

RENDERED: JULY 9, 1999; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001075-MR

DWAYNE MCGUFFIN

APPELLANT

v. APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE SAM MONARCH, JUDGE
ACTION NO. 93-CR-49

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: DYCHE, GUIDUGLI, JOHNSON, JUDGES.

JOHNSON, JUDGE: Dwayne McGuffin (McGuffin) appeals from an order of the Grayson Circuit Court entered on April 1, 1998, denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to vacate his sentence. Having concluded that McGuffin has failed to state grounds upon which relief may be granted, we affirm.

On April 6, 1993, McGuffin was indicted for Flagrant Non-Support (Kentucky Revised Statutes (KRS) 530.050). McGuffin entered into a plea agreement with the Commonwealth on July 20, 1995. In accordance with a recommendation from the Commonwealth,

McGuffin pled guilty to flagrant non-support. The plea agreement provided that, on the condition that McGuffin pay off all child support in arrearage, he would receive a two-year prison sentence that would be probated for five years. On August 1, 1995, the Grayson Circuit Court sentenced McGuffin consistently with the plea agreement. Throughout the court proceedings, McGuffin was represented by retained counsel.

On March 24, 1998, McGuffin, pro se, filed an RCr 11.42 motion alleging ineffective assistance of counsel. On April 1, 1998, the trial court entered an order denying McGuffin's request for RCr 11.42 relief on the grounds that his motion was "clearly. . . without basis in fact and that his allegations [were] simply not true." This appeal followed.

McGuffin claims ineffective assistance of counsel due to counsel's alleged failure to 'investigate' the case fully. In support of this allegation, McGuffin claims that prior to his indictment for flagrant non-support he transferred property to his ex-wife in lieu of child support. McGuffin claims that this property transfer fulfilled his child support obligations that had not previously been paid. McGuffin argues that he was wrongly convicted since his lawyer failed to bring the property transfer to the trial court's attention. What McGuffin ignores is his own responsibility to inform his trial counsel of an alleged property transfer in lieu of child support. And, of equal importance, the record reveals McGuffin's repeated admissions that he did indeed

fail to timely pay his child support and that he owed his ex-wife the amount alleged.

RCr 11.42(2) requires the movant to "state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds." It appears from the record that McGuffin not only failed to inform his counsel and the trial court that he had allegedly already paid his child support through a property transfer, but that he chose to conceal this alleged fact by, under oath, pleading guilty to all charges. The burden is upon the defendant to identify specific acts or omissions alleged to constitute deficient performance. Strickland v. Washington, 466 U.S. 668, 690, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674, 695 (1984). Here, McGuffin failed to advise counsel of the alleged property transfer, and he failed to identify any error that his counsel committed in failing to obtain the information about the alleged property transfer.

The two-prong test for determining whether a defendant has received ineffective assistance of counsel requires McGuffin to show that his counsel's performance was deficient and that the deficiency was prejudicial. Id. 466 U.S. at 687, 104 S.Ct. at 2052, 80 L.Ed.2d at 692; see also Gall v. Commonwealth, Ky., 702 S.W.2d 37, 39 (1985). McGuffin does not claim that he notified counsel of the alleged property transfer, only that counsel should have 'discovered' or somehow found out about the alleged transfer. McGuffin's failure to aid in his own defense cannot be

construed as a failure or omission on the part of his counsel. Thus, McGuffin's contention that his counsel rendered ineffective assistance is without merit.

Since McGuffin has failed to state any reasonable grounds for his claim of ineffective assistance of counsel, there is no necessity for a hearing. Brooks v. Commonwealth, Ky.App., 447 S.W.2d 614, 618 (1969); see also Lay v. Commonwealth, Ky.App., 506 S.W.2d 507 (1974). For the foregoing reasons, we affirm the order of the Grayson Circuit Court that denied the RCr 11.42 motion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Hon. Mark Wettle
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BRIEF FOR APPELLEE:

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