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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000488-MR

DIVON BRADLEY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 04-CR-000538

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND NICKELL, JUDGES; HARRIS,[1] SENIOR JUDGE.

MOORE, JUDGE: Divon Bradley appeals the Jefferson Circuit Court's order denying his motion to vacate his sentence pursuant to RCr[2] 11.42. After a careful review of the record, we affirm because Bradley did not receive the ineffective assistance of counsel.

[1] Senior Judge William R. Harris, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] Kentucky Rule of Criminal Procedure.

I. FACTUAL AND PROCEDURAL BACKGROUND

Bradley was charged with one count each of theft by unlawful taking over $300.00; first-degree fleeing or evading police; first-degree wanton endangerment; third-degree assault; receiving stolen property over $300.00; resisting arrest; third-degree terroristic threatening; receiving stolen property under $300.00; third-degree criminal mischief; giving a peace officer a false name or address; and of being a first-degree persistent felony offender (PFO-1st).

The Commonwealth offered to amend the charge of third-degree assault to fourth-degree assault if Bradley would then enter guilty pleas to all of the charges. Bradley accepted this offer, pleaded guilty, and the circuit court accepted his guilty plea. Thereafter, the court sentenced Bradley to a total of seventeen years of imprisonment.

Bradley then moved to vacate his sentence pursuant to RCr 11.42. The circuit court denied his motion.

Bradley now appeals, contending that: (a) he received the ineffective assistance of counsel when counsel failed to move to dismiss Count 1 of the indictment because the victim's name was incorrect on it; (b) he received the ineffective assistance of counsel when counsel failed to move to dismiss Counts 2 and 3 of the indictment after the Commonwealth failed to provide the defense with a videotape of the police chase; (c) he received the ineffective assistance of counsel when counsel failed to properly investigate and subpoena two witnesses concerning the commission of the offenses set forth in Counts 1, 2, 3, and 4; (d) he

is entitled to withdraw his guilty plea based on the cumulative effect of the errors; and (e) the circuit court erred in failing to hold an evidentiary hearing on his RCr 11.42 motion.

II. STANDARD OF REVIEW

In a motion brought under RCr 11.42, "[t]he movant has the burden of establishing convincingly that he or she was deprived of some substantial right which would justify the extraordinary relief provided by [a] post-conviction proceeding. . . . A reviewing court must always defer to the determination of facts and witness credibility made by the circuit judge." *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151, 159 (Ky. 2009).

III. ANALYSIS

A. CLAIM THAT COUNSEL FAILED TO MOVE TO DISMISS COUNT 1 OF THE INDICTMENT

Bradley first alleges that he received the ineffective assistance of counsel when counsel failed to move to dismiss Count 1[3] of the indictment because the victim's name was incorrect on it. He also asserts that it was error to permit the Commonwealth to amend that count to change the name of the victim.

> A showing that counsel's assistance was ineffective in enabling a defendant to intelligently weigh his legal alternatives in deciding to plead guilty has two components: (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

[3] Count 1 of the indictment was theft by unlawful taking over $300.00.

> 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) (internal quotation marks omitted).

We first note that the Commonwealth amended Count 1 in the indictment to include the correct name of the victim, and that this was proper. Pursuant to RCr 6.16, "[t]he court may permit an indictment . . . to be amended any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." The Kentucky Supreme Court has stated that amending an indictment to change the name of a victim does not prejudice the defendant, even if the indictment is amended during trial, at the close of the evidence. *See Watkins v. Commonwealth*, 565 S.W.2d 630, 631 (Ky. 1978). Therefore, in the present case, it was not error for the circuit court to permit the Commonwealth to amend the indictment, as Bradley was not prejudiced by the amendment, and the amendment occurred before he pleaded guilty.

Bradley also contends that his trial counsel rendered ineffective assistance by failing to request that the indictment for Count 1 be dismissed before it was amended due to the fact that the victim's name was incorrect. Bradley argues that his counsel may have been able to get the charge dismissed. However, it is unlikely that counsel could have had the charge dismissed, considering that all the Commonwealth had to do was amend the indictment to include the victim's

correct name. Further, Bradley cannot show that, but for counsel's failure to seek to have the count dismissed, he would not have pleaded guilty, considering that Bradley entered a guilty plea to the count and he cannot show that the count would have been dismissed if counsel had requested such. *See Bronk*, 58 S.W.3d at 486-87. Thus, Bradley cannot show that his counsel rendered ineffective assistance when counsel failed to request that the count be dismissed.

We note that Bradley appears to argue that he may have been entitled to a jury instruction on a lesser-included offense of joyriding but for counsel's ineffectiveness. However, as previously addressed, counsel did not render ineffective assistance concerning the first count of the indictment, and Bradley cannot show that he was entitled to a jury instruction on a lesser included offense because he pleaded guilty rather than going to trial. Thus, this claim lacks merit.

B. CLAIM THAT COUNSEL FAILED TO MOVE TO DISMISS COUNTS 2 AND 3 OF THE INDICTMENT

Bradley next alleges that he received the ineffective assistance of counsel when counsel failed to move to dismiss Counts 2[4] and 3[5] of the indictment after the Commonwealth failed to provide the defense with a videotape of the police chase. Bradley asserts that those counts could have been dismissed due to a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), and that counsel performed deficiently in failing to request the dismissal of those charges. In *Brady*, the United States Supreme Court held that "the

[4] Count 2 of the indictment was first-degree fleeing or evading police.

[5] Count 3 of the indictment was first-degree wanton endangerment.

suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87, 83 S.Ct. at 1196-97.

In the present case, trial counsel moved to compel the Commonwealth to provide the defense with a copy of all videotaped and audio taped recordings from the police cruiser. The trial court granted the motion to compel. Trial counsel subsequently moved to continue the trial date in part on the grounds that the Commonwealth had not yet complied with the trial court's order compelling discovery of the videotaped and audio taped recordings from the police cruiser. A hearing was then held, in which the Commonwealth informed the court that the videotape had been lost or taped over, so the court ordered the Commonwealth to provide the dispatch tape from the incident to the defense instead.

The *Brady* rule concerns evidence that is favorable to the defendant. Bradley does not allege that the videotape contained evidence that was favorable to him. Further, even if the evidence had been favorable to him, Bradley cannot show that, but for counsel's failure to request dismissal of the counts, Bradley would not have pleaded guilty. In other words, if counsel had requested dismissal of the counts, there is no guarantee that the counts would have been dismissed. Thus, Bradley cannot show that he would not have pleaded guilty to the counts if counsel had requested their dismissal.

Moreover, as argued by the Commonwealth, Bradley faced maximum prison terms of five years for each of Counts 1, 4,[6] and 5,[7] for a total of fifteen years of imprisonment on those three charges alone, and his PFO-1st charge would have enhanced the penalties for those three Class D felonies to a maximum of twenty years of imprisonment. Thus, Bradley still could have received a seventeen year sentence[8] even if Counts 2 and 3 had been dismissed, and he cannot show that he was prejudiced by counsel's failure to seek the dismissal of Counts 2 and 3. Therefore, this claim lacks merit.

C. CLAIM THAT COUNSEL FAILED TO INVESTIGATE AND SUBPOENA TWO WITNESSES

Bradley next asserts that he received the ineffective assistance of counsel when counsel failed to properly investigate and subpoena two witnesses concerning the commission of the offenses set forth in Counts 1, 2, 3, and 4. Specifically, Bradley contends that counsel should have contacted a particular FBI agent who had advised Bradley to have his defense counsel contact the agent. Apparently, Bradley had filed a misconduct complaint against the arresting officer and an investigation was begun concerning whether "Officer Cole" committed "civil rights violations."[9] Bradley alleges that the FBI agent may have had relevant

[6] Count 4 of the indictment was third-degree assault before the Commonwealth offered to amend that charge to fourth-degree assault in exchange for Bradley's guilty plea.

[7] Count 5 of the indictment was receiving stolen property over $300.00.

[8] Considering that the Commonwealth had not offered to amend Count 4 down to fourth-degree assault at that time.

[9] We note that Bradley does not provide Officer Cole's first name, nor does he allege that the civil rights violations potentially committed by Officer Cole were actually committed against Bradley.

evidence that was either exculpatory to Bradley or inculpatory to Officer Cole, but his counsel failed to contact the FBI agent.

Bradley also asserts that his counsel should have contacted Kerry Doiser, who allegedly lent Bradley the car that Bradley was charged with possessing. Bradley contends that Mr. Doiser could have provided testimony that would have shown that Bradley did not know the car was stolen, so the charge against him could have been amended to receiving stolen property or joyriding.

However, Bradley does not provide any proof of what information the FBI agent or Mr. Doiser would have given his defense counsel. We will not grant RCr 11.42 relief based on mere speculation and conclusory allegations. *See Stanford v. Commonwealth*, 854 S.W.2d 742, 745 (Ky. 1993). Therefore, this claim lacks merit.

D. CLAIM REGARDING CUMULATIVE EFFECT OF THE ERRORS

Bradley next contends that he is entitled to withdraw his guilty plea based on the cumulative effect of the errors. However, because we have determined that none of the individual claims of error have merit, there can be no cumulative error. *See Epperson v. Commonwealth*, 197 S.W.3d 46, 66 (Ky. 2006). Consequently, this claim lacks merit.

E. CLAIM REGARDING FAILURE TO HOLD EVIDENTIARY HEARING

Finally, Bradley asserts that the circuit court erred in failing to hold an evidentiary hearing on his RCr 11.42 motion. Pursuant to RCr 11.42(5), if there is "a material issue of fact that cannot be determined on the face of the record[,] the

court shall grant a prompt hearing. . . ." In the present case, because the circuit court was able to resolve Bradley's claims by examining the record, the court did not hold an evidentiary hearing.

On appeal, after "the trial court denies a motion for an evidentiary hearing on the merits of allegations raised in a motion pursuant to RCr 11.42, our 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) (internal quotation marks and citation omitted).

In the present case, all of Bradley's claims were conclusively refuted by the record. Thus, the circuit court did not err in denying his request for an evidentiary hearing.

Accordingly, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Pro se
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BRIEF FOR APPELLEE:

Jack Conway
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