

RENDERED: DECEMBER 11, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002378-MR

BRASTIN BASS

APPELLANT

v. APPEAL FROM SIMPSON CIRCUIT COURT
HONORABLE JANET CROCKER, JUDGE
ACTION NO. 04-CR-00173

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND CLAYTON, JUDGES; KNOPF,¹ SENIOR JUDGE.

CLAYTON, JUDGE: This action comes on appeal before this Court after the denial of Appellant, Brastin Bass's, motion to vacate his judgment pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Bass contends that the trial

¹ Senior Judge William L. Knopf 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.

court erred in denying him an evidentiary hearing on the matter. Based upon the following, we affirm the decision of the trial court.

FACTUAL BACKGROUND

Bass was indicted for trafficking in a controlled substance, first degree (TICS 1), second subsequent offense; promoting contraband, first degree; possession of drug paraphernalia; and persistent felony offender (PFO 1), first degree on October 25, 2004, in Simpson County, Kentucky. On April 25, 2006, Bass entered a guilty plea in Simpson Circuit Court pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), for TICS and PFO 1. He was sentenced to ten (10) years' imprisonment for his crimes.

As a result of the plea agreement, the Commonwealth dismissed the charge of promoting contraband, amended the TICS 1 charge to a first offense, recommended ten (10) years on the TICS 1 charge and twelve (12) months on the drug paraphernalia charge. The trial court refused to sentence Bass until a new presentencing report (PSI) was received from the Department of Probation and Parole. Specifically, the trial judge requested a clarification of Bass's criminal history upon which the PFO 1 charge was based.

Bass brought an RCr 11.42 motion arguing that his counsel was ineffective in convincing him to plead guilty to the PFO charge. Specifically, Bass contended that the indictment did not set forth the prior felonies which were being

used as the basis of the PFO charge. The trial court denied Bass's motion without an evidentiary hearing. Bass now appeals contending that the trial court erred in not granting him an evidentiary hearing.

STANDARD OF REVIEW

We review the trial court's denial of an RCr 11.42 motion for an abuse of discretion. “[An RCr 11.42] motion is limited to issues that were not and could not be raised on direct appeal.” *Sanborn v. Com.*, 975 S.W.2d 905, 908-09 (Ky. 1998) (overruled on other grounds).

In order to prevail on an ineffective assistance of counsel claim, a movant must show that his counsel's performance was deficient and that but for the deficiency, the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Courts must also examine counsel's conduct in light of professional norms based on a standard of reasonableness. *Fraser v. Com.*, 59 S.W.3d 448, 452 (Ky. 2001).

Pursuant to the holding in *Strickland*, a “defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. With this standard in mind, we will examine the trial court's decision.

DISCUSSION

Bass first asserts that the trial court erred in denying his motion for an evidentiary hearing on the allegations set forth in his RCr 11.42 motion. There is no requirement in RCr 11.42 that an evidentiary hearing be held each time a motion is made under the statute. The rule provides that:

(5) Affirmative allegations contained in the answer shall be treated as controverted or avoided of record. If the answer raises a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing

Thus, we must examine Bass's allegations of error and determine whether, as he suggests, the trial court erred in denying his RCr 11.42 motion without an evidentiary hearing.

Bass contends that his counsel was ineffective in counseling him to plead guilty to the PFO 1 charge. The Commonwealth counters that his counsel could not have been ineffective because Bass's sentencing was statutorily pre-determined and he met the statutory requirements for the sentence he received. Bass, however, argues that his indictment should have set forth the specific convictions upon which the Commonwealth was relying when charging him with PFO 1.

The record is clear that Bass did not immediately enter a guilty plea. While an offer was made by the Commonwealth in August of 2005, it was not until February 22, 2006, that Bass signed the plea agreement. This plea was accepted by the trial court as an Alford Plea and the trial judge delayed the sentencing of Bass until a new PSI could be completed by the Department of Probation and Parole.

On April 24, 2006, the trial judge imposed the sentence as agreed to in the plea agreement after reviewing the details of the new PSI. Thus, Bass was aware of the convictions upon which his PFO 1 charge was based and the trial judge was very conscientious in making sure the charge was based upon legitimate convictions. The record is clear regarding the actions of Bass, his counsel and the trial judge, thus, the trial court acted appropriately in refusing to grant an evidentiary hearing. Bass's allegations of error were clearly refuted by the record.

Bass also argues that his counsel was ineffective in convincing him to plead guilty to the PFO 1 charge. As set forth above, however, Bass's charges were amended and his sentence was reduced based upon the plea agreement he entered into with the Commonwealth. The convictions set forth in the PFO 1 charge were legitimate and the trial judge made sure of the legitimacy of those convictions. There is nothing in the record, nor does Bass raise anything, which would indicate his counsel was anything but diligent. Thus, we will affirm the decision of the trial court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Brastin Bass, *pro se*
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BRIEF FOR APPELLEE:

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