

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-001956-MR

ALLEN WILLIAM VROOMAN

APPELLANT

v. APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE VERNON MINIARD JR, JUDGE
ACTION NO. 12-CR-00111

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: COMBS, J. LAMBERT, AND VANMETER, JUDGES.

COMBS, JUDGE: Allen Vrooman appeals the order of the Wayne Circuit Court which denied him relief pursuant to Kentucky Rule[s] of Criminal Procedure (RCr) 11.42. After our review, we affirm.

On December 11, 2012, Vrooman pled guilty to one count of burglary in the first degree and one count of first-degree sexual abuse. According to his plea

bargain, he received a sentence of ten-years' incarceration for the burglary and five-years' of incarceration for the sexual abuse charge. His sentences were to run concurrently for a total of ten-years' confinement.

On June 7, 2014, Vrooman, acting *pro se*, filed a motion to vacate his sentence pursuant to RCr 11.42. Pertinent to this appeal, he alleged that his counsel had provided ineffective representation by failing to inform him that he would be subject to five years of post-incarceration supervision following his release from prison.

On June 11, 2014, the trial court appointed counsel to represent Vrooman with his motion. Counsel entered appearance on August 11, 2014. However, before counsel filed any pleadings to supplement Vrooman's motion, the court entered an order overruling the motion. Vrooman's counsel promptly filed a motion for findings of fact pursuant to RCr 11.42(6) and Kentucky Rule[s] of Civil Procedure (CR) 52.02 - - and for reconsideration pursuant to CR 59.05. The court overruled the motion on October 27, 2014. This appeal followed.

Vrooman argues that he received ineffective assistance of counsel and that the trial court improperly considered his motion without holding an evidentiary hearing. We disagree.

RCr 11.42 is a vehicle by which a convicted defendant may challenge his conviction and sentence on collateral grounds. RCr 11.42(1). In order to prove that he received ineffective assistance of counsel, a convicted defendant "must show that counsel's performance was deficient" and that he was prejudiced by the

deficiency. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The prejudice must be proven by “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.* at 694.

In the context of guilty pleas, “in order to satisfy the ‘prejudice’ requirement, the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370-71, 88 L.Ed. 203 (1985) .

In order to prevail on an RCr 11.42 motion, the appellant must overcome a presumption that counsel’s representation was effective. *Parrish v. Commonwealth*, 272 S.W.3d 161, 169 (Ky. 2008). Our review must be deferential; we must examine claims of error in light of the context of the totality of the evidence. *Id.* Trial strategy which is reasonable according to “prevailing professional norms” is not deemed to be ineffective assistance. *Brown v. Commonwealth*, 253 S.W.3d 490, 498-99 (Ky. 2008).

On appeal, we may only review a trial court’s denial of a motion for an evidentiary hearing for whether the allegations are refuted by the record and, if they were true, whether they would nullify the conviction. *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967). No evidentiary hearing is

required if the record contradicts the allegations. *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986).

Vrooman contends that his counsel's failure to inform him of the post-incarceration supervision cannot be determined by the record. We agree. The Commonwealth also acknowledges this fact in its brief. Nonetheless, neither reversal of the trial court's order nor an evidentiary hearing is warranted.

It is true that the consequences pertaining to parole are serious, and effective assistance of counsel includes informing a defendant of them. *Commonwealth v. Pridham*, 394 S.W.3d 867 (Ky. 2012). However, the failure to inform -- standing alone -- does not entitle a defendant to RCr 11.42 relief. The court must examine whether that failure also created prejudice. *Stiger v. Commonwealth*, 381 S.W.3d 230, 236 (Ky. 2012). In order to justify vacating a sentence, “[t]he movant must allege facts that, if proven, would support a conclusion that the decision to reject the plea bargain and go to trial would have been rational, *e.g.*, valid defenses . . . or the realistic potential for a lower sentence.” *Id.* at 237.

Vrooman has not presented any statements to explain what prejudice --if any -- was created by his alleged lack of knowledge about post-incarceration supervision. He does not offer any potential defenses which he would have presented at trial, nor does he point to any defects in the Commonwealth's evidence. Furthermore, first-degree burglary is subject to a sentence of a maximum of twenty-years' imprisonment. *See* Kentucky Revised Statutes (KRS) 511.020(2) and 532.020(1)(c). Additionally, the sexual abuse conviction created

the possibility of an additional period of incarceration of five to ten years. *See* KRS 510.110(2); 532.020(1)(a). The maximum penalties, if served consecutively, would have been thirty-years' imprisonment. By entering into the plea bargain, Vrooman received the most minimal sentence possible of all the alternatives.

While it was not best practice for the trial court to appoint counsel and then to proceed to rule before counsel was given an opportunity to perform, that flaw in the proceedings has not been shown to have created the prejudice required under RCr 11.42. Therefore, we affirm the Wayne Circuit Court.

ALL CONCUR.

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