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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001851-MR

GARY MARTIN — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KEN M. HOWARD, JUDGE
ACTION NO. 09-CR-00397

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND D. LAMBERT, JUDGES.

ACREE, JUDGE: Gary Martin appeals from the denial, without an evidentiary hearing, of his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion. Martin alleges he was denied counsel when he attempted to withdraw his guilty plea and that his counsel was ineffective in failing to file a motion to suppress his confession. For the reasons set forth herein, we reverse the circuit court's holding regarding the Martin's right to counsel and remand with instructions that the circuit

court re-evaluate Martin's motion in light of *Commonwealth v. Tigue*, 459 S.W.3d 372 (Ky. 2015) to re-evaluate Martin's motion that he was denied counsel during plea withdrawal. In all other respects, the order of the Hardin Circuit Court is affirmed.

I. Factual and Procedural Background

In 2009, Gary Martin was indicted on two counts of first-degree sodomy, two counts of first-degree sexual abuse, and two counts of incest after he admitted to inappropriate interaction with his four-year old step-granddaughter. Martin entered a guilty plea. Pursuant to the plea agreement, the Commonwealth recommended a total sentence of twenty years' imprisonment in exchange for Martin pleading guilty to the two counts of sodomy and two counts of sexual abuse.[1]

At sentencing, Martin made a motion, *pro se*, to withdraw his guilty plea as defense counsel declined to join or assist Martin in the motion. Martin argued that he was not guilty of the sodomy charges and was told that if he entered a plea, he would get a better classification or placement with the Department of Corrections. Despite Martin's efforts, he was sentenced according to the Commonwealth's recommendation.

Martin then filed a *pro se* RCr 11.42 motion to vacate, set aside, or correct his sentence. He made several allegations of error, including (1) counsel

[1]The incest charges were dropped because the relevant statute in effect at the time, Kentucky Revised Statute (KRS) 530.020(1), did not include the step-grandparent/step-grandchild relationship. The statute has since been amended and now explicitly includes that relationship.

was ineffective for failing to fully investigate; (2) counsel was ineffective for failing to file a motion to suppress statements given under the influence of prescription drugs; (3) counsel was ineffective for failing to call any medical professional to verify that Martin was impotent because of radical prostate removal in 2004; (4) counsel was ineffective for failing to call a medical professional to explain the effects of prescription drugs during an interview; (5) counsel was ineffective for persuading Martin to take a plea deal with the promise of a better classification and special housing by corrections; and (6) counsel was ineffective for failing to allow Martin to withdraw his plea. Martin's *pro se* motion was later supplemented by counsel who focused the supplemental pleading on trial counsel's failure to file a motion to suppress Martin's statement to police.

The circuit court denied Martin's RCr 11.42 motion without an evidentiary hearing. This appeal followed.

Additional facts will be discussed as they become relevant.

II. Standard of Review

In order to prevail on an ineffective assistance of counsel claim, a movant must show that his counsel's performance was deficient and that, but for the deficiency, the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed. 674 (1984). The reviewing court must examine trial counsel's conduct in light of professional norms based on a standard of reasonableness. *Id.* at 688, 104 S.Ct. at 2065, 80 L.Ed. 674. In the context of a guilty plea, prejudice is shown if the movant demonstrates "a

reasonable probability that, but for counsel's errors, he would not have plead guilty and would have insisted on going to trial." *Embry v. Commonwealth*, 476 S.W.3d 264, 268 (Ky. 2015) (citations omitted).

The circuit court need only conduct an evidentiary hearing if (i) the movant establishes that the error, if true, entitles him or her to relief under RCr 11.42; and (ii) the motion raises an issue of fact that "cannot be determined on the face of the record." *Parrish v. Commonwealth,* 272 S.W.3d 161, 166 (Ky. 2008). In other words, "an evidentiary hearing is not required when the record refutes the claim of error or when the allegations, even if true, would not be sufficient to invalidate the conviction." *Cawl v. Commonwealth,* 423 S.W.3d 214, 218 (Ky. 2014) (citing *Brewster v. Commonwealth*, 723 S.W.2d 863, 865 (Ky. App. 1986)). Accordingly, where the circuit court denies a motion made pursuant to RCr 11.42 without holding a hearing, our review is limited to whether the motion "on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." *Lewis v. Commonwealth,* 411 S.W.2d 321, 322 (Ky. 1967).

III. Analysis

On appeal, Martin renews two arguments from his original RCr 11.42 motion presented to the circuit court. First, Martin claims he received ineffective assistance when counsel refused to assist him during his sentencing hearing when he requested to withdraw his guilty plea. And second, Martin claims that counsel was ineffective for failing to move for suppression of his statements to police on

the ground that he was heavily intoxicated at the time of the interrogation. We address his arguments in turn.

Martin, in his *pro se* motion to the circuit court, argued that his constitutional right to counsel was violated during the sentencing hearing. According to Martin:

> Counsel was ineffective and the movant was deprived of his rights under the 6th and 14th Amendments to the U.S. constitution where counsel and the court violated his constitutional rights by refusing to allow movant to withdraw his plea prior to final sentencing pursuant to rule 8.10 of the Kentucky Rules of Criminal Procedure and in violation of the movant's rights under the 5th, 6th and 14th Amendments of the U.S. Constitution and sections 7 and 11 of the Kentucky Constitution.

In its order denying Martin's motion, the circuit court provided:

> Martin's first allegation is that his trial counsel was ineffective because he was not allowed to withdraw his guilty plea. This argument is a confusion of the issues and the responsibilities of counsel. If Martin wished to raise the Court's failure to withdraw his plea, he should have done so by direct appeal. *Williams v. Commonwealth*, 233 S.W.3d 206 (Ky. App. 2007). An RCr 11.42 proceeding is not the proper forum to complain about errors of the court that may be addressed on appeal.

Pleadings prepared by *pro se* litigants are not held to the same standard as those prepared by legal counsel, and rules are frequently construed liberally in the *pro se* litigant's favor. *See Case v. Commonwealth*, 467 S.W.2d 367, 368 (Ky.1971). However, an individual proceeding *pro se* "must accommodate the court by specifying all of the complaints of which he has

knowledge and which 'could reasonably have been presented' so that one careful and complete consideration of his application will conclude the litigation and the courts and the bar will not be required again to devote time and effort to his cause." *Id.* at 369.

After reviewing the record and Martin's motion, we are satisfied that Martin asserted sufficient grounds in support of his ineffective assistance of counsel claim based upon his counsel's performance at the sentencing hearing. The circuit court should have reviewed this allegation consistently with the substance of his RCr 11.42 motion. RCr 11.42 "provides a vehicle to attack an erroneous judgment for reasons which are not accessible by direct appeal." *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). This alleged error raised by Martin ultimately relates to ineffective assistance of counsel by his defense attorney at the sentencing hearing, and therefore, it is not required to be brought on direct appeal. *See Humphrey v. Commonwealth*, 962 S.W.2d 870, 872-73 (Ky. 1998). Accordingly, it was error for the circuit court not to address this alleged error pursuant to RCr 11.42.

Additionally, our Supreme Court recently addressed a similar situation to Martin's in *Commonwealth v. Tigue*, 459 S.W.3d 375 (2015). The Court held "that a motion to withdraw a guilty plea made before entry of the final judgment of conviction and sentence is a "critical stage" of the criminal proceedings to which the right to counsel attaches." *Id.* at 384. Tigue's defense counsel refused to assist him in moving to withdraw his guilty plea, completely

and constructively denying him his constitutional right to counsel. *Id.* Counsel's refusal functioned as "a *per se* Sixth Amendment violation." *Id.* at 389. The remedy in such cases is

> reversal of whatever judgment or order is tainted by the lack of counsel. The lack of counsel can only have prospective effect. Thus, if there is an absence of counsel before the conviction, then the conviction is reversed. But if the absence of counsel comes after the conviction, but before sentencing, then only the sentence is vacated. In the latter scenario, there is no taint on the pre-existing conviction.

Id.

For the foregoing reasons, we reverse the portion of the order of the Hardin Circuit Court mischaracterizing Martin's alleged error of counsel. We remand to the circuit court with instruction that the circuit court re-evaluate Martin's claim pursuant to RCr 11.42, specifically taking into consideration the principles advanced by our Supreme Court in *Tigue*.

Martin next claims to have been denied effective assistance of counsel when his counsel failed to seek suppression of his statements to police before advising him to plead guilty. As always, we must evaluate Martin's counsel's conduct under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 672, 104 S.Ct. 2052, 2056, 80 L.Ed.2d 674 (1984). Ineffective assistance of counsel requires a showing that defense counsel's performance was deficient and that the defendant was prejudiced by that deficiency. *Id.* at 687, 104 S.Ct. at 2064, 80 L.Ed.2d 674.

Martin contends that after his family confronted him with the sexual abuse allegations, but before the police arrived, he ingested twenty (20) ten (10) milligram Ambien pills, and seven (7) seven and a half (7.5) milligram Percocets. He claims that because of his level of intoxication (1) his statements made to police were involuntary and (2) he did not have the capacity to voluntarily waive his *Miranda* rights.

In support of his argument, Martin directs our attention to the interrogation video. Martin argues that it is obvious from the interrogation video that he was heavily intoxicated during the course of the interrogation. He contends that he instantly fell asleep whenever the detective was not actively engaging him; that he appears groggy and his speech is slurred; and that he was unable to remain focused. Further, he maintains that he has no memory of the interview. Thus, if counsel would have filed a motion to suppress his interrogation, the motion would have been successful. We are not persuaded.

"The fact that a person is intoxicated does not necessarily disable him from comprehending the intent of his admissions or from giving a true account of the occurrences to which they have reference." *Peters v. Commonwealth*, 403 S.W.2d 686, 689 (Ky. 1966). However, there are two circumstances in which a defendant's intoxication may effect a suppression decision. *Smith v. Commonwealth*, 410 S.W.3d 160, 164 (Ky. 2013). The first is when there is a question "whether police coercion has overborne a defendant's will so as to render the confession involuntary[.]" *Id.* "Second, a confession may be suppressed when

the defendant was "intoxicated to the degree of mania" or was hallucinating, functionally insane, or otherwise "unable to understand the meaning of his statements." *Id.* (citations omitted). The latter circumstance may warrant suppression "not because the confession was "coerced" but because it is unreliable." *Id.* at 164-65.

Neither of these circumstances is present in this case. There is no evidence that Martin was coerced, abused, threatened, or subjected to any mistreatment prior to or during his interview. "It is well-established that no constitutional violation may occur in the absence of state-sponsored coercion." *Id.* at 165 (citing *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986)). Furthermore, our review of Martin's interview does not demonstrate that he was "intoxicated to the degree of mania," was hallucinating, functionally insane or otherwise making inherently unreliable statements to police.

Martin's interview occurred around 2:00 A.M, but it was not a remarkably long interview. Martin appeared tired, but was easily able to answer the detective's questions. He did admit to the detective that he had taken two Percocet before the interview because he had recently had shoulder surgery and his shoulder was bothering him. The detective asked him, more than once, if he needed medical attention. He declined and stated that he was just tired. When the detective was not in the room, Martin put his head down on the table to rest. At the end of the questioning, Martin was unable to give a written statement.

To be effective, a waiver of *Miranda* rights must be made "voluntarily, knowingly and intelligently." *Dillon v. Commonwealth*, 475 S.W.3d 1, 13 (Ky. 2015) (citing *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)). That inquiry has two parts. First, the waiver "must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Id.* (quoting *Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986)). "Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.* Each of the inquiries must be demonstrated by the totality of the circumstances. *Moran*, 475 U.S. at 421, 106 S.Ct. 1135, 89 L.Ed.2d 410.

Our discussion of the voluntariness of Martin's statement to police disposes of the first prong of the waiver analysis. As for the second prong, the record shows that Martin was read his *Miranda* rights and appeared aware of the nature and consequences of abandoning his rights. He signed the waiver form and acknowledged that he understood his rights. Martin argues in essence that his state of intoxication rendered him unable to remember anything about the interrogation. Absent any evidence of coercion by the police, this is not sufficient evidence that the execution of the waiver was invalid. "Loss of inhibitions and muscular coordination, impaired judgment, and subsequent amnesia do not necessarily (if at all) indicate that an intoxicated person did not know what he was saying when he said it." *Britt v. Commonwealth*, 512 S.W.2d 496, 500 (Ky. 1974). There is no

evidence that Martin's intoxication impaired his ability to understand the questioning and tell the truth to police. Therefore, we conclude that the confession was voluntary and informed and that it occurred after a valid waiver of *Miranda* rights.

Because Martin had validly waived his rights, a motion to suppress would have been an exercise in futility. Additionally, as the circuit court pointed out in its order, Martin admitted to the crimes in open court. Based on the foregoing, we cannot conclude that counsel had been ineffective in the absence of a showing of actual prejudice resulting from counsel's inaction. *Casey v. Commonwealth*, 994 S.W.2d 18, 23 (Ky. App. 1999). As a result, failure to make such a motion does not amount to ineffective assistance of counsel.

IV. Conclusion

For these reasons, we reverse the portion of the order of the Hardin Circuit Court mischaracterizing Martin's alleged error at the sentencing hearing in his RCr 11.42 motion and remand for additional proceedings consistent with this opinion. In all other respects, the order is affirmed.

ALL CONCUR.

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