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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001453-MR

STEPHEN LEE SOULES — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, SPECIAL JUDGE
ACTION NO. 03-CR-00442-002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: STUMBO AND TAYLOR, JUDGES; GRAVES,[1] SENIOR JUDGE.

GRAVES, SENIOR JUDGE: Stephen Lee Soules appeals from a Warren Circuit Court order denying his motion to vacate his conviction pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 and Kentucky Rules of Civil Procedure (CR) 60.02. Soules claims that his conviction must be reversed because his guilty

[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.

plea was not entered into knowingly, voluntarily, and intelligently and was a product of ineffective assistance of counsel. We disagree and thus affirm the trial court's order.

On May 4, 2003, Melissa Katie Autry, Lucas Goodrum, and Soules attended a fraternity party. Following the party, Soules accompanied Autry back to her Western Kentucky University dorm room where he beat, raped, and sodomized her. Soules stole items from Autry's room in an attempt to make the crime appear to be motivated by a burglary. Then Soules set Autry on fire. She later died in a Tennessee hospital.

During the investigation, Soules made incriminating statements to police that implicated not only himself in the crimes but also indicated that Goodrum was a complicit party. Both Soules and Goodrum were arrested and indicted on charges of murder, complicity to murder, first-degree rape, complicity to first-degree rape, first-degree sodomy, complicity to first-degree sodomy, first-degree arson, complicity to arson, and first-degree robbery.

Both Soules and Goodrum plead not guilty under the advice of private attorneys retained by their families. Soules' private counsel later withdrew, and he was appointed two public defenders. On March 23, 2004, Soules withdrew his former plea of not guilty and entered a guilty plea under the advice of counsel. In exchange for his plea of guilty, the Commonwealth dismissed the charges of complicity to murder and first-degree arson, agreed not to seek the death penalty against Soules, and recommended that Soules receive a sentence of life

imprisonment without the possibility of probation or parole. The Commonwealth's offer was conditioned upon Soules' testimony against Goodrum. Soules testified against Goodrum and, on May 12, 2005, was sentenced to life imprisonment. Goodrum was found not guilty.

On April 25, 2008, Soules filed a motion to vacate his conviction pursuant to RCr 11.42 and CR 60.02. On June 23, 2008, the trial court entered an order denying Soules' motion without an evidentiary hearing. Soules appeals that order.

Soules claims that his counsel's performance was deficient in four ways: 1) defense counsel failed to investigate, interview, and subpoena alibi witnesses; 2) counsel pressured him to accept the Commonwealth's offer on a plea of guilty; 3) counsel failed to inform him of the full range of penalties; and 4) counsel failed to argue that Kentucky did not have jurisdiction to hear the murder case because Autry died in Tennessee.

In order to prevail on an ineffective assistance of counsel claim, a movant must show that trial counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). The standard for assessing counsel's performance 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. Defense counsel is "strongly presumed to have rendered adequate

assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. With respect to a guilty plea, however, a movant must also show that counsel's performance so seriously affected the case, that but for the deficiency, the movant would not have pled guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985).

Soules argues that his trial counsel failed to investigate his case by neglecting to interview and subpoena potential witnesses. Defense counsel has the duty to conduct a reasonable investigation, including the investigation of potential defenses. *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

> 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. The investigation must be reasonable under all circumstances.

Haight v. Commonwealth, 41 S.W.3d 436, 446 (Ky. 2001) (citations omitted.) The court must assess what a reasonable attorney in those circumstances would do, while maintaining profound deference to defense counsel. *Id*. Moreover, under the second prong of the *Strickland* test, Soules also has the burden to show within a reasonable probability that a reasonable investigation would have changed the outcome of his trial. *Strickland*, 466 U.S. at 691.

Soules maintains that his counsel should have interviewed and subpoenaed party guests, the designated driver who drove him and Autry to the

dorm, and Autry's roommate. However, Soules does not make any showing that the testimony of the proposed witnesses would have been beneficial or changed the outcome of his case. None of the witnesses mentioned were witnesses to the crime, actual alibi witnesses, or able to corroborate Soules' story. Because Soules generally stated that his counsel failed to investigate potential defenses, without any additional support, he failed to show grounds for relief.

Soules claims that his plea was involuntary because defense counsel told him that if he did not plead guilty the Commonwealth would seek the death penalty. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), requires pleas to be knowingly, voluntarily, and intelligently made. "A guilty plea is valid only when it is entered intelligently and voluntarily." *Bronk v. Commonwealth*, 58 S.W.3d 482, 486 (Ky. 2001). Because a guilty plea taken with ineffective counsel may not meet that standard, "[a] guilty plea is open to attack on the ground that counsel did not provide the defendant with 'reasonably competent advice.'" *Rodriguez v. Commonwealth*, 87 S.W.3d 8, 10 (Ky. 2002) *quoting Cuyler v. Sullivan*, 446 U.S. 335, 344, 100 S.Ct. 1708, 1716, 64 L.Ed.2d 333 (1980).

Soules' argument is without merit. He presents no evidence that defense counsel did anything more than discuss the potential outcomes of a trial. We assume that most defendants would feel anxious about the decision to accept a plea bargain or face the possibility of death. Further, in his plea colloquy with the court, Soules acknowledged that he pled guilty of his own volition and free from

threat or coercion. A mere threat by the Commonwealth to seek the death penalty is not enough to constitute duress and reverse a conviction. *Owen v. Commonwealth*, 280 S.W.2d 524, 525 (Ky. 1955).

Soules argues that he was unaware of the penalty range he faced under the indicted charges. Soules fails to articulate how a better understanding of the penalty range would have affected his decision to plead guilty. Further, this claim is refuted by both the record of the plea colloquy and Soules' claims that he pled guilty in order to escape the possibility of the death penalty.

Soules also claims that his counsel's performance was deficient because his attorney failed to argue that Kentucky lacked jurisdiction to hear the case. KRS 500.060 provides, in part, that:

> . . . . a person may be convicted under the law of this state of an offense committed by his own conduct or the conduct of another for which he is legally accountable when:
>
> (a) Either the conduct or the result which is an element of the offense occurs within this state[.]

Because Soules' conduct that caused Autry's death was committed within this Commonwealth, Kentucky was the proper venue. Therefore, counsel's failure to argue that the case be transferred to Tennessee was reasonable.

In addition to his claims of ineffective assistance of counsel, Soules maintains that the circuit court erred by denying his request for an evidentiary hearing on his RCr 11.42 motion. We disagree. An evidentiary hearing is not required if the issues raised are refuted by the trial court record. *Strickland*, 466

U.S. at 687. Instead, a hearing is only required if the motion "raises a material issue of fact that cannot be determined from the face of the record." RCr 11.42(5). In his motion, Soules only made generic allegations that his counsel should have investigated more witnesses. Further, in the plea colloquy with the trial court, Soules acknowledged that he knowingly waived his right to call witnesses on his behalf. Soules' argument that his plea was involuntary is also refuted by the record of his plea colloquy, as well as his claim that he was unaware of the penalty range. Therefore, Soules was not entitled to a hearing. *Id.*

We hold that Soules failed to show that he received ineffective assistance of counsel or that such deficiency rendered his plea involuntary. Accordingly, we affirm the judgment of the Warren Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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