RENDERED: November 19, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002529-MR

HOSEA CHATMAN — APPELLANT

v.

APPEAL FROM McCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 01-CR-00150

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.[1]

JOHNSON, JUDGE: Hosea A. Chatman has appealed from an order entered by the McCracken Circuit Court on November 17, 2003, which denied his motion to vacate his conviction pursuant to RCr[2] 11.42. Having concluded that the record conclusively resolves all of Chatman's claims, we affirm.

On May 12, 2001, Chatman entered a Wal-Mart store in Paducah, McCracken County, Kentucky, placed 29 DVDs and two VHS

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] Kentucky Rules of Criminal Procedure.

videotapes into a shopping cart, and took these items to Wal-Mart's garden center. While in the garden center, Chatman placed the stolen items outside the store's fence. Chatman then took a plastic shopping bag with him and exited the store to retrieve the items. Unknown to Chatman, a small number of Wal-Mart employees observed his activities; and as he was retrieving the stolen items, the employees confronted him. Chatman tried to flee, but was caught by the employees. After the police arrived, Chatman was arrested for shoplifting.

On June 15, 2001, Chatman was indicted by a McCracken County grand jury for theft by unlawful taking over $300.00,[3] and for being a persistent felony offender in the first degree (PFO I).[4] Despite the trial court appointing a public defender to represent him, Chatman filed numerous pro se pre-trial motions. In several of his pro se motions, Chatman pointed out that the police never took the stolen items into custody. Chatman fervently argued that the Commonwealth did not have sufficient evidence to convict him, since it could not produce the stolen items at trial in order to prove their value. The trial court denied all of Chatman's pro se motions and stated that it would only consider motions filed by his attorney.

[3] KRS 514.030.

[4] KRS 532.080.

Despite this admonition, on March 1, 2002, Chatman filed a pro se motion to have his public defender removed as counsel. Chatman argued that since he had filed a bar complaint against his trial counsel, she had a conflict of interest and could no longer represent him. The trial court denied Chatman's pro se motion, but Chatman's attorney filed a motion to withdraw as counsel and for Chatman to be allowed to proceed to trial pro se. The trial court held an evidentiary hearing on May 21, 2002, and denied the motion.

At Chatman's trial on May 23, 2002, he was convicted of felony theft and as being a PFO I. The jury recommended a sentence of five years on the theft conviction, enhanced to 20 years by the PFO I conviction. Chatman appealed his conviction and it was affirmed by the Supreme Court of Kentucky.

Chatman then filed a motion to vacate his conviction pursuant to RCr 11.42, arguing that his trial counsel had rendered ineffective assistance of counsel. According to Chatman, he had told his attorney that he wanted to accept the Commonwealth's offer of 15 years and to plead guilty, but his attorney refused to file a motion to enter a guilty plea. Chatman argued that not only had his attorney rendered ineffective assistance by refusing to assist him in pleading guilty, but she also had rendered ineffective assistance by failing to reveal to the trial court the severity of the

conflict between them. He also claimed that she had rendered ineffective assistance of counsel by filing a motion to withdraw as counsel. The trial court determined that the record conclusively resolved all of Chatman's allegations and denied his RCr 11.42 motion without an evidentiary hearing. This appeal followed.

A claim of ineffective assistance of counsel is analyzed by applying the two-prong test set forth in Strickland v. Washington.[5] To satisfy Strickland's first prong, a movant must prove that his trial attorney's performance was deficient to such an extent that the attorney was not functioning as counsel as guaranteed by the Sixth Amendment. When a movant has pled guilty, the second prong of the Strickland test is replaced with the test found in Hill v. Lockhart.[6] To satisfy the Hill test, a movant must prove that he was so prejudiced by the attorney's deficient performance that there exists, "a reasonable probability that, but for counsel's errors, movant would not have pleaded guilty and would have insisted on going to trial."[7] In this case, Chatman asserts that his trial counsel wrongfully induced him into standing trial instead of assisting

[5] 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

[6] 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

[7] Id.

him in pleading guilty. In such situations, the Hill test is still applicable.[8]

Chatman claims that the videotape of the hearing held on November 19, 2001, regarding his motion to suppress evidence, clearly shows that he attempted to plead guilty during the hearing, but that his attorney stopped him. We have thoroughly reviewed the videotape record of the suppression hearing and at no time during the hearing did Chatman try to plead guilty. In fact, he sat quietly while his attorney argued for suppression of the evidence.

Chatman also claims that at the end of the suppression hearing, the trial court asked if he and his attorney wished to have another pretrial conference. According to Chatman, he said "yes" because he intended to plead guilty, but he insists his attorney interrupted him and told the judge "no." There is no evidence of this incident in the record. The videotape reveals that the trial court asked if the parties had already had a pretrial conference, and Chatman's attorney said "yes." At no time during this exchange did Chatman attempt to speak.

Chatman also cites to a hearing on May 21, 2002, regarding his attorney's motion to withdraw, where his attorney told the trial court that he had a very good case for trial. Chatman contends that given the overwhelming evidence the

[8] Osborne v. Commonwealth, Ky.App., 992 S.W.2d 860, 863 (1998).

Commonwealth had against him that this statement demonstrates the ineffectiveness of his counsel. We have thoroughly reviewed the videotape record of this hearing and at no time during this hearing did Chatman's attorney ever state what Chatman alleges.

Chatman also cites to one of his pro se motions and claims that in the motion he clearly stated that he wished to accept the Commonwealth's offer and plead guilty. Contrary to Chatman's insistence, the motion stated in pertinent part:

> The terms of the [p]lea [a]geement, [i]f [r]eached, [a]long with an executed plea agreement [s]igned by the Commonwealth Attorney, the Defendant and Counsel [or] that the pending motion set before Court be set for a hearing [w]hich is necessary for [r]esolution of the [c]ase.[9]

Contrary to Chatman's insistence, this motion does not establish that he wished to accept the Commonwealth's offer of 15 years. At most, it indicates that Chatman may have wished to negotiate a better plea offer.

Lastly, Chatman relies on a letter he received from Damon Preston, the directing attorney for the Department of Public Advocacy's Paducah office, dated November 27, 2001. Chatman argues that the letter shows that he wanted to accept the Commonwealth's offer and to enter a guilty plea. The letter stated in pertinent part:

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[9] Id.

> I received your letter regarding a plea offer. Although I am writing this while Audrey [Chatman's trial attorney] is in court, I will inform her of your wishes when she returns. Since you have had motion hearings which could have affected the outcome of your case, I believe (though I cannot promise) that Judge Clymer and the Commonwealth will agree to a plea at this time. What that offer is, I cannot say as I do not know enough about your case.

As can be seen, this letter does not indicate that Chatman wished to accept the Commonwealth's offer. At most, it shows that at one time prior to trial he was interested in negotiating a plea.

Thus, instead of establishing that Chatman wanted to accept the Commonwealth's offer and to plead guilty, the record reveals that from the beginning Chatman was convinced that Commonwealth lacked sufficient evidence to convict him. The record shows that Chatman filed several motions, both pro se and through his counsel, that raised the insufficiency of evidence argument. The trial court denied all of Chatman's motions based on the insufficiency of evidence argument and told him that his argument was without merit. Despite this, the record reveals that during the hearing held on May 21, 2002, Chatman remained convinced that the Commonwealth had insufficient evidence against him. The record indicates that he stated that he had his own defense and his own evidence regarding the value of the stolen items that he wished to present at trial, and he

complained to the trial court that his trial counsel had refused to present his defense. Thus, the record conclusively refutes Chatman's allegation that he told his attorney that he wished to accept the Commonwealth's offer and to plead guilty.

Chatman also argues that he was denied the effective assistance of counsel because he had a conflict with his attorney. Prior to trial, Chatman received a second letter from Damon Preston dated April 23, 2002. In the letter, Preston stated that Chatman had called his office numerous times and had harassed and threatened Preston's employees. Preston stated that such behavior was unacceptable, and he informed Chatman that he had contacted the McCracken County Jailer about limiting Chatman's telephone privileges. Chatman contends that his trial counsel should have revealed the contents of Preston's letter to the trial court during the hearing held on May 21, 2002, regarding the motion to withdraw. According to Chatman, this letter was evidence of the severity of the conflict of interest between him and his attorney, and, if the trial court had known the contents of this letter, it would have removed her as his counsel. Thus, he contends his attorney was ineffective for not revealing to the trial court this evidence of a conflict.

According to the record of the hearing held on May 21, 2002, the conflict that Chatman had with his trial attorney concerned proof regarding the value of the stolen items. The

Preston letter does not address this alleged conflict between Chatman and his attorney. Nor does the letter reveal an additional conflict sufficient to have required the trial court to grant the motion to withdraw.

Chatman also argues that his trial counsel was ineffective because she filed a motion to withdraw as counsel. According to Chatman, this motion was prima facie evidence that his trial counsel's representation fell below the objective standard of reasonableness for criminal defense attorneys.

According to the videotape record of the hearing held on May 21, 2002, Chatman's attorney told the trial court that she was required to file the motion to withdraw because of Chatman's bar complaint. She also told the trial court that the complaint had been dismissed, prior to the hearing, as being without merit. Since she was required to file the motion in response to Chatman's bar complaint, the fact that she filed the motion is not evidence that she acted ineffectively.

Finally, Chatman argues that the trial court erred when it denied his motion without an evidentiary hearing. Chatman insists that the record does not conclusively resolve the issues that were raised in his RCr 11.42 motion. Pursuant to Fraser v. Commonwealth,[10] if an RCr 11.42 motion raises material issues of fact that cannot be conclusively resolved by

[10] Ky., 59 S.W.3d 448 (2001).

the record, then the trial court must grant an evidentiary hearing. Since the record conclusively refutes all of Chatman's claims, Chatman was not entitled to either appointment of counsel or an evidentiary hearing.

Based on the foregoing reasons, the order of the McCracken Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Hosea A. Chatman, Pro Se
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BRIEF FOR APPELLEE:

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