RENDERED: JULY 6, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001833-MR

JIMMY DANN NUNN — APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING JR., JUDGE
ACTION NO. 04-CR-00022

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON AND DIXON, JUDGES; ROSENBLUM,[1] SENIOR JUDGE.

DIXON, JUDGE: Appellant, Jimmy Dann Nunn, appeals *pro se* from orders of the Bell Circuit Court denying his motions for post-conviction relief pursuant to RCr 11.42 and CR 59. Finding no error, we affirm.

On February 11, 2004, Appellant was indicted for receiving stolen property with a value in excess of $300. Appellant and his appointed counsel, DPA attorney Linda J. West, appeared for arraignment and entered a plea of not guilty. In June 2004,

[1] Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Appellant secured private counsel, Michael A. Taylor, and the trial court thereafter granted West's motion to withdraw.

In July 2004, Appellant entered a guilty plea to the receiving stolen property charge. In exchange, the Commonwealth recommended a sentence of five years, with 90 days to be served in the Bell County Jail and the remainder of the sentence probated for a period of five years. The trial court accepted the plea and entered judgment accordingly.

In January 2005, the Commonwealth filed a motion to set aside probation alleging that: (1) On November 23, 2004, Appellant was charged in the Harlan District Court for driving on a DUI suspended license and use/possession of drug paraphernalia; (2) On December 15, 2004, Appellant was arrested for DUI and possession of a controlled substance (Oxycontin); (3) On December 22, 2004, Appellant was charged in the Bell Circuit Court with theft by unlawful taking; and (4) On December 23, 2004, Appellant was charged in the Bell Circuit Court with use/possession of drug paraphernalia and improper use of a signal. Following a revocation hearing, Appellant was ordered to serve the remainder of his five year sentence. In April 2005, the trial court denied Appellant's motion for shock probation.

On July 11, 2006, Appellant filed a *pro se* RCr 11.42 motion alleging ineffective assistance of trial counsel. The trial court denied Appellant's motion without an evidentiary hearing. Appellant thereafter filed a CR 59.01 motion for a new trial, which was also denied. This appeal ensued.

The crux of Appellant's argument in this Court is as follows:

> In this case, Appellant on the record rejected a two year plea offer based upon [West's] advice. Shortly thereafter, [Taylor] was assigned to represent your Appellant who immediately advised Appellant to accept a five year plea offer, three additional years without any elaboration as to **any factual differences**. Logic dictates, based on a common-sense recognition, that t**hree additional years of imprisonment based solely on having different lawyers, says that Appellant did not have effective assistance during a critical stage of the proceeding.** (Emphasis in original).

Essentially, Appellant believes that West was ineffective for advising him to reject the two-year plea offer[2] and Taylor was ineffective for advising him to accept the five-year offer. We disagree.

The standard of review for claims raised in a motion filed pursuant to RCr 11.42 alleging ineffective assistance of counsel at trial is limited to issues that were not and could not be raised on direct appeal. The movant in an RCr 11.42 proceeding has the burden of establishing convincingly that he or she was deprived of some substantial right which would justify the extraordinary post-conviction relief. *Haight v. Commonwealth*, 41 S.W.3d 436, 441 (Ky. 2001), *cert. denied*, 534 U.S. 998 (2001). *(Citing Dorton v. Commonwealth*, 433 S.W.2d 117 (Ky. 1968)). An evidentiary hearing is not required about issues refuted by the record of the trial court. *Stanford v. Commonwealth*, 854 S.W.2d 742 (Ky. 1993), *cert. denied*, 510 U.S. 1049 (1994).

When this Court analyzes claims of ineffective assistance of counsel, it usually applies the two-prong standard set forth in *Strickland v. Washington*, 466 U.S.

[2] We would note that there is no evidence in the record relating to this purported offer by the Commonwealth.

668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). However, when analyzing claims of ineffective assistance of counsel in the context of a guilty plea, the second prong found in *Strickland* is replaced with the standard set forth in *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). Thus, a criminal defendant who alleges ineffective assistance of counsel must, first, 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, and, second, prove he was so prejudiced by the attorney's deficient performance that there exists, "a reasonable probability that, but for counsel's errors, [defendant] would not have pleaded guilty and would have insisted on going to trial." *Taylor v. Commonwealth*, 724 S.W.2d 223, 226 (Ky. App. 1986). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Strickland, supra*, at 694.

In his RCr 11.42 motion, Appellant claimed that he repeatedly informed counsel that he was innocent and that he did not want to accept the Commonwealth's plea offer. Appellant further argued that counsel failed to interview a witness who would have allegedly confirmed Appellant's innocence. Notably, however, the trial court's order denying Appellant relief provides, in relevant part,

> The Court has reviewed the motion and can rule in this matter by resorting to the record. The record reveals that on July 27, 2004, the Defendant entered an informed, voluntary and intelligent plea of guilty to the charge. At the time of the plea, the Defendant advised the Court that he was fully informed and aware of the evidence against him. The Defendant further advised the Court that he received the

> stolen property in question and that he knew the property was stolen at the time he received it.

It is clear that Appellant not only admitted guilt at the time he entered his plea, but again in his motion for shock probation. As such, it is certainly disingenuous at this point for Appellant to claim that counsel was ineffective for failing to investigate his innocence or for advising him to accept the Commonwealth's offer. Moreover, we find absolutely no significance in the fact that Appellant's first appointed counsel may or may not have advised him to reject an initial plea offer.

We find no evidence that counsels' performance in this case was deficient. Notwithstanding, Appellant fails to establish that there was a reasonable probability that, but for counsels' errors, [he] would not have pleaded guilty and would have insisted on going to trial." *Taylor, supra.* Thus, the trial court did not err in denying Appellant's RCr 11.42 motion without an evidentiary hearing and did not err in denying the CR 59.01 motion for a new trial.

The orders of the Bell Circuit Court denying Appellant's RCr 11.42 and CR 59.01 motions are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Pineville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
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