RENDERED: MAY 9, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000024-MR

RICKY DALE SWITZER, JR. APPELLANT

v.

APPEAL FROM LEWIS CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 00-CR-00080

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND MOORE, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: Ricky Dale Switzer, Jr., appeals the denial of his RCr 11.42 motion by the Lewis Circuit Court on December 2, 2005. We affirm.

Switzer pleaded guilty to an amended charge of criminal facilitation to commit murder, robbery first-degree, and one count of tampering with physical evidence on November 30, 2001. Pursuant to the plea agreement he was sentenced to five years on the facilitation charge, seventeen years on the robbery charge and five years on the one count of tampering. He was originally charged with capital murder for which the death penalty was sought, robbery first-degree and three (3) counts of tampering

[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute 21.580.

with evidence. Following sentencing to the agreed upon twenty-seven years, Switzer filed a CR 60.02 motion on October 21, 2004, requesting the court for leniency and to reduce his sentence. That motion was denied on June 21, 2005. No appeal was taken.

Soon thereafter, on September 15, 2005, Switzer filed the RCr 11.42 motion which is the subject of this appeal. In his forty-eight page motion and memorandum he goes into great detail of the factual events that resulted in the criminal charges against him. He also argues that his conviction should be vacated due to several incidences of alleged ineffectiveness of counsel. Generally, he contends his counsel did not investigate the charges against him, failed to advise him of available defenses to the charges, failed to seek a competency hearing and failed to move to allow him to withdraw his guilty plea. The Commonwealth responded that the record refuted all his arguments and establishes that Switzer's pleas were made willingly, freely, voluntarily, knowingly and intelligently. The trial court simply denied Switzer's motion on its December 2, 2005 docket sheet without further comment. This appeal followed.

To establish a claim of ineffective assistance of counsel under RCr 11.42, a movant must satisfy a two-part test by showing: (1) that counsel's performance was deficient and (2) that the deficiency caused actual prejudice that rendered the proceeding so fundamentally unfair as to produce a result that was unreliable. *Stickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Commonwealth v. Tamme*, 83 S.W.3d 465, 469 (Ky. 2002).

> The underlying question to be answered is whether trial counsel's conduct has so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

Brewster v. Commonwealth, 723 S.W.2d 863, 864 (Ky. App. 1986). In assessing counsel's performance, we must examine 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 687-88, 104 S.Ct. at 2064-65. "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." *Haight v. Commonwealth*, 41 S.W.3d 436, 441 (Ky. 2001), *citing United States v. Morrow*, 977 F. 2d 222, 229 (6th Cir. 1992). Counsel is not held to a standard of infallibility. Rather, "[t]he critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory." *Id*.

In considering a claim of ineffective assistance of counsel, we are required to focus on the totality of evidence that was presented to the judge or jury and to assess the overall performance of counsel throughout the case. We must then determine whether the acts or omissions in question overcome the presumption that counsel rendered reasonable professional assistance. *Id*. at 441-42. That presumption of competence is to be afforded a high level of deference by a reviewing court. *Harper v. Commonwealth*, 978 S.W.2d 311, 315 (Ky. 1998). "A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render and rendering reasonably effective assistance." *Haight*, 41 S.W.3d at 442; *see also Sanborn v. Commonwealth*, 975 S.W.2d 905, 911 (Ky. 1998). In any RCr 11.42 proceeding, the defendant bears the burden of establishing convincingly that he was deprived of some substantial right that would justify the extraordinary relief entailed in RCr 11.42 proceedings. *Haight*, 41 S.W.3d at 442; *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968).

In this case Switzer claims he was entitled to a competency hearing. He alleges that he told counsel he "had a prior history of competency and drug issues." A review of the record reveals that in 1999 he had attempted suicide following the suicide of a friend. He received treatment at that time and was diagnosed with depression and substance abuse. A court is required to hold a competency hearing **if** there is a sufficient cause to put the issue before the court. *See generally*, *Gabbard v. Commonwealth*, 887 S.W.2d 547 (Ky. 1994) and *Clark v. Commonwealth*, 591 S.W.2d 365 (Ky. 1979). Counsel or the court, however, must have reasonable grounds to question the defendant's competency. The record herein does not support his present claim that he was not competent to participate in his defense. There were no reasonable grounds to believe Switzer's competency was an issue on this case. In Kentucky, the standard of competency is whether the defendant has a substantial capacity to comprehend the nature and consequences of the proceedings against him and to participate rationally in his defense. *Alley v. Commonwealth*, 160 S.W.3d 736 (Ky. 2005). Trial courts are not required to *sua sponte* hold competency hearings unless the defendant presents reasonable grounds to call into question his competency or it is so obvious that the trial court cannot fail to be aware of them. *See Via v. Commonwealth*, 522 S.W.2d 848, 849-50 (Ky. 1975). In this case it is clear that Switzer both understood the nature and consequences of the proceedings and actively and rationally participated in his defense. There was no reasonable basis to question his competency, and there was no ineffective assistance of counsel on the issue.

Switzer next contends that counsel failed to adequately investigate the case and did not inform him of all potential defenses to the crimes. In effect, he claims that this led him to enter an unknowing plea and that he therefore should have been permitted to withdraw his guilty plea. Again, the facts do not support his allegations.

First, the record contains lengthy discovery that the Commonwealth provided counsel of the numerous witness statements, exhibits and evidence it had to present at trial. This discovery was substantial and extremely damaging to Switzer, as well as the other defendants. Second, Switzer was originally charged with capital murder and given notice that the Commonwealth was seeking the death penalty. Counsel was able to negotiate a plea agreement that reduced the murder charge to facilitation and a possible life sentence to only twenty-seven years. Finally, the written plea agreement and the *Boykin*[2] colloquy refute Switzer's contention that the plea was not entered freely, voluntarily, knowingly and intelligently. In these documents Switzer acknowledged that counsel had done everything he had asked him to do and that there was nothing counsel had failed to do. He also admitted his guilt and indicated that he understood the charges; that counsel had explained the charges; that he had ample time to speak with counsel; that he had no complaints as to counsel; that he was satisfied with counsel's performance; and in general gave responses that clearly indicated his plea was freely, knowingly, voluntarily and intelligently entered. It should also be noted that during this colloquy, the court did find Switzer mentally competent to enter his plea. It is clear, from the record, that Switzer, who is serving a twenty-seven year sentence and may now be having second thoughts, received effective assistance of counsel and entered a valid plea in this matter. This case falls into those addressed by *Frazier v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001), of being one that the admissions made during a *Boykin* hearing, as well as any findings by the judge accepting the plea, "constitute a formidable barrier in any subsequent collateral proceedings." *Id*. at 457, *citing Blackledge v. Allison*, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977).

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[2] *Boykin v. Alabama*, 395 U.S. 238, 242-44, 89 S.Ct. 1709, 1711-13, 23 L.Ed.2d 274 (1969).

For the foregoing reasons, the order of the Lewis Circuit Court denying Switzer's RCr 11.42 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ricky Dale Switzer, Jr.
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BRIEF FOR APPELLEE:

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