

RENDERED: JUNE 27, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001308-MR

SHAWN M. MALONE

APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 01-CR-00197

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE AND STUMBO, JUDGES; GRAVES,¹ SENIOR JUDGE.

¹ Senior Judge John W. Graves 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.

ACREE, JUDGE: Shawn Malone appeals, *pro se*, from a judgment of the Laurel Circuit Court denying his motion for relief pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. We have determined that the trial court, which held an evidentiary hearing on his motion, properly denied the motion and, thus, we affirm.

Malone was indicted on charges of murder, first-degree robbery, first-degree burglary, felony theft, and being a persistent felony offender in the second degree after he and a co-defendant escaped from prison, broke into a home, killed the homeowner, and stole his car. The Commonwealth filed notice of its intent to seek the death penalty. Malone's trial counsel had filed a motion to suppress evidence seized from the search of a motel room in Tennessee where he was apprehended. The Commonwealth offered to recommend a total sentence of thirty-five years in exchange for Malone's guilty plea to murder, burglary, and robbery, and his waiver of the suppression hearing. Malone accepted the plea bargain, and judgment was entered accordingly.

Subsequently, Malone filed a *pro se* RCr 11.42 motion alleging his trial attorneys were ineffective. Specifically, he stated that trial counsel incorrectly advised him that he would be eligible for parole after serving only seven years, rather than the eighty-five percent or twenty-year minimum for persons classified as violent offenders. Kentucky Revised Statute 439.3401. In addition, he claimed that trial counsel's advice to waive his suppression hearing was ineffective,

asserting that suppression of the evidence in his motel room would have prevented the Commonwealth from trying him on the statutory aggravators of robbery and burglary and so would have excluded the death penalty as a sentencing option.

Malone requested the appointment of counsel to assist him in presenting his RCr 11.42 claims, and the trial court appointed the Department of Public Advocacy to represent him. Throughout the proceedings on his RCr 11.42, Malone clashed with his post-conviction counsel. He eventually requested permission to discharge her and require DPA to designate another attorney. This request was denied. Malone also filed an unsuccessful motion for the presiding judge to recuse himself from the proceedings.

The trial court granted Malone's request for an evidentiary hearing at which his two trial attorneys testified. Both denied having told him that he would be eligible for parole in seven years. Further, attorney Jim Norris, one of Malone's appointed trial attorneys, testified that prevailing on the suppression issue would not have affected the final outcome of the case since Malone was found in possession of his victim's automobile. The trial court found that both attorneys gave credible testimony regarding their advice to Malone as to his parole eligibility. Further, Malone's claim that he was advised he would be eligible for parole in seven years was deemed implausible. The trial court did not find that Norris' advice to forgo the suppression hearing and accept the Commonwealth's plea offer fell outside the norm of professionally competent representation. *Sparks*

v. Commonwealth, 721 S.W.2d 726, 727-28 (Ky.App. 1986). The RCr 11.42 motion was denied, and this appeal followed.

In order to prevail on a claim of ineffective assistance, Malone is required to show that counsel made errors outside the professional norm for legal representation and, further, that he was prejudiced by those errors. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Further, since Malone entered a guilty plea, he must prove that, but for counsel's errors, there is a reasonable chance that he would have elected to go to trial instead of entering a guilty plea. *Hill v. Lockart*, 474 U.S. 52, 57, 103 S.Ct. 366, 88 L.Ed.2d 203 (1985).

On appeal, Malone argues that he received ineffective assistance from both his trial attorneys and post-conviction counsel, and that the trial judge erroneously refused to recuse himself. The trial court concluded that Malone's trial attorneys testified truthfully regarding their advice to him about parole eligibility. "When the trial court conducts an evidentiary hearing, the reviewing court must defer to the determinations of fact and witness credibility made by the trial judge." *Sanborn v. Commonwealth*, 975 S.W.2d 905, 909 (Ky. 1998). The trial court further found that trial counsel pursued a reasonable strategy in advising Malone to waive his suppression hearing and enter a guilty plea, given that he otherwise would have been subject to a possible death sentence. We agree with the trial court's finding that counsel did not perform outside the range of professionally competent representation.

With respect to Malone's additional RCr 11.42 claims, we note that there is no constitutional right to appointed counsel for state post-conviction proceedings and, thus, claims that post-conviction counsel rendered ineffective assistance are not cognizable for review. *Bowling v. Commonwealth*, 981 S.W.2d 545, 552 (Ky. 1998). Moreover, we have examined the remaining claims presented in Malone's RCr 11.42 motion, and deemed them similarly without merit. For the foregoing reasons, the judgment of the Laurel Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Shawn Michael Malone, *pro se*
Eddyville, Kentucky

BRIEF FOR APPELLEE:

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