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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001998-MR

PATRICK WAYNE RAY — APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE ROBERT COSTANZO, JUDGE
ACTION NO. 08-CR-00004

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, COMBS, AND STUMBO, JUDGES.

CLAYTON, JUDGE: Patrick Wayne Ray appeals the order of the Bell County Circuit Court, denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion without a hearing. On appeal, Ray alleges that his counsel was ineffective for failing to file a motion to suppress his statement to the police, and for failing to

advise him that he would not be eligible for parole until he served eighty-five percent of his sentence. For the reasons stated herein, we affirm.

FACTS AND PROCEDURAL HISTORY

On January 14, 2008, Ray was indicted by a Bell Circuit grand jury, which charged him with first-degree rape and first-degree sodomy. The indictment arose out of events which took place on June 8, 2007, when Ray had sexual intercourse with his eight-year-old step-daughter while her mother was asleep on the couch. On May 6, 2008, on the advice of counsel, Ray waived his constitutional right to proceed to trial and entered a guilty plea to both charges. In exchange for his plea of guilty, Ray received thirty-five years' imprisonment.

On April 4, 2011, Ray filed his RCr 11.42 motion to vacate his convictions. As basis for his motion, Ray argued that he received ineffective assistance of trial counsel when counsel allegedly failed to move to suppress his statement obtained in violation of his Fifth Amendment right to counsel, and failed to inform him of eighty-five percent parole eligibility. The trial court denied Ray's motion on August 11, 2011, without explanation and without an evidentiary hearing. Ray appeals the order denying his motion arguing that the trial court erred when it denied his motion without an evidentiary hearing.

STANDARD OF REVIEW

To establish a valid claim of ineffective assistance of counsel, a defendant must satisfy both the deficient performance and prejudice prongs established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2053, 2064, 80 L.Ed.2d 674 (1994); *accord Gall v. Commonwealth*, 702 S.W.2d 37, 39 (Ky. 1985). To satisfy the deficient performance prong, a defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. The prejudice prong is satisfied where a reasonable probability exists that but for counsel's unprofessional errors the result of the proceeding would have been different. 466 U.S. at 694, 104 S.Ct. at 2068. In the context of a guilty plea, in order to establish prejudice, a defendant must show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have instead insisted on going to trial. *Premo v. Moore*, 562 U.S. 115, 129, 131 S.Ct. 733, 743, 178 L.Ed.2d 649 (2011).

Pursuant to RCr 11.42(5), a hearing on a motion to vacate is only required if the motion raises issues that cannot be determined on the face of the record. As our Supreme Court explained, "[a] hearing is required if there is a material issue of fact that cannot be conclusively resolved, i.e., conclusively proved or disproved, by an examination of the record.... The trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them." *Fraser v. Commonwealth*, 59 S.W.3d 448, 452-53 (Ky. 2001). Accordingly, where, as here, an RCr 11.42 hearing is denied, 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).

ANALYSIS

Ray first argues that he received ineffective assistance of counsel when his trial attorney failed to bring a meritorious pretrial motion to suppress his illegally obtained statement.[1] Ray contends that during the course of the investigation, he was questioned by the Middlesboro Police department regarding the allegations. He insists that after he was read his *Miranda*[2] rights he requested counsel, but the police officer continued with questioning. He claims that he informed his trial attorney of these events, but counsel failed to file any pretrial motions to suppress the statements. Ray believes he was prejudiced because had his statement been suppressed, counsel would not have advised him to plead guilty. However, after reviewing the record, we believe that Ray has failed to meet his burden in establishing ineffective assistance of counsel.

In the guilty plea context, a 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, a pending suppression motion

[1] In his brief Ray relates the events of his questioning and provides citations to the record supporting his statements, suggesting that those events, in fact, occurred. However, Ray only cites to his own memorandum in support of his RCr 11.42 motion to the trial court. Outside of Ray's own allegation, the record does not otherwise establish that Ray was questioned by the police, or that police questioned him after he invoked his constitutional rights.

[2] *Miranda v. Arizona*, 384 U.S.436, 86 S.Ct. 1602, 16 L.Ed. 694 (1966).

that could undermine the prosecution's case, or the realistic potential for a lower sentence." *Stiger v. Commonwealth*, 381 S.W.3d 230, 236-237 (Ky. 2012). We are not convinced that had counsel successfully moved to suppress Ray's alleged statement, the decision to go to trial would have been rational. Even if we assume that Ray made inculpatory statements during his alleged interview with the police, suppressing those statements would not have significantly undermined the prosecution's case.

The Commonwealth's evidence against Ray included the testimony of the eight-year-old victim and a medical examination corroborating her story. Had Ray proceeded to trial, he faced a life sentence.[3] The plea agreement recommended by counsel, and voluntarily accepted by Ray, resulted in a significantly lower term of imprisonment, and a guarantee that he would one day be released. As the Supreme Court of Kentucky noted in *Commonwealth v. Elza*, 284 S.W.3d 118, 122 (Ky. 2009), there is "no ineffective assistance of counsel where defendant was advised to accept a reasonable plea agreement." *Id.* Here, counsel's advice to accept the plea "represent[ed] a meaningful choice between the probable outcome at trial and the more certain outcome offered by the plea agreement." *Vaughn v. Commonwealth*, 258 S.W.3d 435, 439 (Ky. App. 2008). Based on the evidence against Ray, trial counsel's advise to accept the plea was reasonable as was Ray's decision to accept it.

[3] First-degree sodomy may be classified as either a Class A or Class B felony depending on the age of the victim and/or whether the victim received a serious physical injury. Kentucky Revised Statutes 510.070(2).

Moreover, our Supreme Court has noted many times, RCr 11.42 is not a discovery mechanism. *Hodge v. Commonwealth*, 116 S.W3d 463 (Ky. 2003). (*overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)). To proceed under the rule, a movant must allege specific facts which, if true, would constitute grounds for relief. A motion asserting insufficient grounds, speculative allegations, or allegations conclusively refuted by the record may be summarily dismissed. *Id.*

Here, Ray alleges that the police continued to question him after he asserted his constitutional right to counsel; however, he fails to provide any information as to the content of those statements. As noted by the Commonwealth, Ray's statements to the police could have been exculpatory. If so, a failure to suppress those statements would not have had an effect on the outcome of the case. Thus, even if his allegation was taken as true, it does not establish that trial counsel's failure to pursue a motion to suppress resulted in prejudice. Because Ray has failed to make a sufficient showing of deficient performance or resulting prejudice, we hold that the trial court did not err in summarily denying his RCr 11.42 motion regarding this claim of error.

Ray next claims that he accepted the thirty-five-year plea deal because he was told by his counsel that he would be eligible for parole in twelve years when in fact he would not be eligible for parole until he had served twenty years. Ray insists that his counsel provided ineffective assistance regarding his misadvice. We disagree.

Plea bargaining is a critical phase of litigation for purposes of the Sixth Amendment to which the right to effective assistance of counsel attaches. *Missouri v. Frye*, 132 S.Ct 1399, 1406, 182 L.Ed.2d 379 (2012). In *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct 1473, 176 L.Ed.2d 284 (2010), the Supreme Court of the United States held that trial counsel's failure to advise his noncitizen client about automatic deportation as a result of his guilty plea amounted to ineffective assistance of counsel. The Court, in reaching its conclusion, considered the severity of the deportation, its high level of involvement with the criminal penalty, and its mandatory nature, along with the fact that counsel could have easily determined the deportation consequences from statute. *Id.*

Our Supreme Court, in *Commonwealth v. Pridham*, 394 S.W.3d 867 (Ky. 2012), finding that misadvice regarding parole eligibility under the violent offender statute is sufficiently analogous to the misadvice regarding deportation, extended the reasoning of the *Padilla* decision. The Court held that misadvice regarding the violent offender statute's effect on parole eligibility is a valid basis for establishing deficient performance by trial counsel. Thus, if Ray's allegations are true, he has stated a valid claim of deficient performance.

If Ray received the bad advice he claims, and it cannot be determined by an examination of the record, Ray would be entitled to an evidentiary hearing. *See Bell v. Cone*, 535 U.S. 685, 695, 122 S.Ct 1843, 1850, 152 L.Ed.2d 914 (2002) ("without proof of both deficient performance and prejudice to the defense, ...the sentence or conviction should stand."); *see also Fraser*, 59 S.W.3d at 452 ("A

hearing is required if there is a material issue of fact that cannot be conclusively resolved...by an examination of the record.").

We note that in Ray's *pro se* motion to the trial court, he did not claim that had he received correct information regarding parole eligibility, he would have rejected the plea offer and proceeded to trial. In his initial motion, Ray contended that had he received the correct information, he would have insisted that the Commonwealth reduce its offer by ten years. However, "[i]n the guilty plea context, to establish prejudice the challenger must demonstrate 'a reasonable probability that, but for counsel's errors, *he would not have pleaded guilty and would have insisted on going to trial*." *Stiger v. Commonwealth*, 381 S.W.3d 230, 237 (Ky. 2012) (internal quotations omitted) (emphasis added). Ray's insistence that the Commonwealth reduce its offer was not sufficient to establish prejudice and therefore the trial court was correct when it summarily denied his motion.

Ray has changed his argument on appeal. He now contends that had he known of the correct parole eligibility terms, he would have rejected the offer and insisted on proceeding to trial with the hopes of receiving the minimum sentence, which would result in three years less of parole ineligibility. It is well-established that an appellant "will not be permitted to feed one can of worms to the trial judge and another to the appellate court." *Carrier v. Commonwealth*, 142 S.W.3d 670, 677 (quoting *Kennedy v. Commonwealth,* 544 S.W.2d 219, 222 (Ky. 1976)). The trial court was not presented with this argument, nor given the

opportunity to rule thereon. Therefore, it is not properly before us on appeal. Regardless, Ray's argument would have failed anyway.

"[T]o obtain relief..., a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla*, 559 U.S. at 372, 130 S.Ct. at 1485. In *Pridham*, our Supreme Court found that, despite overwhelming evidence of guilt, it would not have been unreasonable for the appellant in that case to reject the Commonwealth's thirty-year offer with parole eligibility after twenty years, and proceed to trial where he risked a maximum sentence of life imprisonment. The Court reasoned that arguably for a fifty-seven-year-old man, there is little difference between a thirty-year sentence and a life sentence. Thus, by proceeding to trial, Pridham risked virtually nothing, but had a slim chance of receiving the minimum sentence of twenty years with parole eligibility after seventeen. The Court concluded that Pridham had met the minimum standard as to the prejudice prong and affirmed this Court's order remanding the case to the trial court for an evidentiary hearing. In this case, we are not convinced that Ray has met the minimum standard as to the prejudice prong, because, as noted earlier, we do not believe it would have been rational for Ray to turn down the plea offer and proceed to trial.

First, the risk in this case was significant. Similar to the defendant in *Pridham*, had Ray been correctly advised that he was subject to the violent offender statute, he would have faced a choice between the Commonwealth's

thirty-five-year offer with its twenty-year parole eligibility, and going to trial with the risk of being convicted of a Class A felony whereupon he would have been subject to up to a life sentence. However, unlike Pridham, Ray was only twenty years old at the time of sentencing. Therefore, the prospect of a life sentence for Ray had far greater ramifications than it did to Pridham. Had he been correctly advised, Ray could not have concluded, as could Pridham, that he risked virtually nothing by going to trial. On the contrary, by turning down the Commonwealth's offer, Ray risked spending the entirety of his natural life in prison. Ray is correct that even on a maximum sentence he would have been eligible for parole after twenty years. However, the fact that an inmate becomes eligible for parole does not guarantee that the inmate will actually be paroled. *Garland v. Commonwealth*, 997 S.W.2d 487, 490 (Ky. App. 1999). By accepting the plea deal, Ray guaranteed his release at the age of fifty-five.

Second, Ray was not likely to have fared any better at trial. Ray was charged with two Class A felonies, each carrying a potential of life imprisonment. It is true that Ray could have conceivably received a minimum total of twenty years' imprisonment with parole eligibility after seventeen years. However, we believe that that result would have been highly unlikely. Ray was charged with first-degree rape and first-degree sodomy of an eight-year-old child. The victim presumably would have testified and the medical examination corroborated her testimony. "The sexual molestation of young children...is widely viewed as one of the most, if not the most, reprehensible crimes in our society." *R.O. v. A.C. ex rel.*

M.C., 384 S.W.3d 185, 190 (Ky. App. 2012) (quoting *State v. McKinniss*, 153 Ohio App.3d 654, 795 N.E.2d 160, 163 (2003)). Given the facts of this case, (which Ray admitted to in his guilty plea), it is possible that the jury would have imposed a greater sentence. Moreover, Ray has not raised any valid defenses to the charges, or otherwise shown that he could undermine the prosecution's case, such as with a pending suppression motion. *Stiger*, 381 S.W.3d at 237.

Accordingly, we conclude that Ray has not shown that he was prejudiced by trial counsel's alleged deficiency. We are not persuaded that had Ray "been correctly advised about the parole consequences of his plea, there is a reasonable probability that he would have rejected the plea bargain and insisted upon a trial." *Id*. at 238. Ray had little, if any chance of improving his outcome at trial but, based on the reprehensible nature of the charges, the age of the victim, and the lack of a valid defense, he had a substantial chance of faring far worse. It would have been patently irrational to risk a life sentence for the minute chance of receiving three years less of parole ineligibility. Moreover, Ray received the benefit of the bargain because accepting the plea all but guaranteed that Ray will eventually be released from incarceration.

CONCLUSION

For the foregoing reasons, the order of the Bell Circuit Court is affirmed.

COMBS, JUDGE, CONCURS.

STUMBO, JUDGE, DISSENTS AND WILL NOT FILE SEPARATE OPINION.

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