

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000531-MR
AND
NO. 2014-CA-000833-MR

JOHN D. REID

APPELLANT

v. APPEALS FROM MUHLENBERG CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
ACTION NOS. 13-CR-00114 AND 13-CR-00015

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JONES, STUMBO AND VANMETER, JUDGES.

STUMBO, JUDGE: In this consolidated action, John Daniel Reid appeals from the denial of two RCr¹ 11.42 motions. He contends that his trial counsel failed to properly investigate and defend the charges against him, that he was entitled to an

¹ Kentucky Rules of Criminal Procedure.

evidentiary hearing and that counsel was ineffective in defending against the forfeiture of Reid's property. We find no error, and AFFIRM the Orders on appeal.

On January 4, 2013, the Muhlenberg County grand jury indicted Reid on two counts each of trafficking in a controlled substance in the first degree while in possession of a firearm, and possession of a controlled substance in the first degree while in possession of a firearm (Case 13-CR-00114). The indictment resulted from a traffic stop of Reid's vehicle, followed by the execution of a search warrant at Reid's residence where drugs, drug paraphernalia, firearms and money were found.

After his unsuccessful motion to suppress the introduction of certain evidence, Reid entered a plea of guilty on all charges in exchange for an aggregate fifteen-year sentence. He also agreed to the forfeiture of all seized property. Final Judgment was rendered on April 25, 2013.

On March 4, 2014, Reid filed an RCr 11.42 motion to vacate his conviction. As a basis for the motion, Reid claimed that his trial counsel was ineffective in failing to investigate and provide an adequate defense, failing to explain the defenses and failing to defend against the asset forfeiture. On March 7, 2014, the trial court denied the motion without an evidentiary hearing.

During the pendency of the first proceeding, the Muhlenberg County grand jury indicted Reid on charges of possession of a controlled substance in the first degree, trafficking in a controlled substance in the second degree, and possession of drug paraphernalia (Case 13-CR-00015). The charges arose from

Reid's alleged impaired operation of a motor vehicle. A search incident to arrest uncovered methamphetamine, 68 hydrocodone pills and drug paraphernalia.

On May 14, 2013, Reid entered a guilty plea in Case 13-CR-00015 in exchange for a sentence of one year to be served consecutively with the fifteen-year sentence in Case 13-CR-00114. As in the first case, Reid agreed to the forfeiture of all seized property, and Final Judgment was rendered on July 23, 2013.

On March 5, 2014, Reid filed an RCr 11.42 motion in Case 13-CR-00015 alleging ineffective assistance of counsel on identical grounds to those alleged in Case 13-CR-00114. The motion was denied and this consolidated appeal followed.

In his first appeal (13-CR-00114/2014-CA-000531-MR), Reid, *pro se*, raises three issues for our consideration. He contends that trial counsel was ineffective for 1) failing to explain the possible defenses and to investigate the case; 2) failing to defend against the forfeiture of his property; and 3) failing to hold an evidentiary hearing on his RCr 11.42 motion.

We have closely examined the record and the law on these issues and find no error. To prevail on a claim of ineffective assistance of counsel, Appellant must show two things:

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 the defendant 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.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). “[T]he proper standard for attorney performance is that of reasonably effective assistance.” *Id.*

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution. [Internal citation omitted].

Id., 466 U.S. at 691-692, 104 S.Ct. at 2066-67. “It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.” *Id.*, 466 U.S. at 693, 104 S.Ct. at 2067. “The defendant must show that 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 a probability sufficient to undermine confidence in the outcome.” *Id.*, 466 U.S. at 694, 104 S.Ct. at 2068. Additionally, “a hearing is required only if there is an issue of fact which cannot be determined on the face of the record.” *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-744 (Ky. 1993).

In the matter at bar, while Reid asserts that his trial counsel was ineffective in failing to properly investigate the case, explain the available defenses and defend against the forfeiture, he has done little to demonstrate what would have been uncovered with a more thorough investigation, which defenses were not explained, and what counsel should have done differently to defend against the forfeiture. Additionally, Reid voluntarily entered into a plea agreement forfeiting the cash, weapons and other property seized as part of his arrest and subsequent search. Reid makes broad claims of ineffective assistance, but cannot demonstrate that but-for the alleged ineffective assistance there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. Additionally, because these claims were justiciable solely by examining the record, Reid was not entitled to a hearing on the motion. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001).

In Reid's second appeal (13-CR-00015/2014-CA-000833-MR), he raises three issues, *pro se*, apparently derived from the disposition of a Complaint Asserting Defects in Lis Pendens Forfeiture Action. This Complaint is not found in the appellate record. The appendix to Reid's written argument contains a portion of an Order Dismissing Complaint Filed April 22, 2014, wherein the Muhlenberg Circuit Court determined that Reid's Complaint was without merit because Reid's plea documents clearly revealed that he knew his property was subject to forfeiture as part of his Plea of Guilty.

We have no basis for tampering with this Order. Reid's Complaint is an improper collateral attack on the Judgment that did not rely on RCr 11.42 or CR² 60.02. *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). Rather, it should have been raised, if at all, via direct appeal. *Id.* Even if properly raised, the Muhlenberg Circuit Court's disposition of the matter correctly determined that Reid agreed - via his Plea of Guilty - to the same forfeiture of which he now complains. We find no error.

Lastly, Reid contends that the court improperly denied his *pro se* Motion to Recuse Judge Brian Wiggins and the Commonwealth's Attorney. Reid's motion, which is not contained in the appellate record but is partially quoted in the court's April 23, 2014 Order Denying Defendant's Motion to Disqualify and Recuse, alleged that "Judge Brian Wiggins will not and cannot be impartial to the [defendant] and his pending actions because the case coming before the court is so intertwined the [sic][defendant's] criminal actions[.]" It also sought to direct the court to dismiss the Commonwealth Attorney based on an alleged conflict of interest. In disposing of the motion, the circuit court characterized the request as utterly meritless and arising merely from Reid's dissatisfaction with the court's rulings. Additionally, the court determined that it did not have the authority to disqualify the Commonwealth's Attorney.

We find no error in the Muhlenberg Circuit Court's disposition of Reid's Motion to Disqualify and Recuse. The recusal of a trial judge is governed

² Kentucky Rules of Civil Procedure.

by SCR³ 4.300 Canon 3E, which provides in relevant part that a trial judge shall recuse himself if his impartiality may reasonably be questioned. A movant seeking recusal has an "onerous" burden. *Stopher v. Commonwealth*, 57 S.W.3d 787, 794 (Ky. 2001). In order to prevail, Reid must not only demonstrate bias, but that it is of such character as to impair the judge's impartiality and sway his judgment. *Foster v. Commonwealth*, 348 S.W.2d 759, 760 (Ky. 1961).

Reid has made sweeping claims of partiality, but has not demonstrated even the slightest basis for concluding that Judge Wiggins's impartiality could be reasonably questioned or his judgment swayed. Additionally, Reid has not shown that Judge Wiggins acted improperly in failing to accept Reid's invitation to disqualify the Commonwealth's Attorney. Reid's Motion to Disqualify and Recuse was without merit, and the Muhlenberg Circuit Court properly so found. We find no error.

For the foregoing reasons, we AFFIRM the Orders of the Muhlenberg Circuit Court.

ALL CONCUR.

³ Rules of the Supreme Court.

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