and his mother, Patricia Williams; his sister, Demetria Holt; his girlfriend, Marissa Alexander; and Bradley regarding the selling of cocaine, transferring of assets, and depositing of money made in the course of selling narcotics over the course of several months. At the time that these conversations took place both Patricia Williams and Demetria Holt lived at 315 North 43rd Street.

During a phone conversation that took place on September 23, 2005, Holt made arrangements for Bradley to obtain one-eighth of a kilogram of cocaine from Alexander. In another conversation on November 27, 2005, Holt and Bradley discussed how much to charge individuals for both crack and powder cocaine, and Holt instructed Bradley certain contacts to access in Holt's cell phone in order to facilitate the sale of the drugs. Subsequently, in a December 1, 2005, phone conversation, Wesley Holt and Bradley discussed prices of narcotics and made three-way calls to drug buyers, wherein Holt vouched for Bradley.

Bradley, Marissa Alexander, Demetria Holt, Leon Holt, Patricia Williams, and Wesley Holt were indicted by a Jefferson County Grand Jury on

charges of criminal syndication, engaging in organized crime, and trafficking in a controlled substance in the first degree (cocaine). Bradley and Wesley Holt were indicted on an additional count of trafficking in a controlled substance in the first degree. Bradley was also charged with persistent felony offender in the first degree.

On September 13, 2006, the trial court appointed Honorable Stephanie Kelly, a public defender from the Louisville Metro Public Defender's Office to represent Bradley. Kelly was replaced by Honorable Patricia L. Eschner, also with the Public Defender's Office, on October 13, 2006. Honorable Krsna Tibbs, with the Public Defender's Office, was appointed to represent Demetria Holt. Bradley signed a "Waiver of Dual or Multiple Representation," which contained the following:

The undersigned, Demetrius Bradley, before this Court charged with the offense(s) of criminal syndication, complicity to trafficking in a controlled substance (2 counts) and PFO I, acknowledges that the Court has explained to him and that he understands the possibility of a conflict of interest on the part of his attorney, Patricia L. Echsner, of the Louisville Metro Public Defender, in that what may be or seem to be the best interest of his co-defendant, Demetria Holt, also represented by a public defender, represented by the Hon. Krsna Tibbs, may not be to his best interest. With that understanding, the undersigned nevertheless desires that Patricia L. Echsner, of the Louisville Metro Public Defender, represent him in this proceeding and has no objection to another public defender continuing to act as counsel for the other person mentioned in this waiver as being involved in a possible conflict of interest. Signed in open court this 12th day of February, 2007.¹

¹ Demetria Holt signed a similar waiver.

Upon receiving this signed waiver, the trial court engaged Bradley and his attorney in the following colloquy:

Court: This is a waiver of dual or multiple representation. You are being represented by a public defender, as is [Demetria Holt] ... You're both being represented by public defenders.

Bradley: Yes ma'am.

Court: And you are just waiving the right. You still want to be represented by Ms. Eschner?

Bradley: Yeah.

Eschner: And I explained that you know even though ...

Court: Conflict?

Eschner: ... We work in the same office that I represent him and that I don't have anything to do with his [Mr. Tibbs's] client.

Court: That's a big office, but ...

Eschner: Is that okay with you?

Bradley: Yes ma'am.

Court: Just want to make sure you understand.

Bradley: Yes.

On October 29, 2007, Honorable Michael Lemke and Honorable Michael Ferraraccio, attorneys with the Public Defender's Office, submitted an affidavit with the trial court attesting that they became Bradley's new counsel in

August 2007. They also moved to extend the date of trial, citing the need for time to review the facts and legal issues.

At some point following the underlying indictment, Bradley was indicted in two separate criminal cases. On September 3, 2009, Bradley entered pleas to all three indictments, entering an *Alford* plea to an amended charge of facilitation to commit criminal syndication and two counts of trafficking in a controlled substance in the first degree. The Commonwealth recommended a sentence of four years for the facilitation to criminal syndication conviction and ten years for both counts of trafficking in a controlled substance in the first degree, with the convictions to run concurrently for a total of fourteen years' imprisonment. Bradley also pled guilty to manslaughter one, robbery in the first degree, burglary in the second degree, assault in the first degree, and tampering with physical evidence, as well as to facilitation to criminal attempt murder. Bradley received an additional sixteen years' imprisonment for those charges.

Before the pleas were accepted by the trial court, Bradley testified under oath to the circumstances surrounding his pleas. Bradley testified that he has a GED certificate, that he read the plea agreement, understood it, and signed it, and that his attorneys explained the plea process to him. Bradley further stated that he understood an *Alford* plea meant that he maintained his innocence but acknowledged that the Commonwealth had enough evidence for a jury to find him guilty. The trial court detailed the

facts alleged by the Commonwealth against Bradley, and questioned Bradley as follows:

Court: Case 06-CR-2698. And the question to you, Mr. Bradley, on this case is going to be, even though you are maintaining your innocence, whether you would believe a jury would have sufficient evidence to find you guilty if they heard that in Jefferson County, Kentucky, on or between November 20, 2005 and May 2006, that you participated with other co-defendants in collaborating and promoting the trafficking cocaine, and also that on September 25, 2005, and on or between November 25, 2005 and December 1, 2005, you and co-defendants sold or attempted to sell cocaine. And again, the question is if you know what the evidence is, you've gone over that with your attorneys, do you believe a jury would have sufficient evidence if they chose to find you guilty to do that?

Bradley: Yeah.

The court also questioned Bradley regarding his understanding of the evidence and legal representation during the criminal proceeding:

Court: First of all, have you had enough time to go over all of the evidence against you in all of these cases?

Bradley: Yeah.

Court: Do you have any questions about the evidence against you?

Bradley: I've read everything presented to me.

Court: Did you understand everything?

Bradley: Yes ma'am.

Court: Is there anything I've asked you here today that you don't understand?

Bradley: No, I'm good. I understand.

Court: I need to know if you feel like you've had enough time with your attorneys to discuss all of your cases, to discuss all of your options?

Bradley: Yeah. Yes ma'am.

Following Bradley's testimony, the court found that his plea was entered knowingly and voluntarily, the court accepted same, and postponed entry of judgment pending a presentence investigation.

Prior to sentencing, Bradley moved *pro se* to withdraw his *Alford* plea. Thereafter, appearing with counsel at a presentencing hearing, Bradley withdrew the motion to withdraw his *Alford* plea. The trial court accepted Bradley's withdrawal, and wrote "Remand per Def and Def's Att" on the first page of Bradley's motion. The trial court ultimately sentenced Bradley to fourteen years' imprisonment in accordance with the recommendation of the Commonwealth.

Bradley subsequently filed another *pro se* motion seeking an order vacating his judgment of conviction and sentence pursuant to RCr 11.42 on grounds of ineffective assistance of counsel. In his motion, Bradley alleged four instances of ineffective assistance, namely: (1) That his counsel was burdened by a conflict of interest because other public defenders represented co-defendants; (2) That his counsel failed to investigate the Commonwealth's case against him; (3) That counsel misadvised him regarding the length of his sentences pursuant to the *Alford* plea; and (4) That counsel failed to advise him regarding the withdrawal

of his *Alford* plea. The trial court denied Bradley's motion without an evidentiary hearing in an order dated May 14, 2012. It is from that order that Bradley now appeals to this Court.

Prior to addressing Bradley's arguments on appeal, we note that an ineffective assistance of counsel claim is assessed under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). As set out in *Bowling v. Commonwealth*, 80 S.W.3d 405 (Ky. 2002):

The *Strickland* standard sets forth a two-prong test for ineffective assistance of counsel:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

To show prejudice, the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is the probability sufficient to undermine the confidence in the outcome.

Bowling at 411–412 (internal citations omitted).

In *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006), our Kentucky Supreme Court stated that "*Strickland* articulated a requirement of

reasonable likelihood of a different result but stopped short of outcome determination[.]” Further, *Brewster v. Commonwealth*, 723 S.W.2d 863, 864 (Ky. App. 1986), stated that “[t]he underlying question to be answered is whether trial counsel's conduct has so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” The standard for assessing counsel's performance is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. *Strickland* at 688–89, 104 S.Ct. at 2065.

A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* Additionally, a court's review of counsel's performance must be highly deferential. *Id.*, 466 U.S. at 689, 104 S.Ct. at 2065. “A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.” *Id.* Hence, the defendant must overcome the presumption that counsel provided a reasonable trial strategy. *Id.* Moreover, the court is free to determine the question of prejudice before determining whether counsel's performance was deficient. *Brewster* at 864–865.

In asserting an ineffective assistance of counsel claim, the burden is on the movant to overcome a strong presumption that counsel's performance was constitutionally sufficient. *Strickland* at 689, 104 S.Ct. at 2065; *Commonwealth v. Pelfrey*, 998 S.W.2d 460, 463 (Ky. 1999). When an evidentiary hearing is held in

an RCr 11.42 proceeding, RCr 11.42(6) requires the trial court to make findings on the material issues of fact, which we review under a clearly erroneous standard. Kentucky Rules of Civil Procedure (CR) 52.01. Recognition must be given to the trial court's superior position to judge the credibility of the witnesses and the weight to accord their testimony. *McQueen v. Commonwealth*, 721 S.W.2d 699, 698 (Ky. 1986).

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.” *Hodge v. Commonwealth*, 68 S.W.3d 338, 342 (Ky. 2001). 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.’ ” *Id.* (quoting *Lay v. Commonwealth*, 506 S.W.2d 507, 508 (Ky. 1974)). “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.’ ” *Id.* (quoting *Stanford v. Commonwealth*, 854 S.W.2d 742, 743–44 (Ky. 1993)). 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”). *Id.* We review the arguments of the parties with these standards in mind.

As his first basis for appeal, Bradley argues that his counsel failed to adequately investigate the recorded phone conversations between himself and other defendants. Bradley argues that his counsel could not have adequately investigated the conversations at issue because if counsel had done so, then counsel would have discovered that the conversations did not implicate Bradley in either the criminal syndication charge or the two charges of trafficking in a controlled substance.

In response, the Commonwealth argues that these allegations are conclusory and are not supported by any specific facts. Moreover, the Commonwealth asserts that counsel did conduct a reasonable investigation, and that Bradley failed to demonstrate any prejudice.

As our Kentucky Supreme Court has held, defense counsel is required to make a reasonable investigation or to make a reasonable decision that a particular investigation is unnecessary. *Hodge v. Commonwealth*, 68 S.W.3d 338, 344 (Ky. 2001). The circumstances of the case dictate the reasonableness of counsel's investigation, and when counsel has reason to believe that certain lines of investigation would be fruitless or harmful, the failure to fully pursue those investigations may not later be challenged as unreasonable. *Strickland* at 691, 104 S.Ct. at 2066.

A review of the record indicates that the phone calls at issue included conversations between Bradley and Wesley Holt during which they discussed obtaining cocaine from co-defendants, the prices at which Bradley should sell the cocaine, and to whom to sell it. Those phone calls were made from the Louisville

Metro Corrections Department to 315 North 43rd Street, the residence of several of the co-defendants. Counsel was aware of the content of the recorded phone conversations and ultimately negotiated a plea agreement in Bradley's favor.

Though Bradley now denies engaging in criminal syndication or trafficking in cocaine, during the course of the guilty plea colloquy he admitted that the recorded phone conversations contained evidence upon which a jury could find him guilty. Moreover, Detective Crowell provided an affidavit in which he attested that information contained in the recorded phone conversations implicated Bradley engaging in a criminal syndication and trafficking cocaine. In light of all of these facts, this Court is of the opinion that counsel's investigation was reasonable. We find no basis to believe that any further investigation would have led to a plausible defense, or to any mitigating evidence in Bradley's favor. Accordingly, we affirm.

As his second basis for appeal, Bradley argues that he received ineffective assistance of counsel because his counsel was burdened by a conflict. Bradley asserts that because both he and Demetria Holt were represented by attorneys from the Public Defender's Office, his counsel's goal was to "obtain the best deal for the greatest number of co-defendants" which he asserts resulted in counsel failing to discuss the evidence and charges with Bradley personally. The Commonwealth disagrees and asserts that the record refutes Bradley's claim that counsel was burdened by a conflict. Upon review of the record and applicable law, we agree.

A review of the record reveals that Bradley clearly waived his right to independent counsel in accordance with RCr 8.30. That provision provides, in pertinent part, that:

(1) If the crime of which the defendant is charged is punishable by a fine of more than \$500, or by confinement, 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 (a) the judge of the court in which the proceeding is being held explains to the defendant or defendants the possibility of a conflict of interests on the part of the attorney in that what may be or seem to be in the best interests of one client may not be in the best interests of another, and (b) each defendant in the proceeding executes and causes to be entered in the record a statement that the possibility of a conflict of interests on the part of the attorney has been explained to the defendant by the court and that the defendant nevertheless desires to be represented by the same attorney.

Below, Bradley signed a “Waiver of Dual or Multiple Representation,” wherein he confirmed that the trial court explained to him that his public defender might be presented with a conflict which was against his best interest due to the fact that the Public Defender’s Office represented a co-defendant. The waiver clearly indicates that Bradley still wished to be represented by a public defender. Moreover, during the course of the pretrial hearing, the trial court questioned Bradley regarding the waiver. During the course of that colloquy, Bradley indicated that he understood his right to independent counsel, that he desired to waive that right, and that he still wanted to be represented by a public

defender. Accordingly, we are in agreement with the court below and the Commonwealth that Bradley's waiver was knowing and voluntary.

We note that a conflict during representation arises from competing interests or duties that create the *potential* for prejudice. *Beard v. Commonwealth*, 302 S.W.3d 643, 647 (Ky. 2010)(emphasis added). It was Bradley's burden to establish an actual conflict. *Epperson v. Commonwealth*, 809 S.W.2d 835, 844 (Ky. 1990). As our courts have previously held, dual representation does not automatically constitute a violation of the constitutional guarantee of effective assistance of counsel. Having found that Bradley effectively waived this right and, alternatively, that he failed to meet his burden to establish an actual, prejudicial conflict, we affirm.²

Wherefore, for the foregoing reasons, we hereby affirm the May 14, 2012, order of the Jefferson Circuit Court denying Bradley's RCr 11.42 motion without an evidentiary hearing, the Honorable Judith E. McDonald-Burkman, presiding.

LAMBERT, JUDGE, CONCURS.

MOORE, JUDGE, CONCURS IN RESULT ONLY.

² In affirming, we briefly address Bradley's argument that the waiver which he signed was invalidated when Hon. Lemke and Hon. Ferraraccio were substituted as counsel for Hon. Echsner. We find no merit to this argument, as Bradley's waiver was not contingent upon specific representation by one particular public defender within the Public Defender's Office. The waiver was for conflict arising from dual representation by attorneys within the Public Defender's Office generally. The record refutes any claim that Bradley's waiver was made without full knowledge of the rights he relinquished. Accordingly, we affirm.

BRIEF FOR APPELLANT:

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LaGrange, Kentucky

BRIEF FOR APPELLEE:

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