

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002548-MR

MATTHEW W. RANKIN

APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 04-CR-00078

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: NICKELL, STUMBO, AND THOMPSON, JUDGES.

NICKELL, JUDGE: Matthew W. Rankin (hereinafter "Rankin") has appealed from an order entered by the Oldham Circuit Court on November 15, 2006, which denied his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to vacate, set aside, or correct the trial court's final judgment and sentence of imprisonment without holding an evidentiary hearing. Having concluded the trial court did not err in denying Rankin's claims of ineffective assistance of counsel, we affirm.

On September 2, 2004, Rankin, with the assistance of counsel, entered a negotiated guilty plea to two counts of sexual abuse in the first degree.¹ On November 4, 2004, Rankin was sentenced pursuant to the plea agreement to five years' imprisonment on each count, to run concurrently for a total sentence of five years' imprisonment. Rankin was also ordered to submit to DNA and HIV testing, to undergo a sexual offender assessment and any recommended follow-up treatment, and to become a lifetime sexual offender registrant pursuant to KRS 17.495. His term of imprisonment was probated for a period of five years.

On October 4, 2006, Rankin filed a motion pursuant to RCr 11.42 to vacate the judgment of conviction and requested an evidentiary hearing on the motion. On November 1, 2006, the Commonwealth filed its response to the motion. The trial court entered an order on November 15, 2006, denying the motion to vacate without holding a hearing. This appeal followed.

Rankin contends on appeal that trial counsel was ineffective: (1) for failing to fully investigate the allegations; (2) for coercing Rankin into entering a guilty plea; and (3) for misinforming Rankin of the complete consequences of his guilty plea. He further alleges counsel's ineffectiveness rendered his guilty plea involuntary. Additionally, Rankin contends the trial court erred in failing to conduct an evidentiary hearing on his RCr 11.42 motion.

¹ Kentucky Revised Statutes (KRS) 510.110.

A movant is not automatically entitled to an evidentiary hearing on an RCr 11.42 motion unless there is an issue of fact which cannot be determined on the face of the record. *Stanford v. Commonwealth*, 854 S.W.2d 742 (Ky. 1993). “Where the movant's allegations are refuted on the face of the record as a whole, no evidentiary hearing is required.” *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky.App. 1986) (citing *Hopewell v. Commonwealth*, 687 S.W.2d 153, 154 (Ky.App. 1985)). Upon a careful review of the record, we hold each of Rankin's claims is refuted on the face of the record. Thus, Rankin was not entitled to an evidentiary hearing.

The standard for determining the validity of a guilty plea was set forth in *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky.App. 1986), wherein it was stated:

The test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. *North Carolina v. Alford*, 400 U.S. 25 (1970). There must be an affirmative showing in the record that the plea was intelligently and voluntarily made. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). However, “the validity of a guilty plea is determined not by reference to some magic incantation recited at the time it is taken but from the totality of the circumstances surrounding it.” *Kotas v. Commonwealth*, 565 S.W.2d 445, 447 (Ky. 1978), (citing *Brady v. United States*, 397 U.S. 742, 749 (1970)).

In *Commonwealth v. Crawford*, 789 S.W.2d 779, 780 (Ky. 1990), the Supreme Court of Kentucky endorsed the use of written guilty plea forms to satisfy the due process concerns of *Sparks* and *Boykin*. The *Crawford* court noted that the “Certificate of Counsel” indicating the voluntariness of the defendant's plea coupled with

the defendant's waiver of rights created a record that was “adequate to show that the petitioner intelligently and knowingly pleaded guilty.” *Id.*

In the case *sub judice*, Rankin signed a “Motion to Enter Guilty Plea” which attested that his judgment was not impaired by drugs, alcohol or medication, and further that he had fully discussed his case with his attorney prior to executing the document. The written motion also contained a detailed recitation of the constitutional rights he would be waiving by entering his guilty plea, and the consequences of entering such a plea. In addition, the form stated:

I declare my plea of “GUILTY” is freely, knowingly, intelligently and voluntarily made; that I have been represented by counsel; that my attorney has explained my constitutional rights to me, as well as the charges against me and any defenses to them; and that I understand the nature of this proceeding and all matters contained in this document.

Rankin executed the guilty plea form on September 2, 2004. Immediately below his signature is a certificate executed by counsel, affirming, to the best of his knowledge and belief, Rankin was fully informed of the consequences of entering his plea, and that the plea was freely, knowingly, voluntarily and intelligently made.

Further, during the detailed plea colloquy on September 2, 2004, Rankin verbally reaffirmed his written statements to the trial court. Given these facts, we conclude that his guilty plea was valid.

To establish ineffective assistance of counsel, a movant must satisfy a two-part test showing both that counsel's performance was deficient and that the deficiency caused actual prejudice resulting in a proceeding that was fundamentally unfair and

unreliable. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Commonwealth v. Tamme*, 83 S.W.3d 465 (Ky. 2002); *Foley v. Commonwealth*, 17 S.W.3d 878 (Ky. 2000). The burden is on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient or that under the circumstances counsel's action might be considered "trial strategy." *Strickland*, 466 U.S. at 689; *Moore v. Commonwealth*, 983 S.W.2d 479 (Ky. 1998); *Sanborn v. Commonwealth*, 975 S.W.2d 905 (Ky. 1998).

A court must be highly deferential in reviewing defense counsel's performance and should avoid second-guessing counsel's actions based on hindsight. *Haight v. Commonwealth*, 41 S.W.3d 436 (Ky. 2001); *Harper v. Commonwealth*, 978 S.W.2d 311 (Ky. 1998). In assessing counsel's performance, the standard is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. *Strickland*, 466 U.S. at 688-89; *Tamme*, 83 S.W.3d at 470; *Commonwealth v. Pelfrey*, 998 S.W.2d 460 (Ky. 1999). "A defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." *Sanborn*, 975 S.W.2d at 911 (quoting *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997)). In order to establish actual prejudice, a movant must show a reasonable probability that the outcome of the proceeding would have been different or was rendered fundamentally unfair and unreliable. *Strickland*, 466 U.S. at 694; *Bowling v. Commonwealth*, 80 S.W.3d 405 (Ky. 2002).

Rankin has failed in his burden of overcoming the strong presumption of effectiveness. None of his alleged claims of ineffective assistance are borne out by the record on appeal. However, regardless of the arguable existence of such acts or omissions, Rankin's guilty plea precludes his ability to assert the defense of ineffective assistance of counsel. "In fact, the effect of a plea of guilty is to waive all defenses other than that the indictment charges no offense." *Quarles v. Commonwealth*, 456 S.W.2d 693, 694 (Ky. 1970) (citing *Commonwealth v. Watkins*, 398 S.W.2d 698 (Ky. 1966) cert. denied, *Watkins v. Kentucky*, 384 U.S. 965, 86 S.Ct. 1596, 16 L.Ed.2d 677, *Boles v. Commonwealth*, 406 S.W.2d 853 (Ky. 1966)). Rankin has failed to demonstrate that he received ineffective assistance as a matter of fact, and further, as a matter of law, he is not entitled to raise such a claim.

For the foregoing reasons, the order of the Oldham Circuit Court is affirmed.

ALL CONCUR.

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