RENDERED: AUGUST 11, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000550-MR

GARY JODY WEISS — APPELLANT

v.

APPEAL FROM CLINTON CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 99-CR-00026

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HENRY AND SCHRODER, JUDGES; EMBERTON,[1] SENIOR JUDGE.

SCHRODER, JUDGE: Gary Jody Weiss, *pro se*, appeals from an order of the Clinton Circuit Court denying his RCr 11.42 motion. We agree with the trial court that defense counsel did not render ineffective assistance. Hence, we affirm.

In an indictment returned on August 26, 1999, Weiss, along with Randall G. Hicks, was charged with murder. The indictment charged that on December 30, 1993, Weiss and Hicks

[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.

had intentionally caused the death of Dwight M. Lawrence. In October, 1999, the Commonwealth filed notice of intent to seek the death penalty.

On March 19, 2001, pursuant to a plea agreement, Weiss pled guilty to an amended charge of complicity to commit murder, in exchange for the Commonwealth's recommendation of a life sentence under 1993 law, and Weiss's agreement to testify at any subsequent proceeding involving this matter. The trial court accepted the plea, and, on April 16, 2001, Weiss was sentenced in accordance with the plea agreement.

On April 17, 2002, Weiss, *pro se*, filed an RCr ll.42 motion seeking to have his plea and sentence vacated. In the RCr 11.42 motion, Weiss claimed ineffective assistance of counsel alleging that 1) a conflict of interest was created by counsel's hiring the ex-prosecutor as his assistant; 2) counsel failed to challenge the death penalty; 3) counsel failed to advise of possible defenses; and 4) counsel failed to inform Weiss of what the plea entailed. The court appointed counsel, and an evidentiary hearing was held in June, 2004. In an order entered February 2, 2005, the trial court denied the RCr 11.42 motion. This appeal followed.

Weiss's brief fails in many regards to comply with the requirements of CR 76.12, including the failure to provide any citations to the record. Weiss's brief also merely "adopts" his

memorandum to the trial court on the RCr 11.42 motion, which he includes in the appendix to his brief, in lieu of presenting these arguments in the brief. In light of the leeway which is afforded to *pro se* litigants, however, we will consider the merits of Weiss's appeal. Beecham v. Commonwealth, 657 S.W.2d 234, 236 (Ky. 1983); Case v. Commonwealth, 467 S.W.2d 367, 368 (Ky. 1971).

Weiss argues that the trial court's decision overruling his RCr 11.42 motion was contrary to Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Weiss first contends that the trial court considered his claims under the wrong standard, alleging that it used the "farce and mockery" standard, rather than the "reasonable competence" standard in assessing counsel's performance. While the court made the observation in its order denying the RCr 11.42 motion that Weiss's action "represents a complete and total waste of judicial resources and is a farce upon the legal system", the court cited to and applied the Strickland test when considering Weiss's claims of ineffective assistance of counsel. Accordingly, we conclude this argument to be completely without merit.

We next turn to the ineffective assistance of counsel claims raised in the RCr 11.42 motion. In order to prove ineffective assistance of counsel on a guilty plea, the

defendant must show (1) counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance as the counsel was not performing as counsel guaranteed by the Sixth Amendment and (2) that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Gall v. Commonwealth, 702 S.W.2d 37, 39 (Ky. 1985). In order to satisfy the prejudice prong on a guilty plea, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); Sparks v. Commonwealth, 721 S.W.2d 726, 728 (Ky.App. 1986).

In his RCr 11.42 motion, Weiss first argued that a conflict of interest was created when his defense attorney, Charlie Pharis, hired as his assistant, Tom Simmons, an ex-prosecutor who had built the case against him. Weiss claimed that he was convinced by Pharis, and Simmons, the ex-prosecutor, that he would get the death penalty, which coerced him into taking the plea.

The only evidence which we are aware was presented to the trial court as to this allegation is the testimony of Pharis

and Weiss.[2] In its February, 2005, order denying the RCr 11.42 motion, the trial court stated that "Weiss [] attempted to convince this Court that Thomas Simmons whom at one time was an Assistant Commonwealth Attorney entered into the practice of law with Pharis during this time frame, thus creating a conflict of interest." The trial court's order went on to state that "Pharis testified that he did not become law partners with Simmons until after Weiss' guilty plea and that before becoming law partners he (Pharis) occupied a building separate from Simmons. Pharis testified without equivocation that he and Simmons were not law partners during the time that Pharis represented Weiss." When a trial court conducts an evidentiary hearing, a reviewing court must defer to the determination of the facts and witness credibility made by the trial judge. Sanborn v. Commonwealth, 975 S.W.2d 905, 909 (Ky. 1998). Accordingly, we defer to the trial court's findings on this issue. Id.

Weiss next argues that counsel was ineffective for failing to challenge the death penalty. Weiss contends that he was not indicted for any of the aggravating factors set forth in

[2] We are relying on the trial court's order denying the RCr 11.42 motion, which summarized the testimony presented at the evidentiary hearing. The record does not contain a recording or transcript of the hearing. The record contains an affidavit from the Clinton County Circuit Clerk's office, which states that the tape of the evidentiary hearing, as well as tapes of other proceedings in this case, could not be located. Weiss does not raise this as an issue on appeal.

the Commonwealth's notice to seek the death penalty. Therefore, he contends that the aggravating factors amounted to an illegal broadening of the indictment, and that counsel was ineffective for doing nothing to prevent this violation.

Aggravators are not required to be charged in the indictment. St. Clair v. Commonwealth, 174 S.W.3d 474, 485 (Ky. 2005). KRS 532.025(1) only requires the Commonwealth to provide written notice of aggravating circumstances prior to trial. Id.; Wheeler v. Commonwealth, 121 S.W.3d 173, 175 (Ky. 2003). On October 11, 1999, the Commonwealth filed a notice of intent to seek the death penalty, giving as aggravating factors that the offense of murder was committed for the purpose of receiving money or any other thing of value, KRS 532.025(2)(a)(4), and committed while engaged in the commission of Robbery in the First Degree, KRS 532.025(2)(a)(2). On October 12, 1999, the Commonwealth filed an amended notice of intent to seek the death penalty, giving as aggravating factors that the offense of murder was committed for the purpose of receiving money or any other thing of value, KRS 532.025(2)(a)(4), and committed while engaged in the commission of Burglary in the First Degree, KRS 532.025(2)(a)(2). As no error occurred, counsel cannot be said to have been deficient in this regard.

Weiss's third argument in the RCr 11.42 motion is that counsel was ineffective for failing to advise him of possible

defenses. Weiss argued that he has only a sixth grade education, is of low intellectual functioning, was a drug abuser, and was highly intoxicated during the alleged offense. Therefore, Weiss contends that counsel should have pursued an intoxication defense or brought his incompetency to the attention of the court.

As to Weiss's claim that counsel was deficient for failing to request a competency evaluation, according to the trial court's order, at the evidentiary hearing "Pharis . . . testified that Weiss did not ask for an evaluation. Pharis was aware of Weiss' intelligence level, knew Weiss and his family because Weiss and his family had previously worked for Pharis' parents cutting tobacco. Pharis . . . testified that in his opinion Weiss was scared, but not mentally ill." Weiss provides no evidence, other than his bare allegations, which suggests he is or was incompetent. Accordingly, we defer to the findings of the trial court. Sanborn, 975 S.W.2d at 909; Ivey v. Commonwealth, 655 S.W.2d 506, 509 (Ky.App. 1983). As to his argument that counsel should have pursued an intoxication defense, he again provides absolutely no support for this claim. Failure to provide factual support for a claim as required by RCr 11.42 warrants summary dismissal thereof. Sanders v. Commonwealth, 89 S.W.3d 380, 390 (Ky. 2002); RCr 11.42(2).

Finally, Weiss argues that his attorney failed to advise him of what the plea entailed. Weiss alleges that he was told that, as part of the plea bargain, in exchange for his testimony, he would be granted parole at the earliest parole hearing. Again, there is no support in the record for Weiss's allegation, which is refuted by the transcript of the plea hearing which only refers to eligibility for parole. At the plea hearing, following the court's review of the Commonwealth's recommendation, defense counsel told the court that Weiss "wanted me to specify the reason that [the plea agreement] states under the 1993 law is it will give him an eligibility for parole earlier than the current law." (Emphasis added.) Following counsel's explanation, Weiss agreed that he wished the court to accept the plea. Also, when asked by the court if in return for his plea, anyone had made any promises of any type, Weiss answered no. As to Weiss's additional argument that he was not made aware that there is no guarantee of parole, "[a] guilty plea that is brought about by a person's own free will is not less valid because he did not know all possible consequences of the plea and all possible alternative courses of action." Turner v. Commonwealth, 647 S.W.2d 500, 501 (Ky. 1982).

For the aforementioned reasons, we conclude the trial court did not err in finding that Weiss's counsel did not render

ineffective assistance. Accordingly, the order of the Clinton Circuit Court is affirmed.

ALL CONCUR.

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