RENDERED: APRIL 28, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002055-MR

GRADY LEE CALDWELL — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE EDWIN A. SCHROERING, JR., JUDGE
ACTION NO. 94-CR-03032

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: JOHNSON, MCANULTY AND MILLER, JUDGES.

JOHNSON, JUDGE: Grady Lee Caldwell appeals from an opinion and order rendered by the Jefferson Circuit Court on July 20, 1998, denying his motion pursuant to RCr[1] 11.42 to vacate, set aside or correct his sentence. Having concluded that Caldwell is not entitled to relief, we affirm.

[1]Kentucky Rules of Criminal Procedure.

On March 14, 1995, Caldwell pled guilty to two counts of burglary in the first degree, KRS[2] 511.020, two counts of robbery in the first degree, KRS 515.020, one count of burglary in the second degree, KRS 511.030, one count of robbery in the second degree, KRS 515.030, and to being a persistent felony offender in the first degree (PFO I) under KRS 532.080. Caldwell was sentenced to prison on April 25, 1995, in accordance with the Commonwealth's offer of a ten-year sentence to serve on each count with the sentences to run concurrently and to be enhanced to 20 years to serve pursuant to the PFO I conviction.

On March 30, 1998, Caldwell filed an RCr 11.42 motion to vacate, set aside or correct his sentence claiming ineffective assistance of counsel. The Commonwealth filed a response to the motion on May 21, 1998, refuting the claims made by Caldwell. On July 20, 1998, without holding an evidentiary hearing or appointing counsel to represent Caldwell, the trial court denied Caldwell's RCr 11.42 motion. This appeal followed.

In reviewing the question of ineffective assistance of counsel, we must consider the well-established test from Strickland v. Washington.[3] In Strickland, the Supreme Court established the following two-prong test for analyzing ineffective assistance of counsel claims:

> First, the defendant must show that counsel's performance was deficient. This

---

[2]Kentucky Revised Statutes.

[3]466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

> requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction. . . resulted from a breakdown in the adversary process that renders the result unreliable."[4]

Caldwell argues that the trial court erred in denying his RCr 11.42 motion because he "was denied the chance to prove that the prosecution failed to keep the plea agreement." Caldwell claims that the Commonwealth's attorney visited him at the jail to "negotiate terms for a plea agreement." Caldwell states in his brief and in a letter to his appointed counsel, Alex Fleming, that he was told the prosecution would recommend a lenient sentence in exchange for testimony against a co-defendant. Caldwell describes an alleged agreement in which he would serve a prison term of seven and one-half years based on good-time credits. Caldwell's letter to counsel states as follows:

> Mr. Fleming, you stood up and announced in Court to the Judge, Mr. Shoering [sic] as stated: "Judge, I want the records to show that this is infact [sic] a Alfo [sic] Plea, and that because my client. . . gave full testimony against his co-defendant (Mr. Gardner Yates)[w]e (myself and the

---

[4]Gall v. Commonwealth, Ky., 702 S.W.2d 37, 39-40 (1985); cert. denied, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986) (quoting Strickland, supra).

> prosecutor) both agreed to allow Mr. Cladwell [sic] good-time on the PFO I; 20 year sentence. Meaning, instead of Mr. Caldwell serving (10) straight years before the Parole Board, he would serve seven (7) years and six (6) months before he does [sic] meet the Parole Board."[5]

Fleming responded to Caldwell's letter as follows:

> My recollection of the facts surrounding your plea and plea negotiations differs greatly from your account. I can state unequivocally that I never told you or anyone else that I have represented that someone serving a PFO I sentence would not have to serve ten (10) years before seeing the parole board (emphasis original).
>
> Although I am sure I discussed good time credit with you, I did not state that the good time would have any effect on your parole eligibility.

This Court's review of the videotaped plea does not reveal that Caldwell entered an Alford plea, a fact which Caldwell himself admits in his letter to counsel. Caldwell states:

> I want to also say, that I do have a copy of my vidio [sic] tape with my final sentencing on it, bu[t] Mr. Fleming, it is very strange that this announcement is not on tape.

In light of the fact that the record refutes Caldwell's allegations, we agree with the trial court's well-reasoned opinion and adopt the following:

> Lastly, [Caldwell] alleges the Commonwealth has not abided by the plea agreement. However, [he] fails to put forth any evidence to illustrate his contention.

---

[5]The record does not reflect that Mr. Fleming made these remarks.

> Essentially, [Caldwell] argues he was misinformed as to his minimum parole eligibility. Defense counsel adamantly denies this in his letter to [Caldwell] attached to the file, and there is nothing in the record to support [his] claim. A defendant's assertion that his guilty plea was invalid because he was not informed of some of the collateral consequences of his plea is without merit. Jewell v. Commonwealth, Ky., 725 S.W.2d 593 (1987).

Bare allegations are an insufficient basis for RCr 11.42 relief.[6] Caldwell has not alleged any facts sufficient to require reversal of the trial court's findings.

Caldwell also argues that he was "directed to plea [sic] guilty to charges that were deficient as to the elements and the facts did not support a Robbery I, and Burglary I offense." Sufficiency of evidence is not an issue that can be properly raised in a post-conviction proceeding under RCr 11.42.[7]

In Taylor v. Commonwealth,[8] a case similar to the one before us, this Court held:

> Entry of a voluntary, intelligent plea of guilty has long been held by Kentucky courts to preclude a post-judgment challenge to the sufficiency of the evidence (citations omitted). The reasoning behind such a conclusion is obvious. A defendant who elects to unconditionally plead guilty admits the factual accuracy of the various elements of the offense with which he is charged. By

---

[6]King v. Commonwealth, Ky., 408 S.W.2d 622 (1966).

[7]Nickell v. Commonwealth, Ky., 451 S.W.2d 651, 652 (1970). See also Brock v. Commonwealth, Ky., 479 S.W.2d 644 (1972); Harris v. Commonwealth, Ky., 441 S.W.2d 443 (1969); King, supra.

[8]Ky.App., 724 S.W.2d 223 (1986).

> such an admission, a convicted appellant forfeits the right to protest at some later date that the state could not have proven that he committed the crimes to which he pled guilty. To permit a convicted defendant to do so would result in a double benefit in that defendants who elect to plead guilty would receive the benefit of the plea bargain which ordinarily precedes such a plea along with the advantage of later challenging the sentence resulting from the plea on grounds normally arising in the very trial which defendant elected to forego.[9]

Accordingly, we hold that since Caldwell does not argue on appeal that his plea was not voluntarily and intelligently entered, he forfeited his right to argue that the evidence relied upon by the Commonwealth was insufficient to convict him had he not pled guilty.

Caldwell claims that he was improperly denied an evidentiary hearing on his RCr 11.42 motion and that since he was proceeding in forma pauperis that he was improperly denied appointment of counsel. RCr 11.42 requires a hearing on a motion to vacate only "[i]f the answer raises a material issue of fact that cannot be determined on the face of the record" (emphasis added).[10] The trial court in its opinion and order citing Newsome v. Commonwealth,[11] and Hopewell v. Commonwealth,[12] concluded that "the record refutes [Caldwell's] allegations."

---

[9]Id. at 225.

[10]See also Maggard v. Commonwealth, Ky., 394 S.W.2d 893, 894 (1965).

[11]Ky., 456 S.W.2d 686 (1970).

[12]Ky.App., 687 S.W.2d 153 (1985).

Where the material issues of fact can be determined on the face of the record, it is unnecessary for the trial court to order an evidentiary hearing.[13] Having reviewed the record, we hold that the trial court's findings are not clearly erroneous and Caldwell was not entitled to an evidentiary hearing on his RCr 11.42 motion.

Caldwell further contends that he was denied effective assistance of counsel in perfecting his RCr 11.42 motion since he was proceeding in forma pauperis. In Commonwealth v. Stamps,[14] our Supreme Court held that an RCr 11.42 motion does not require appointment of counsel, and stated as follows:

> Thus we are squarely confronted with whether our decision in Commonwealth v. Ivey, [Ky., 599 S.W.2d 456 (1980)] at p. 337, mandates automatic reversal in every case where a defendant proceeding in forma pauperis has filed an RCr 11.42 proceeding and requested appointment of counsel, but the trial court has failed to provide one. KRS 31.110 provides for the appointment of counsel at public expense whenever a "needy person" is entitled to be represented by an attorney. In Ivey, we hold [sic] that "KRS 31.110 and RCr 11.42 are complimentary and clearly provide for appointment of counsel in the situation presented." 599 S.W.2d at 458. But an RCr 11.42 proceeding is not a direct appeal with a constitutional right to an attorney. Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d. 341 (1974)(emphasis added).[15]

---

[13]Glass v. Commonwealth, Ky., 474 S.W.2d 400 (1971) (citing Messer v. Commonwealth, Ky., 454 S.W.2d 694 (1970)).

[14]Ky., 672 S.W.2d 336 (1984).

[15]Id. at 339.

Since the trial court determined that based on the face of the record Caldwell's motion was without merit, the trial court was not required to appoint counsel to search for supplementary grounds for RCR 11.42 relief.[16]

In the case sub judice, Caldwell has clearly failed to meet either prong of the Strickland test. Therefore, we cannot say that the trial court's findings were clearly erroneous. Accordingly, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Grady Lee Caldwell, pro se
LaGrange, KY

BRIEF FOR APPELLEE:

A.B. Chandler, III
Attorney General

David A. Smith
Asst. Attorney General
Frankfort, KY

[16]Stamps, supra.