

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2008-CA-000139-MR

MARK BAIZE

APPELLANT

v. APPEAL FROM OHIO CIRCUIT COURT  
HONORABLE RONNIE C. DORTCH, JUDGE  
ACTION NO. 03-CR-00229

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: STUMBO AND THOMPSON, JUDGES; GUIDUGLI,<sup>1</sup> SENIOR  
JUDGE.

STUMBO, JUDGE: Mark D. Baize appeals from an order of the Ohio Circuit  
Court denying his motion for RCr 11.42 relief from judgment. He contends that  
the circuit court erred in failing to conclude that his trial counsel did not properly

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<sup>1</sup> 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 KRS 21.580.

investigate the facts of his case, and committed fraud by directing Baize to plead guilty with the knowledge that Baize was under the influence of mind-altering drugs at the time of the plea. He also argues that he was entitled to an evidentiary hearing on the motion. For the reasons stated below, we affirm the order on appeal.

On December 29, 2003, the Ohio County grand jury indicted Baize on fleeing and evading police in the second-degree, criminal trespass in the third-degree, possession of a prescription controlled substance in a container other than its original container, two counts of criminal mischief in the third-degree, and possession of anhydrous ammonia in an unapproved container with the intent to manufacture methamphetamine. The indictment also alleged that Baize was a persistent felony offender (PFO) in the first-degree. The indictment resulted from events occurring on November 10, 2003, when officers of the Beaver Dam police department responded to a call regarding suspicious activity at Felty's Crop Service. Upon arriving, officers observed a man wearing a black hat and black jacket who was carrying a propane tank and walking along a ditch. The man, Mark Baize, began running, and shortly thereafter was apprehended. Officers recovered a black hat and propane tank from the route Baize had taken while fleeing. He was found to be in possession of prescription drugs, and subsequently was arrested.

Baize received appointed counsel, who filed a motion seeking a psychiatric evaluation for purposes of determining whether Baize was competent to stand trial. The motion was sustained, and Baize received a psychiatric

evaluation which determined that he was competent. Baize's appointed counsel was then replaced by private counsel, after which the circuit court found that Baize was competent to stand trial.

On February 10, 2006, Baize accepted a plea offer from the Commonwealth and tendered a motion to enter a guilty plea. Under the terms of the plea, the count of theft by unlawful taking was amended to attempted theft by unlawful taking, with a recommended sentence of 10 years; the possession of anhydrous ammonia in an unapproved container charge would carry a recommended sentence of 5 years; and, the remaining counts would be dismissed, with a recommended total sentence including PFO-enhancement of 15 years. On February 16, 2006, the plea was accepted and a judgment was rendered, and on May 12, 2006, Baize was sentenced in accordance with the terms of the Commonwealth's recommendation.

On October 24, 2007, Baize filed a *pro se* RCr 11.42 motion to vacate his sentence based on ineffective assistance of counsel. As a basis for the motion, Baize claimed that counsel failed to investigate the case; failed to ensure that the terms of the plea were incorporated into the sentence; improperly advised him to enter a plea while knowing that Baize was under the influence of drugs; failed to challenge the indictment; and, improperly advised Baize to tell the court that he fully understood the charges and that the plea was voluntary. Baize also sought appointed counsel and a hearing on the motion.

After considering the motion and the parties' memoranda, the circuit court rendered an order on November 2, 2007, summarily denying the relief sought. This appeal followed.

Baize now argues that the circuit court erred in denying his RCr 11.42 motion to vacate, correct or set aside the judgment. He first contends that the court improperly failed to find that he was denied the effective assistance of counsel to which he was entitled when counsel "failed to investigate the facts of appellant [sic] case and prepare for trial." Specifically, Baize maintains that his trial counsel did not review discovery with him, and that such failure prejudiced the proceedings against him.

We have closely examined Baize's argument, and find no error on this issue. The standard for addressing a claim of ineffective assistance of counsel is set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to be found ineffective, counsel's performance must be below the objective standard of reasonableness and must be so prejudicial as to deprive the defendant of a fair trial and a reasonable result. *Id.* In considering an appeal from the denial of a claim of ineffective assistance, the reviewing court must focus on the totality of evidence before the lower court and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). And finally, in determining whether counsel was ineffective, a

reviewing court must be highly deferential in scrutinizing counsel's performance and the tendency and temptation to second-guess should be avoided. *Harper v. Commonwealth*, 978 S.W.2d 311 (Ky. 1998).

Under *Strickland*, the movant must show that but for the alleged ineffective assistance, there is a reasonable probability that the outcome of the proceeding would not only have been different, but would have been more favorable to the movant. *Strickland, supra*. In the matter at bar, nothing in the record supports Baize's claim that but for counsel's purported failure to discuss discovery with him the outcome of the proceeding against him would have been both different and more favorable to him. Baize makes the unsupported assertion that counsel failed to discuss discovery with him, but does not demonstrate how this discussion would have positively affected the outcome of the action against him. There is nothing in the record which reasonably supports either his general claim that counsel failed to properly investigate the case or his specific assertion that he was not apprised of the results of discovery and that counsel's purported failure on this issue led to a less favorable outcome. Accordingly, we find no error.

Baize also argues that he did not receive effective assistance of counsel when counsel directed him to plead guilty while knowing that he was under the influence of "mind-altering drugs" at the time of the plea. He contends that the jail's medication log, which was made part of the record, indicates that he was administered the prescription drugs Xanax and Seroquel by the jail's medical

staff on the same day the plea was entered. He argues that these medications so altered his cognitive ability that he was unable to think clearly and was not capable of entering an intelligent plea. He claims that his counsel knew that he was taking this prescription medication, and that her act of allowing him to enter a plea while under the influence of these medications constituted ineffective assistance. He seeks an order reversing the order on appeal and vacating the judgment.

We find no error on this issue. The record reveals that Baize requested and received a psychiatric evaluation, which found him competent to stand trial. Similarly, the medications which Baize was taking were prescribed by a medical doctor and administered in jail by a nurse. Nothing in the record suggests that these medications adversely affected Baize's ability to enter a voluntary guilty plea. To the contrary, Baize might have a more persuasive argument on this issue had he *not* been receiving his medication. Since Baize was evaluated and found competent to stand trial, and because the medication he received was prescribed by a medical doctor and administered by the jail's medical staff, we cannot conclude that his unsupported claim on this issue - taken alone - forms a sufficient basis for finding error.

Baize's final argument is that the circuit court erred in denying his motion for a hearing on these issues. As the parties are well aware, an RCr 11.42 movant is not entitled to an evidentiary hearing on the motion where the allegations contained in the motion are justiciable by reference to the record.

*Hodge v. Commonwealth*, 68 S.W.3d 338 (Ky. 2001). In *Hodge*, the Supreme

Court of Kentucky held that the dispositive inquiry on the issue of whether a hearing is required is whether the record refutes the allegations raised. In the matter at bar, the record is sufficient to dispose of Baize's claims of ineffective assistance. Accordingly, we find no error.

For the foregoing reasons, we affirm the order of the Ohio Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Mark D. Baize, *pro se*  
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

Louis F. Mathias, Jr.  
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