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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000876-MR

WALTER A. NOLAND — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 04-CR-00473

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, KELLER, AND LAMBERT, JUDGES.

CAPERTON, JUDGE: The Appellant, Walter Noland (Noland), pled guilty to arson in the first degree and burglary in the second degree. Noland sought to vacate his conviction pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 and now appeals from the March 21, 2008, order of the Hardin Circuit Court denying relief following an evidentiary hearing, as well as the circuit court's

subsequent April 18, 2008, order denying Noland's motion to reconsider. After thorough review of the record, the arguments of the parties, and applicable law, we affirm.

A Hardin County grand jury indicted Noland on September 7, 2004, for arson in the first degree and burglary in the second degree. Both charges stem from an August 15, 2004, incident which occurred at the home of Noland's ex-girlfriend. It is the position of the Commonwealth that Noland entered the home and intentionally set a fire. Noland asserts that after becoming very intoxicated, he entered his ex-girlfriend's garage with the intention of committing suicide. Noland asserts that he doused himself in gasoline with the intent to set himself on fire but instead lit a cigarette to think it over. Noland states that when he did so, the gasoline in the garage ignited and he fled the scene.

The Department of Public Advocacy (DPA) was appointed to represent Noland. Noland asserts that during discussions, his counsel apparently advised him that intoxication "could provide a defense." Nevertheless, Noland now asserts that there is no indication that counsel discussed exactly how intoxication could negate the intent element of the arson charge, or that the defense was investigated. Further, Noland states that as evidenced by a letter that counsel sent to Noland *after* he entered a guilty plea, counsel advised Noland that he did not fall under the violent offender statute and would consequently be eligible for parole after serving only 20 percent of his sentence. Accordingly, Noland asserts that because the defense of voluntary intoxication was not fully explained to him or

investigated, and because he was misadvised as to his parole eligibility,[1] he pled guilty to the aforementioned charges on January 11, 2005.

The Commonwealth states that the trial court engaged Noland in a full guilty plea colloquy and that Noland acknowledged being satisfied with his attorney and entering the plea because he was guilty. The Commonwealth notes that when the trial court asked Noland to relate his actions, Noland replied that he did not remember specifically because he was drunk but that he attempted to set fire to himself. In response to the trial court's questions, Noland acknowledged that he entered a dwelling with the intent to violate the law and that he set a fire. Further, Noland stated that he understood he could not change his mind later, even though he claimed to be drunk at the time of the incident.

The trial court found Noland's plea to be entered knowingly, intelligently, and voluntarily, and therefore entered formal judgment and sentenced Noland in accordance with the plea agreement on March 15, 2005. Noland received twenty years for the charge of Arson in the First Degree and five years for Burglary in the Second Degree, to run concurrently for a total of twenty years. The Commonwealth notes that Noland voiced no concerns at the sentencing hearing about his parole eligibility date.

Thereafter, on August 6, 2006, Noland filed a motion to vacate, set aside, or correct judgment and sentence pursuant to RCr 11.42, and a memorandum of law in support of same. On August 31, 2006, the circuit court appointed the

[1] As a violent offender Noland would be eligible for parole after 85 percent of his service time, not the 20 percent which he contends he was advised by counsel.

DPA to represent Noland on his RCr 11.42 motion. Two of Noland's DPA attorneys left the office, and two new attorneys were assigned to represent Noland and entered their appearance on January 22, 2008.

In his RCr 11.42 motion, Noland made several claims of ineffective assistance of counsel, including failing to investigate and advise Noland about the possible defense of intoxication.[2] To that end, the Commonwealth states that Noland informed the police that his intent was to kill himself but, after dousing himself in gasoline, he had second thoughts and lit a cigarette to think about the situation, causing the gasoline to ignite and knock him down. The Commonwealth asserts that Noland subsequently claimed that he simply made this story up for the police in order to fill in the blanks of his memory.

The trial court reviewed the motion and determined that some claims did not require an evidentiary hearing, but "[o]n the other hand it cannot be determined from this record whether the Defendant's counsel misadvised him as to the intent element of the charges of First-Degree Arson, and specifically the availability of voluntary intoxication as a defense." Consequently, an evidentiary hearing was held on March 10, 2008.

In the interim, Noland did not file or ask to file any pleading stating additional grounds for relief. However, at the evidentiary hearing, Noland

[2] We note that the other arguments made in the RCr 11.42 motion have not been appealed by Noland. Accordingly, we shall not address them herein. Likewise, we note that Noland's second argument to this Court on appeal, namely that Noland was denied effective assistance of counsel when his trial counsel provided gross misadvice as to his parole eligibility, was not pled in the original RCr 11.42 motion. We shall address this issue further herein, *infra*.

indicated that he wanted to raise the additional issue of misadvice of trial counsel about parole eligibility, despite the fact that he had not raised this issue previously. The Commonwealth objected. The trial court responded that it was proper to hear the evidence and make a record, but that it would research the issue and later determine if the issue would be considered.

At the hearing, Noland's trial counsel, Nancy Bowman-Denton, testified that she had been an attorney with the DPA for twenty years, the last nine of which were in the Elizabethtown office. Bowman-Denton could not remember how many times she spoke with Noland, but stated that she spoke with him about the case at least two or three times before the plea offer was discussed. Bowman-Denton stated that she was aware that Arson in the First Degree was a Class A felony, which carried a minimum sentence of twenty years' imprisonment. Further, she was aware that an offender would be classified as violent and would consequently not be eligible for parole until serving 85 percent of his sentence. Bowman-Denton was aware that nonviolent offenders were eligible for parole after serving 20 percent of their sentence.

Bowman-Denton further testified that the Commonwealth offered the minimum number of years on the arson charge but refused to amend the charge down. Bowman-Denton explained that the Commonwealth Attorney had a policy of extending a plea offer which must be accepted by a certain date. This offer contained the minimum agreeable sentence and would be withdrawn if not timely

accepted. Bowman-Denton stated that she spoke with Noland about the plea agreement both before the plea was entered and on the day it was entered.

Bowman-Denton stated that she specifically talked with Noland about parole eligibility "because I was concerned about the 18, I guess it was 17 years he would have to serve before he got out. This is why I did not like the plea." Bowman-Denton stated that she told Noland that parole eligibility for the arson charge was 85 percent of the sentence imposed because it was a Class A felony. Nevertheless, Noland's post-conviction counsel showed Bowman-Denton a letter dated January 15, 2005, stating that Noland would not be considered a violent offender. Bowman-Denton acknowledged that her signature was on the letter but was at a loss to explain it. She nevertheless reaffirmed that she told Noland otherwise and that this was the reason she was attempting to get the Commonwealth Attorney to amend the charge downward. On cross-examination, Bowman-Denton stated that she very specifically remembered telling Noland that he would be sentenced as a violent offender.

Bowman-Denton testified that she was also unhappy about accepting the plea because she wanted to look more closely into the statement that Noland gave the police when arrested. Noland apparently thought his intoxication would excuse his conduct, but Bowman-Denton explained to Noland that, "[i]t provides us a defense. We have the burden of pretty much proving that he was so intoxicated that he could not form the requisite intent." Bowman-Denton stated that she never told Noland that he was not eligible for an intoxication defense. She

further stated that she considered trying to suppress Noland's statement to police because he was intoxicated at the time it was made.

Nevertheless, Bowman-Denton testified that there were parts of the statement which were favorable to the defense, and which mitigated against suppression, including the fact that Noland told the police he was drunk and that he set the fire in an attempt to kill himself, thereby negating the element of intent. Finally, we note that Bowman-Denton testified that she attempted to persuade the Commonwealth Attorney to extend the deadline on the plea offer, but he refused.

Noland also testified at the evidentiary hearing. He testified that he told counsel he was suffering from "DT's" when he gave his statement to police, but that counsel seemed uninterested. Noland stated that Bowman-Denton had attempted to get the charge lowered but could not and that she advised Noland that he could be sentenced to fifty years if he went to trial. Noland claimed that Bowman-Denton told him he could be paroled in four years and that he took the plea agreement because she told him he would get fifty years if they went to trial. Noland testified that he understood that there were no guarantees on when he might be paroled. Noland testified that he first became aware of a possible problem with his parole eligibility date in April of 2005.

Noland's daughter, Sarah Noland, also testified. Sarah stated that she lived in Louisville at the time of the fire. Further, she stated that Noland came to her home four or five times during the day and was drinking. Sarah testified that

on the last occasion she saw Noland that evening, he appeared drunk enough that she attempted to take his car keys, but Noland refused to surrender them.

Subsequently, on March 20, 2008, the circuit court entered findings of fact and conclusions of law denying Noland's RCr 11.42 motion. Subsequently, on April 18, 2008, the circuit court denied Noland's motion for reconsideration pursuant to Kentucky Rules of Civil Procedure (CR) 59.05. It is from those denials that Noland now appeals to this Court.

On appeal, Noland makes two arguments. First, Noland argues that he was denied effective assistance of counsel when his trial counsel provided gross misadvice as to his parole eligibility. Secondly, Noland argues that he was denied effective assistance of counsel when his trial counsel failed to fully investigate a defense of voluntary intoxication and to correctly advise him of that defense. In response, the Commonwealth asserts that Noland should be precluded from arguing misadvice about parole eligibility because he failed to assert that argument in his initial motion.

Further, the Commonwealth asserts that the parole eligibility claim should fail on its merits. Finally, the Commonwealth asserts that the trial court was not clearly erroneous in finding that counsel advised Noland about the intoxication defense, and further, that Noland failed to prove either prong of the two-part test required by *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). We shall address these arguments in turn.

Initially, we note that the law in this Commonwealth is clear concerning claims of ineffective assistance of counsel. In order to establish ineffective assistance of counsel pursuant to RCr 11.42, a movant must satisfy a two-part test showing both that counsel's performance was deficient and that the deficiency caused actual prejudice resulting in a proceeding that was fundamentally unfair and a result that was unreliable. *Strickland,* 466 U.S. 668 at 687, 104 S.Ct. 2052 at 2064, 80 L.Ed.2d 674 (1984), and *Commonwealth v. Tamme*, 83 S.W.3d 465, 469 (Ky. 2002). To establish such deficient performance, the petitioner must show that his counsel's representation fell below an objective standard of reasonableness. *See Strickland* at 687-88.

Essentially, the *Strickland* test requires a showing that without the error, the fact-finder would have had a reasonable doubt respecting guilt. In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Taking the unaffected findings as a given, and taking due accord of the effect of the errors on the remaining findings, a court making a prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors. See *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006), citing *Strickland* at 695-96.

A reasonable probability is a probability sufficient to undermine confidence in the outcome. *See Strickland* at 694. Further, the burden is on the movant to overcome a strong presumption that counsel's assistance was

constitutionally sufficient, or that under the circumstances, counsel's action might be considered sound trial strategy. *See Strickland* at 689.

On appeal, the reviewing court looks *de novo* at counsel's performance and at any potential deficiency caused by counsel's performance. *See Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008), citing *Groseclose v. Bell*, 130 F.3d 1161, 1164 (6th Cir. 1997). Further, even though both parts of the *Strickland* test involve mixed questions of law and fact, the reviewing court must defer to the determination of facts and credibility made by the trial court unless those findings are clearly erroneous. *See Brown*, *supra,* citing *McQueen v. Commonwealth*, 72 S.W.2d 694, 698 (Ky. 1986).

In appealing from the trial court's grant or denial of relief based on ineffective assistance of counsel, the appealing party has the burden of showing that the trial court committed an error in reaching its decision. *See Brown*, *supra*. We turn now to the arguments of the parties with these standards in mind.

As his first basis for appeal to this Court, Noland asserts that he was denied effective assistance of counsel when his trial counsel provided gross misadvice as to his parole eligibility. Noland concedes that he did not specifically plead this issue in his original RCr 11.42 motion. Nevertheless, Noland argues that the issue is preserved because the trial court allowed evidence to be introduced in support of this claim at the hearing on the RCr 11.42 motion and because the trial court ruled on this issue in its findings of fact and conclusions of law and in its order denying Noland's motion to reconsider.

In response, the Commonwealth asserts that Noland should be precluded from arguing misadvice about parole eligibility because he failed to assert that issue in his initial motion. The Commonwealth argues that the plain language of the rule requires a movant to state specific grounds for the motion supported by facts or face summary dismissal of the motion. Further, the Commonwealth relies upon the decision of our Kentucky Supreme Court in *Hodge v. Commonwealth*, 116 S.W.3d 463 (Ky. 2003), wherein the court stated, "[t]he RCr 11.42 motion must set forth all facts necessary to establish the existence of a constitutional violation. The court will not presume that facts omitted from the motion establish the existence of such a violation." *Hodge* at 468.

The Commonwealth states that Noland never claimed in his original motion that counsel misadvised him about his parole eligibility date, and further, that the issue was never raised until the beginning of the evidentiary hearing. As noted at that time, the Commonwealth objected, and the trial court responded that it would receive evidence on the issue but would reserve on ruling whether the claim was properly before it. Subsequently, in its written order, the trial court referred to the requirements of RCr 11.42, and cited to *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001), in holding:

> Noland knew of the problem of his parole eligibility no later than April of 2005. It was Noland's individual responsibility to make at least some reference to this issue in his initial motion. Lawyerly eloquence would not have been required. The issue may not be considered now.

In response to the arguments of the Commonwealth and the findings of the trial court in this regard, Noland asserts first, that the issue was preserved because the trial court allowed evidence to be introduced in support of this claim at the hearing on the 11.42 motion. Secondly, he argues that the issue was preserved because the trial court ruled on this issue in its findings of fact and conclusions of law, and in its order denying Noland's motion to reconsider.[3]

In the alternative, Noland has submitted a reply brief to this Court urging that if we find the issue not to have been preserved, we should also find that Noland received ineffective assistance of post-conviction counsel on this issue. Noland's current counsel concedes that counsel below should have supplemented Noland's *pro se* RCr 11.42 motion immediately after determining that parole eligibility was an issue, but did not. Accordingly, counsel asserts that although Kentucky has never recognized a claim of ineffective assistance of post-conviction counsel, this is a clear case of same, and we should make such a ruling now. We decline to do so and note that the courts of this Commonwealth have repeatedly held that RCr 11.42 cannot be used as a vehicle for relief from ineffective assistance of appellate counsel. *See Vunetich v. Commonwealth,* 847 S.W.2d 51 (Ky. 1992), and *Commonwealth v. Wine,* 694 S.W.2d 689 (Ky. 1985). Accordingly, we shall not address this issue further here.

[3] As discussed in more detail herein below, we note that the trial court did rule on the issue, but did so only after determining that the issue was not properly preserved, and only after noting that it made the findings "assuming *arguendo"* that the issue had been preserved.

Having reviewed the record and applicable law, we are compelled to agree with the trial court that Noland did not properly preserve this issue for decision on the merits. The plain language of RCr 11.42 requires that the movant shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds. Additionally, as the Commonwealth correctly noted, our courts have held that the motion shall state *all grounds* for holding the sentence invalid for which the movant has knowledge. *See Hodge v. Commonwealth*, 116 S.W.3d 463, 468 (Ky. 2003).

In the matter *sub judice*, Noland did not state the claim concerning parole eligibility, despite conceding that he knew of the mistake he was claiming well before filing his RCr 11.42. Accordingly, we believe the trial court properly held that Noland was barred from raising the issue on the day of the hearing. Although *pro se*, we note that Noland prepared his RCr 11.42 motion with the help of legal guidance while in prison, and as the trial court noted, Noland knew well before the hearing date on his RCr 11.42 about the claim of ineffective assistance as related to his parole eligibility.

In affirming the trial court in this regard, we note that arguing new issues on the day of the hearing which were not raised in the initial motion not only goes against the plain requirements of the criminal rule, it also creates an unfair surprise to the Commonwealth and does not allow the Commonwealth the opportunity to properly prepare for the hearing.

In sum, Noland's claim concerning parole eligibility does not meet any of the exceptions to the general rule, and Noland knew of the parole eligibility issue well before the date of the hearing. Accordingly, we find that Noland was precluded from raising this issue for the first time at the hearing, as it was not mentioned in the original RCr 11.42 motion nor even added by amendment prior to the hearing date. We therefore affirm the trial court in that regard.

Although we agree that the trial court properly determined that this issue was not preserved, we nevertheless note that the trial court did briefly address the issue for purposes of the record. In so doing, the trial court stated, "[a]ssuming *arguendo* that Noland could be entitled to have this question addressed despite a lack of proper notice of the claim prior to the evidentiary hearing and further assuming without deciding that Bowman-Denton did misadvise Noland on the parole eligibility prior to his plea, the Court will address whether that would entitle Noland to relief."[4]

The trial court then concluded that Noland failed to prove the prejudice prong of *Strickland*, *supra*. Indeed, in the context of a guilty plea, a defendant must show a reasonable probability 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). The trial court determined that Noland's testimony that he would not have pled guilty absent the errors of counsel was self-serving.

[4] *See* TR at 88.

Further, the court noted that Noland received the minimum sentence of twenty years, as opposed to the potential sentence of fifty years.

Having reviewed the records and arguments of the parties, we are again compelled to agree with the trial court. First, we note that our Kentucky Supreme Court has previously held that representation as to collateral issues is beyond the scope of the Sixth Amendment. *See Commonwealth v. Fuartado*, 170 S.W.3d 284 (Ky. 2005).

Indeed, in *Turner v. Commonwealth*, 647 S.W.3d 500 (Ky. App. 1982), this Court previously held that there was no ineffective assistance of counsel when counsel failed to inform the defendant before entering his plea that he would be ineligible for parole for ten years. In the matter *sub judice*, we believe that Noland failed to preserve this issue for the review of the court. Nevertheless, even if Noland had properly raised the issue, we believe the foregoing caselaw to apply.

Furthermore, we note that even if Noland would have been eligible for parole after serving 20 percent of his sentence, there was not a guarantee that he would have made parole at any time. Potentially, Noland could have served the entirety of his sentence in any event, regardless of his classification as a violent or nonviolent offender. Consideration of parole does not affect potential defenses at trial, sufficiency of the evidence, the loss of fundamental constitutional rights, nor the punishment that may be imposed by the trial court. Accordingly, we affirm the trial court on this issue.

As his second basis for appeal, Noland asserts that he was denied effective assistance of counsel when his trial counsel failed to fully investigate a defense of voluntary intoxication and to correctly advise him of that defense. As noted hereinabove, it was the testimony of Noland's trial counsel that she did advise him of the potential defense of intoxication. A further review of the record indicates that Noland was specifically questioned concerning this defense while giving his plea. Indeed, Noland stated to the court that he understood that by pleading guilty he was giving up his rights to claim later that he was intoxicated.

Nevertheless, Noland now argues, for the first time on appeal, that even if counsel did discuss the intoxication defense with Noland, she failed both to fully investigate the defense and failed to give correct advice concerning the law on that issue. Specifically, Noland asserts that counsel wrongfully told him that he had the burden to prove that he was so intoxicated that he could not form the requisite intent. Noland now argues that counsel should have advised him that the defense was available by merely showing enough evidence to reasonably negate the existence of an element of the offense. *See Jewell v. Commonwealth*, 549 S.W.2d 807, 812 (Ky. 1977). Accordingly, Noland asserts that counsel's advice amounted to ineffective assistance because it fell below an objective standard of reasonableness. Having reviewed the issue, we disagree.

First, we again note that the argument concerning the burden of proof was not made to the court below. As we have previously stated herein, appellants are not permitted to feed one can of worms to the trial judge and another to the

appellate court. *See Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976). Regardless, even if Noland had properly raised this issue before the Court, we nevertheless find the argument to be without merit.

Our review of the record indicates that substantial evidence exists to support the trial court's finding that Noland was made aware that there was a potential defense of intoxication. The court conducted a thorough evidentiary hearing on this issue and was well within its discretion to find as it did.
In fact, Noland's counsel stated that she advised Noland that she would like more time to investigate the potential advantage of this defense. However, as Noland knew, the Commonwealth's offer was available for only a limited period of time. The record reveals that Noland was aware of his alternative choices of going to trial and the potential to receive up to fifty years, but instead chose the minimum sentence of twenty years in a plea agreement.

Our review of the record reveals no indication that Noland made his decision based upon his understanding of the legal burdens of proving the defense of intoxication. Furthermore, the record shows no indication whatsoever that any misrepresentations that may have come from his counsel concerning the burden of proof with regard to that defense was the decisive factor, or even a factor, in Noland's decision. Accordingly, we simply cannot find that the *Strickland* standard was met in this instance.

Furthermore, as the trial court correctly noted, in order to succeed on a defense of intoxication, the jury would have been instructed that Noland had to be

"so drunk (intoxicated) that he did not have the intention of committing a crime." *See* William S. Cooper and Donald P. Cetrulo, *Kentucky Instructions to Juries*, Criminal § 11.30 (5th Ed. 2007). As the trial court aptly stated, Noland would have to have been so drunk that he did not know what he was doing. *See Stanford v. Commonwealth*, 793 S.W.2d 112, 118 (Ky. 1990). Indeed, as the record revealed, and as the trial court stated, Noland, by his own limited recollection, *did know* what he was doing. Accordingly, we find no merit to Noland's claim that counsel failed to properly investigate this issue, nor do we find merit to his arguments concerning the burden of proof. Accordingly, we affirm the trial court's decision to deny Noland's claim with respect to this issue.

Wherefore, due to the foregoing reasons, we affirm the March 21, 2008, order of the Hardin Circuit Court denying relief under RCr 11.42 following an evidentiary hearing, as well as the circuit court's subsequent April 18, 2008, order denying Noland's motion to reconsider, the Honorable Kelly Mark Easton, presiding.

ALL CONCUR

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