

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000591-MR

HAZARD MILLER

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE WILLIAM ENGLE, III, JUDGE
ACTION NO. 02-CR-00286

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: DIXON AND LAMBERT, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.

DIXON, JUDGE: Hazard Miller appeals from an order of the Pike Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. We affirm.

Miller was indicted by a Pike County Grand Jury on two counts of first-degree trafficking in a controlled substance (Oxycontin). Gail Cavins, a confidential informant working with the Kentucky State Police, participated in two videotaped drug

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 KRS 21.580.

buys at Miller's residence on July 22 and July 24, 2002. The video showed an individual leaning out a window of the residence to conduct the transactions.

A jury trial was held on June 11, 2003. The jury viewed the video, and Cavins testified that Miller sold her the drugs. Miller and his wife both testified and offered an alibi for the dates in question. The Millers contended they were camping at a mountain cabin with their grandchildren from July 19 through July 26.

At the conclusion of the trial, the jury found Miller guilty on both counts and recommended a ten-year sentence on each count, to be served consecutively. On July 3, 2003, the trial court sentenced Miller to twenty years' imprisonment pursuant to the jury's recommendation. Miller's conviction was affirmed by the Supreme Court of Kentucky in an unpublished decision. *Miller v. Commonwealth*, 2003-SC-0518-MR (May 20, 2004).

On November 9, 2004, Miller filed a *pro se* motion to vacate his sentence pursuant to RCr 11.42, alleging he received ineffective assistance of counsel. The trial court granted Miller's motion for appointment of counsel, and a supplemental brief was filed on Miller's behalf. An evidentiary hearing was held two years later, on December 5, 2006, following the recusal of the trial judge and appointment of new post-conviction counsel for Miller. At the hearing, Miller and his wife both testified that trial counsel failed to advise Miller of a plea bargain and that counsel failed to investigate alibi witnesses for trial. Trial counsel also testified at the hearing and refuted Miller's

allegations. The trial court denied Miller's RCr 11.42 motion on February 16, 2007. This appeal followed.

To establish ineffective assistance of counsel Miller must show that, (1) “counsel's performance was deficient[;]” and (2) “that the deficient performance prejudiced the defense[,]” by depriving Miller of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984) accord *Gall v. Commonwealth*, 702 S.W.2d 37, 39-40 (Ky. 1985). Ultimately, Miller “must demonstrate that, absent counsel's errors, there exists a 'reasonable probability' the jury would have reached a different verdict.” *Bowling v. Commonwealth*, 981 S.W.2d 545, 551 (Ky. 1998) quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. Since the trial court held an evidentiary hearing on Miller's motion, we “must defer to the determination of the facts and witness credibility made by the trial judge.” *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001) (citations omitted). Accordingly, we will not disturb the findings of the trial court unless they are clearly erroneous. Kentucky Rules of Civil Procedure 52.01; *Adams v. Commonwealth*, 424 S.W.2d 849, 851 (Ky. 1968).

We first address Miller's allegation that counsel failed to communicate with him regarding a five-year plea bargain. Miller contends that had he been aware of the plea offer, he would have accepted it rather than proceed to trial. At the hearing, the court heard conflicting testimony. On one side, both Miller and his wife claimed they were unaware of the offer until after the trial concluded. On the other hand, trial counsel denied the Millers' allegations that he failed to advise them of the plea offer. Counsel

testified he told the couple about the offer during a meeting and they went “back and forth” on it. Miller now opines that trial counsel's testimony was not credible because he was unable to provide any written evidence that he made Miller aware of the offer. We disagree.

We acknowledge Miller's disappointment with the unfavorable verdict; however, considering the totality of the testimony on this issue, we agree with the trial court's finding that counsel communicated the offer to Miller, and Miller decided to stand trial on the charges. It was undisputed that trial counsel was an experienced criminal defense attorney who had practiced law for thirty-four years. A review of the hearing shows that the testimony of trial counsel was both reliable and credible, while Miller's testimony was less than convincing. It was within the province of the trial court to assess the credibility of the witnesses at the hearing. *Haight*, 41 S.W.3d at 442. We conclude the findings of the trial court were not clearly erroneous.

Miller next argues counsel was deficient by failing to investigate alibi witnesses. At the hearing, both Miller and his wife testified that counsel never informed them that witnesses would be necessary at trial. In contrast, counsel testified that he explained to the Millers the importance of having alibi witnesses to bolster the defense; however, the Millers only advised counsel of one possible witness. It was unrefuted that counsel spoke with the individual identified by the Millers, but during the interview counsel determined the witness would likely further incriminate Miller. In light of the testimony presented at the hearing, we agree with the trial court that counsel fully

investigated Miller's alibi defense. "A reasonable investigation is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources, but also with the benefit of hindsight, would conduct." *Haight*, 41 S.W.3d at 446 (citation omitted). Miller did not call any of his alleged alibi witnesses to testify at the RCr 11.42 hearing, and he failed to show that the jury's verdict would have been different had his witnesses testified at trial. Under the totality of the circumstances presented here, we agree with the trial court that counsel prepared a vigorous defense and competently investigated the case.

We have closely considered each of the allegations raised by Miller, and we have thoroughly reviewed the record on appeal. We conclude, as did the trial court, that Miller failed to meet his burden pursuant to *Strickland, supra.*; accordingly, he is not entitled to RCr 11.42 relief.

For the reasons stated herein, the order of the Pike Circuit Court is affirmed.

ALL CONCUR.

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