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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002072-MR

ARNOLD LINDQUIST — APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 03-CR-00044

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, DIXON AND TAYLOR, JUDGES.

DIXON, JUDGE: Appellant, Arnold Lindquist, appeals *pro se* from an order of the Whitley Circuit Court denying him post-conviction relief pursuant to RCr 11.42. Finding no error, we affirm.

In April 2003, Appellant was indicted by a Whitley County Grand Jury for first-degree possession of a controlled substance, bribery of a public

servant, and for being a second-degree persistent felony offender. On the morning of trial, Appellant moved to suppress evidence obtained at the time of his arrest. Following a hearing, the trial court denied the motion. Appellant thereafter entered a conditional guilty plea to first-degree possession of a controlled substance and bribery of a public servant, and was sentenced to a total of eight years' imprisonment.[1] However, Appellant expressly reserved his right to appeal the suppression issue.

On appeal, a panel of this Court affirmed Appellant's conviction and sentence. With respect to the suppression issue, the panel noted,

> At a September 21, 2005, hearing regarding Lindquist's suppression motion, the following testimony was given. Kentucky State Police Trooper Michael Witt testified that on November 10, 2002, he and Trooper Scott Bunch were traveling in separate police cruisers on a secluded gravel road. Witt saw a new-model van parked with its lights on some fifty yards off the gravel road, down a dirt logging road. Since there were no houses or other structures near the van, it was near midnight, and the area was one where the police had found burned and stolen vehicles, Witt pulled behind the van. Witt and Bunch approached the van on foot.
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> Witt found Lindquist in the van's driver's seat with his pants down to his knees, blood on his left arm, and bloody towels on the dashboard. Witt also testified that he could readily see that Lindquist's arm had been stuck with an intravenous needle. Further, Bunch found a syringe on the ground next to the passenger's rear sliding door. After Witt briefly talked to Lindquist, he instructed Lindquist to get out of the van. When Lindquist did so, Witt observed a small bag containing a white powdery substance in the driver's side cup holder, located under

[1] The second-degree persistent felony offender charge was dismissed.

> the radio. At that point Witt arrested Lindquist for possession of a controlled substance.
>
> Based on the seclusion of the area in which Lindquist was arrested, and the other circumstances as described by Witt, including the fact that Witt testified the bag was in plain view once Lindquist exited the car, the court overruled Lindquist's suppression motion.
> . . .
> On appeal from a trial court's determination following a motion to suppress,
>
> > We first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. Based on those findings of fact, we must then conduct a de novo review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law.
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> *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. App. 2002) (footnotes omitted). Here, despite Lindquist's argument to the contrary, the circuit court expressly found that it believed the circumstances as described by Trooper Witt, including that the bag in Lindquist's cup holder was in plain view once Lindquist left the vehicle. . . . [T]hese facts were supported by substantial evidence, i.e., Trooper Witt's testimony.

Lindquist v. Commonwealth, 2006-CA-000089-MR (June 15, 2007).

In June 2008, Appellant filed an RCr 11.42 motion to vacate his sentence on the grounds that trial counsel was ineffective for arguing the wrong standard during the suppression hearing. Appellant further requested appointment of counsel and an evidentiary hearing. On October 6, 2008, the trial court entered an order denying Appellant's motion without an evidentiary hearing on the grounds that the ineffective assistance of claim was simply a "re-characterization"

of the suppression issue raised and disposed of on direct appeal. This appeal ensued.

In an RCr 11.42 proceeding, the movant has the burden to establish convincingly that he was deprived of substantial rights that would justify the extraordinary relief afforded by the post-conviction proceeding. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). Since Appellant entered a guilty plea, a claim that he was afforded ineffective assistance of counsel requires him to show: (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial. *Bronk v. Commonwealth*, 58 S.W.3d 482, 486-87 (Ky. 2001). *See also Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Furthermore, an evidentiary hearing on an RCr 11.42 motion is warranted only "if there is an issue of fact which cannot be determined on the face of the record." *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993), *cert. denied*, 510 U.S. 1049 (1994); RCr 11.42(5). *See also Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001); *Bowling v. Commonwealth*, 981 S.W.2d 545, 549 (Ky. 1998), *cert. denied*, 527 U.S. 1026 (1999). "Conclusionary allegations which are not supported by specific facts do not justify an evidentiary

hearing because RCr 11.42 does not require a hearing to serve the function of a discovery deposition." *Sanders v. Commonwealth*, 89 S.W.3d 380, 385 (Ky. 2002), *cert. denied*, 540 U.S. 838 (2003), *overruled on other grounds* in *Leonard v. Commonwealth*, 279 S .W.3d 151 (Ky. 2009).

Where an evidentiary hearing is unwarranted, appointment of counsel is not required. *Fraser*, 59 S.W.3d at 453. Moreover, when a trial court denies a motion for an evidentiary hearing, appellate review is limited to whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction. *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986). Thus, the question becomes whether the trial court properly found that Appellant's claims of ineffective assistance of counsel were refuted by the record. This Court must consider the totality of the evidence before the trial court, and must assess trial counsel's overall performance, to determine whether the presumption that counsel afforded reasonable professional assistance is overcome by the identified omissions. *See Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky.2006), *overruled on other grounds* in *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

Appellant argues on appeal that the trial court erred in failing to conduct an evidentiary hearing, because his claims could not be refuted from the face of the record. Further, Appellant argues that the trial court violated the Kentucky Supreme Court's decision in *Martin v. Commonwealth*, 207 S.W.3d 1

(Ky. 2006), by ruling that an issue litigated on direct appeal cannot be relitigated in an RCr 11.42 motion as ineffective assistance of counsel. As he did in the trial court, Appellant contends that his counsel rendered ineffective assistance by arguing the suppression standard for a search of an automobile rather than a search occurring on private property. It is Appellant's position that had trial counsel correctly presented the suppression issue, the trial court would have suppressed the evidence and, in turn, he would not have entered the conditional guilty plea. We disagree.

We are of the opinion that Appellant's reliance on *Martin v. Commonwealth* is misplaced. In *Martin,* our Supreme Court held that a petitioner may present an ineffective assistance of counsel claim in an RCr 11.42 motion, even though the underlying claim of palpable error had been denied on direct appeal. The Court reasoned:

> When an appellate court engages in a palpable error review, its focus is on what happened and whether the defect is so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process. However, on collateral attack, when claims of ineffective assistance of counsel are before the court, the inquiry is broader. In that circumstance, the inquiry is not only upon what happened, but why it happened, and whether it was a result of trial strategy, the negligence or indifference of counsel, or any other factor that would shed light upon the severity of the defect and why there was no objection at trial. Thus, a palpable error claim imposes a more stringent standard and a narrower focus than does an ineffective assistance claim. Therefore, as a matter of law, a failure to prevail on a palpable error claim does not obviate a proper ineffective assistance claim.

Id. at 1. Recently, in *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009), the Court reaffirmed the principle set forth in *Martin*.

The facts herein are distinguishable from those presented in *Martin* in that the suppression issue was preserved. As such, a panel of this Court reviewed the factual issues under an abuse of discretion standard, not the palpable error standard, and determined that the trial court properly denied Appellant's suppression motion. Thus, *Martin* has no application to the instant case, and Appellant was not entitled to relitigate the same claim under the guise of ineffective assistance of counsel.

Notwithstanding, we find no merit in Appellant's claim that counsel rendered ineffective assistance during the suppression hearing. Appellant repeatedly asserts that the search and seizure was improper because the arresting officers had no probable cause to enter private property where his van was parked. Yet, the record is devoid of any evidence that the property in question was, in fact, privately owned and, if so, by whom. Appellant certainly does not claim ownership. Nevertheless, he clearly believes that there is some significance that he was parked on alleged private property that did not belong to him.

As the Commonwealth points out, Appellant has placed himself in the tenuous position of arguing that he was a trespasser in the hopes of prevailing on his claim that there was no probable cause for the search and seizure. However, the law is clear that only the owner of the property has a right to privacy in the

property in question and "one whose presence thereon is wrongful cannot invoke the privacy of the premises searched." *Commonwealth v. Johnson*, 420 S.W.2d 103 (Ky. 1967). *See also Garcia v. Commonwealth*, 185 S.W.3d 658 (Ky. App. 2006).

We conclude that Appellant's claim of ineffective assistance of counsel was conclusively refuted by the record. *Sparks v. Commonwealth*, 721 S.W.2d at 727. Accordingly, the trial court did not err in denying his RCr 11.42 motion without an evidentiary hearing. *Stanford v. Commonwealth*, 854 S.W.2d at 743-44.

The order of the Whitley Circuit Court denying Appellant's motion for post-conviction relief pursuant to RCr 11.42 is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Arnold Lindquist, *Pro Se*
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

M. Brandon Roberts
Assistant Attorney General
Frankfort, Kentucky