

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001927-MR

DARIUS M. STARLING

APPELLANT

v.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 13-CR-00157

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, THOMPSON, AND VANMETER, JUDGES.

VANMETER, JUDGE: Appellant, Darius M. Starling, has appealed, *pro se*, from a Graves County Circuit Court order summarily denying his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Starling contends that he received ineffective assistance of counsel leading up to his guilty plea because counsel failed to investigate witnesses and failed to

suppress eyewitness identification evidence. Finding no merit in Starling's claims, we affirm.

FACTS AND PROCEDURAL HISTORY

On April 9, 2013, Kayla Murdock was robbed at gunpoint as she attempted to sell her friend, Jamie Wallace, marijuana. According to Murdock's statement to police, she met Wallace in the parking lot of a local bowling alley for the purposes of selling her twenty dollars' worth of marijuana. While Wallace was in Murdock's vehicle making the purchase, two males exited Wallace's vehicle and entered Murdock's back seat. Murdock recognized one of the perpetrators as Jaylen Johnson, but she did not recognize the other perpetrator (Starling). The robbers demanded Murdock give them her purse, but she resisted. Suddenly, one of the men—the one she did not recognize—drew a firearm and demanded Murdock give him everything she had. Murdock acquiesced. When the robbery concluded, Starling and Johnson forced Wallace at gunpoint to drive them to a local Elementary School where she dropped them off. Murdock's purse contained \$600 and an undisclosed amount of marijuana.

According to Wallace's statement, she was with David Roberson, Jaylen Johnson, and another male (Starling) when they went to purchase the marijuana from Murdock. While she was in Murdock's car making the purchase, Johnson and the Starling jumped in the car and robbed Murdock. Roberson waited in Wallace's car. Murdock screamed at Wallace to help her, but Wallace was scared that Starling would shoot her. When Wallace stopped at a red light during

the getaway, Starling hit her in the head with the butt of the firearm and told her to keep driving.

On June 20, 2013, a Graves County grand jury returned an indictment against Starling charging him with Robbery in the first degree; unlawful imprisonment in the first degree; trafficking in marijuana, less than eight ounces second or greater offense; and being a persistent felony offender in the first degree. On November 7, 2013, Starling filed a motion to suppress Murdock's identification of him as the perpetrator as unnecessarily suggestive. A hearing on the motion was held on the same day at which two Mayfield police officers testified.

Lt. Jason Riegler, the arresting officer, testified that on April 10, 2013, a woman (Jamie Wallace) flagged him down and informed him that the two robbery suspects were at Mason's Gas and Go. Wallace named one of the suspects as Roberson and gave a description of the other suspect. Shortly thereafter, Lt. Riegler found Starling and Roberson at the gas station and detained them. A search of Starling incident to his arrest produced \$88.00 and an ounce of marijuana. Lt. Riegler took Roberson and Starling to the police station and sat with Starling until the investigating officers could interview him. Lt. Riegler confirmed that he and Starling were in a separate room and there was no opportunity for Murdock to observe Starling before the photo lineup.

Lead investigating officer, Sgt. Chris Watkins, testified that when he arrived at the police station on April 10, 2013, he interviewed Starling, who claimed no knowledge of the incident. He then contacted the Kentucky State

Police and requested a photo array that included Starling's photo. Murdock arrived at the police station approximately twenty minutes later and was shown the photo array. After briefly looking at the photo array, Murdock identified Starling as the person who had robbed her. Sgt. Watkins further testified that Murdock had no opportunity to see Starling in custody before identifying him in the photo lineup.

Following the hearing, the judge issued a written order denying Starling's motion to suppress the identification. In ruling, the judge found that there was no impermissible show-up at the police station and that the photo lineup was not suggestive in nature.

On January 6, 2014, Starling entered an unconditional plea of guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct 160, 27 L.Ed.2d 162 (1970). In the process of accepting Starling's guilty plea, the court found that Starling understood the nature of the charges against him, including the possible penalties, that he was knowingly and voluntarily waiving his right to plead his innocence, to be tried by a jury, to compel the attendance of witnesses in his behalf, to confront and cross-examine witnesses, and to appeal his case to a higher court. In exchange for his guilty plea, Starling was sentenced to ten years' imprisonment for an amended count of robbery in the second degree, five years' imprisonment for unlawful imprisonment in the first degree, and five years' imprisonment for trafficking marijuana less than eight ounces, second or subsequent offense. The court dismissed the charge of persistent felony offender

in the first degree and ordered all sentences run concurrently for a total of ten years' imprisonment.

Thereafter, in September, 2014, Starling filed his *pro se* Motion to Vacate, Set Aside, or Correct Sentence pursuant to RCr 11.42. In his motion, he alleged that his trial counsel provided ineffective assistance by failing to interview witnesses and failing to obtain suppression of the evidence relating to the photo identification procedure. The trial court denied Starling's motion without an evidentiary hearing and he appeals, *pro se*, from that order.

STANDARD OF REVIEW

“The burden is upon the accused to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceedings provided in RCr 11.42.” *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968).

The test for determining ineffective assistance of counsel on a guilty plea has two components:

(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.

Sparks v. Commonwealth, 721 S.W.2d 726, 727 –728 (Ky. App. 1986).

Since “a plea of guilty constitutes a waiver of all defenses other than that the indictment charged no offense,” consideration of the motion to vacate is properly limited to the allegation that counsel was ineffective. *Id.* at 727. Where the trial court denies a motion for an evidentiary hearing on the merits, 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.” *Id.*

ANALYSIS

Starling claims that his defense counsel was ineffective for failing to interview police witnesses Lt. Riegler and Sgt. Watkins and victims Wallace and Murdock. First, he alleges that had his counsel interviewed Ofc. Dunn, Sgt. Watkins, and Lt. Riegler, he could have found out who informed Riegler that the suspects were located at Mason’s Gas and Go. We find this claim is refuted by the record.

Despite Starling’s allegation, the record reveals that trial counsel did question Sgt. Watkins and Lt. Riegler regarding the informant at the evidentiary hearing on Starling’s motion to suppress. At that hearing, both police officers identified Wallace as the informant. Starling’s claim regarding Sgt. Watkins and Lt. Riegler further fails because he gives no indication how knowing the informant would have made a difference in the outcome of the case.

Starling also believes that counsel was ineffective for failing to interview the victims Wallace and Murdock. However, based on the written

reports they gave to the police, both victims would have testified that Starling jumped into the back seat of Murdock's vehicle, brandished a firearm, and demanded Murdock give her everything she had. Wallace would have testified that Starling hit her in the back of the head with the firearm when she stopped her car during the getaway. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Commonwealth v. Tigue*, 459 S.W.3d 372, 394 (Ky. 2015) (quoting *Strickland v. Washington*, 466 U.S. 668, 690–91, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984)). It is clear by their statements to police that any information trial counsel could have elicited from Murdock and Wallace during an interview would have been adverse to Starling's case. Therefore, it was reasonable for counsel to believe that an interview with the victims was unnecessary.

Starling insists that interviewing both Wallace and Murdock could have elicited favorable testimony, however, he fails to state specifically what that testimony might entail. "A claim that certain facts might be true, in essence an admission that Appellant does not know whether the claim is true, cannot be the basis for RCr 11.42 relief." *Mills v. Commonwealth*, 170 S.W.3d 310, 328 (Ky. 2005) (overruled on other grounds by *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)). "[T]he purpose of an RCr 11.42 motion is to provide a forum for known grievances and not an opportunity to conduct a fishing expedition for potential grievances." *Sanborn v. Commonwealth*, 975 S.W.2d 905, 910 (Ky. 1998) (overruled on other grounds by *Leonard v. Commonwealth*, 279 S.W.3d 151

(Ky. 2009)). Starling's claim that Murdock and Wallace would have given favorable statements is too speculative to warrant relief.

Starling further insists that Murdock could have been questioned as to how she identified Starling as her alleged assailant. What Starling does not explain is what Murdock would have said or how what she would have said would have changed his decision to plead guilty. As stated above, an RCr 11.42 motion is not an opportunity to conduct a fishing expedition.

Moreover, the procedure by which Murdock identified Starling was established at the evidentiary hearing and in the trial judge's findings. The trial judge specifically found, based on the testimony at the evidentiary hearing, that the officers called Murdock to the station, she did not have the opportunity to see Starling, who was detained, and after looking at the photo lineup, she picked Starling out with little delay. Starling does not allege that Murdock would have testified any differently. Consequently, this claim is without merit.

Starling next claims that his attorney was ineffective because he "failed to object to the photo pack display; the Kentucky State Police Criminal Records and Identification Branch—AFIS system used; or how the trial court summarized it as being Imagerack." In support, he argues that he was the only individual depicted in the photo array provided by the KSP with "tattoos over their face, dreadlocks, and tattoos over their necks, hands, or arms." Once again, we find that the record clearly refutes this claim.

No tattoos are discernible on Starling's face or neck in the photo array, and his arms and hands are not visible. Further, there are three individual in the array that are depicted with dreadlocked hair. Starling has failed to show how his photo lineup was unduly suggestive and has thus failed to show how a defense objection to the lineup would have resulted in a different sentence or result. Accordingly, Starling's argument regarding the photo lineup fails.

Starling also objects to the trial courts finding that the identification procedure involved an impermissible show-up. He states that the trial court "abused its discretion, making a clearly erroneous ruling." We decline to address this argument because the issue was litigated in the suppression hearing prior to Starling's guilty plea and could have been raised on direct appeal. Starling waived his right to appeal the trial court's ruling on that matter when he entered his unconditional plea of guilty. "RCr 11.42 cannot be used toraise issues that could have been presented on direct appeal." *Baze v. Commonwealth*, 23 S.W.3d 619 (Ky. 2000) (overruled on other grounds by *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)).

Finally, Starling insists that the trial court should have given him an opportunity to prove his arguments at an evidentiary hearing. An evidentiary hearing on an RCr 11.42 motion is "not necessary when the record in the case refutes the movant's allegations." *Hopewell v. Commonwealth*, 687 S.W.2d 153, 154 (Ky. App. 1985). As all of Starling's claims of ineffective assistance of

counsel are refuted using evidence in the record, an evidentiary hearing was not required.

For the foregoing reasons the order of the Graves Circuit Court denying Starling's motion for RCr 11.42 relief is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Darius M. Starling, Pro se
Burgin, Kentucky

BRIEF FOR APPELLEE:

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