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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001645-MR

WILLIAM JOSEPH PHILLIPS — APPELLANT

v.

APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
INDICTMENT NO. 00-CR-00036

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: DYCHE, McANULTY, AND SCHRODER, JUDGES.

DYCHE, JUDGE. Appellant, William Joseph Phillips, appeals *pro se* from the Muhlenberg Circuit Court's Order denying his RCr 11.42 motion. Upon a full review of the matter, we affirm.

Phillips maintains on appeal that he is entitled to relief under RCr 11.42 for ineffective assistance of counsel for failure to present a defense or seek a change in venue. He was charged with bail jumping in the first degree for failing to appear at a court ordered date. See KRS 520.070. He entered a

guilty plea under North Carolina v. Alford, 400 U.S. 25 (1970), and was sentenced to four years to run concurrently with a sentence on separate charges.

Under the leading case in evaluating claims of ineffective assistance of counsel, Strickland v. Washington, 466 U.S. 668, 669 (1984), we must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" Moreover, where a defendant challenges a guilty plea based on a claim of ineffective assistance of counsel, he must show that counsel made serious errors which fell outside the wide range of professionally competent assistance. McMann v. Richardson, 397 U.S. 759, 771 (1970). Additionally, he must prove that counsel's deficient performance so seriously affected the outcome of the plea process that, but for such errors, there is a reasonable probability that the defendant would not have pled guilty but instead would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726, 727-28 (1986).

Phillips was scheduled to be tried by a jury on a separate matter on December 30, 1999. At an earlier court date, his attorney asked for and was granted a continuance of the trial date. Phillips was not present. The order granting the continuance stated that "IT IS ORERED [sic] that the jury trial

on December 30, 1999 is continued; however, the defendant and attorney are under a continuing order to appear no later than 8:30 a.m., on said date." Phillips contends that there was no date set for the trial, and he did not know when to appear. Nonetheless, the order continuing the trial date includes that Phillips was ordered to appear on "said date." The only date in the order was December 30, 1999; therefore, a clear date was set.

Although Phillips's counsel appeared on December 30, 1999, Phillips did not because he contends that his counsel did not inform him that he needed to appear at that time. He alleges that he did learn that the trial date had been changed after his counsel informed one of his relatives of this fact, but that he did not know when he needed to appear.

Assuming that Phillips's version of the events is true, we are not persuaded to grant the relief he seeks. The record is clear that he voluntarily entered an Alford plea. The transcript of the plea colloquy shows that he clearly understood the charge against him. He stated that he was pleading guilty because he did not believe he could get a fair trial in Muhlenberg County. He was fully aware of what he was doing and did not testify to any duress or dissatisfaction with his counsel.

Further, he did not simply plead guilty out of

ignorance to the charge. Instead, Phillips's Alford plea was not admission of guilt, but an informed admission that the evidence was sufficient to convict him of the offense charged. The record supports a clear finding that Phillips understood this distinction and voluntarily entered the plea, notwithstanding whether he intentionally missed the court date.

Moreover, Phillips received the benefit of a concurrent sentence. Had he gone to trial and been found guilty, he could have been sentenced to serve his sentence consecutively. Based on these facts, we cannot find a reasonable probability that Phillips would have insisted on going to trial regardless of any alleged errors by his counsel.

We also find no error on his counsel's part in not moving for a change in venue. "The determination of whether to request a change of venue addresses itself to the discretion of the trial lawyer." McKinney v. Commonwealth, Ky., 445 S.W.2d 874, 877 (1969). On this, a reviewing court must be highly deferential in scrutinizing an attorney's performance, and the tendency to second-guess the attorney's decision must be avoided. Harper v. Commonwealth, Ky., 978 S.W.2d 311, 315 (1998).

Beyond the deference due the attorney's decision, we note that we are not persuaded in the least by Phillips's arguments. He is conclusory in arguing that he could not have

gotten a fair trial. He totally fails to explain why he would have been unable to obtain a fair trial in Muhlenberg County or that he was prejudiced in any way by his attorney's failure to request a change in venue. Phillips's vague assertions do not satisfy RCr 11.42. The failure to provide the factual support required by RCr 11.42 justifies the summary dismissal of that part of his claim. Sanders v. Commonwealth, Ky., 89 S.W.3d 380, 390 (2002).

Notwithstanding the foregoing, Phillips argues that he is entitled to relief under Reynolds v. Commonwealth, Ky. App., 994 S.W.2d 23 (1999). This matter is decidedly different from Reynolds. In Reynolds the defendant was found guilty after a jury trial. However, this Court reversed after concluding that the evidence was insufficient to convict the defendant because the evidence was conclusive that he had not been informed of the court date.

In the present matter, had Phillips elected to go to trial and been convicted without evidence supporting notice for him to appear in court, we might agree with him. However, he voluntarily entered an Alford plea, without duress and any other circumstances entitling him to relief and elected to receive the benefits of a guilty plea. Thus, Reynolds does not mandate reversal.

Finally, we find no error in the trial court's denial of an evidentiary hearing. Phillips's claims could be refuted by resort to the record alone in this matter. Thus, it was unnecessary for the trial court to conduct a hearing in this matter. Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 452 (2001).

For the reasons stated, we affirm.

ALL CONCUR.

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