

RENDERED DECEMBER 18, 2009; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2008-CA-001202-MR

FAYETTE MILTON VANDERFORD

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE PAMELA R. GOODWINE, JUDGE  
ACTION NO. 03-CR-00007

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, DIXON, AND THOMPSON, JUDGES.

CLAYTON, JUDGE: Fayette Milton Vanderford, *pro se*, appeals the Fayette Circuit Court's order denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to vacate to or set aside the judgment entered against him.

Vanderford bases his RCr 11.42 motion on ineffective assistance of trial counsel.

After a careful review of the record, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

Vanderford was convicted, following a jury trial, of robbery, in the first degree and sentenced to thirty years' imprisonment. In a previous appeal of this case, we affirmed Vanderford's conviction and sentence in an unreported case, *Vanderford v. Com.*, 2004 WL 1909413 (Ky. App. 2004)(2003-CA-001360-MR). In doing so, we summarized the facts of the case as follows:

On November 17, 2002, sometime before 1:30 a.m., Fayette Milton Vanderford and Lisa Johnson arrived at a Shell Station located at Todds Road and Man O'War Boulevard in Lexington, Kentucky. Vanderford entered the store carrying a crowbar. He jumped over the counter into the small office area where Tiffany Boulder, the night clerk, was. Boulder fled, but Vanderford pursued her, caught her, and demanded the money from the cash register. Video footage from the station's security cameras showed Vanderford jumping across the counter toward Boulder with the crowbar in his hand. It also showed Vanderford taking money from Boulder. Vanderford took \$109.00 in cash and approximately \$131.00 in cigarettes. Then he and Johnson fled the scene in a vehicle Johnson was driving.

On January 6, 2003, a Fayette County grand jury indicted Vanderford on one count of robbery in the first degree, KRS [Kentucky Revised Statutes] 515.020. The grand jury also indicted Johnson as well. Vanderford pled not guilty, and the trial court appointed an attorney with Fayette County Legal Aid to represent Vanderford. Johnson, however, pled guilty to facilitation to robbery in the second degree and, in exchange for the amended charge, agreed to testify against Vanderford.

Shortly before trial, counsel became concerned over Vanderford's strong religious beliefs because, according to counsel, Vanderford was not assisting in trial preparation. According to counsel, every time he broached the subject, Vanderford would tell him that God

would “deliver” him. Counsel advised Vanderford that the evidence was overwhelming, and he asked Vanderford for his input regarding a defense. However, Vanderford merely told counsel that God would show counsel the way when the time came.

As the trial date approached, the Commonwealth made a plea offer of ten years but Vanderford refused it. Later, the Commonwealth had difficulties locating Boulder, who was subpoenaed to testify against Vanderford. Due to this, the Commonwealth offered to amend the charge to robbery in the second degree with a sentence recommendation of five years. Defense counsel conveyed this new offer to Vanderford. However, Vanderford rejected it and told counsel that he believed that God would not allow him to be sentenced to more than one year.

After counsel conveyed Vanderford's rejection to the Commonwealth, the prosecutor withdrew the five-year offer. However, a few days later, Vanderford told counsel that he wanted to take the five years. Counsel told this to the prosecutor. The prosecutor rejected this but made a new offer to amend the charge to robbery in the second degree with a sentence recommendation of seven years. Counsel conveyed this new offer to Vanderford, but he rejected it as well.

At this point, counsel made an oral motion for Vanderford to be evaluated for competency. Counsel stated his belief that Vanderford's religious faith was excessive to the point of fanaticism and it rendered Vanderford irrational. At a hearing, counsel argued that Vanderford was unable to consider what was in his best interest due to his overpowering religious zeal. As proof of this, counsel argued that Vanderford had repeatedly told counsel that God would “deliver” him despite the evidence. Counsel argued that Vanderford's rejection of both the five-year offer and the seven-year offer clearly demonstrated that he lacked competency.

The trial court questioned Vanderford at length whether he understood the nature and the consequences

of the proceedings against him. He told the trial court that he understood that he had been charged with robbery in the first degree, a felony. He told the trial court that he understood that if he proceeded to trial that he could be convicted; that he could be sentenced up to twenty years; and that he would not be eligible for parole until he had served eighty-five percent of his sentence. He told the trial court that he understood the evidence against him was very strong and that he had limited options regarding a defense.

Moreover, Vanderford told the trial court that he never threatened Boulder verbally or physically and never brandished the crowbar in such a way to have threatened her; thus, he felt that he was not guilty of robbery in the first degree. Vanderford continued to insist that God would deliver him. When the trial court asked him how God would do this, he told the court that he did not know. Nevertheless, he told the Court that he had faith in God and felt that God would not let him serve more than a year. Despite this, he readily acknowledged that it may be God's will that he serve twenty years.

Near the end of the hearing, Vanderford repeatedly asked the prosecutor for leniency and asked her not only to recommend a five-year sentence but also asked her to recommend probation. Vanderford reasoned that since his co-defendant, Johnson, received probation, he ought to as well.

After listening to Vanderford, the trial court found no reasonable basis to question Vanderford's competency, thus, denied the defense motion. Subsequently, Vanderford proceeded to trial. The jury convicted Vanderford of robbery in the first degree and sentenced him to eighteen years. Counsel then filed an appeal on Vanderford's behalf.

Discretionary review of the decision was denied by the Kentucky Supreme Court on April 13, 2005.

Subsequently, on February 7, 2006, Vanderford filed an unverified RCr 11.42 motion to vacate alleging that counsel was ineffective for failing to assert an extreme emotional disturbance defense to the robbery charge.

Additionally, Vanderford contended that his counsel was ineffective not only in failing to assert his mistaken identity defense but also not asserting some acts and omitting others. After filing his motion, Vanderford was appointed counsel who supplemented Vanderford's memo and raised the additional claim of ineffective assistance by counsel for failing to call witnesses in mitigation of punishment.

The court held a hearing on the motion on May 29, 2008. The only witnesses were Vanderford and his original counsel, Gene Lewter. Lewter outlined a lack of cooperation by Vanderford in preparing for trial and his continued insistence that God would provide. Additionally, Lewter testified that Vanderford did not give him the names of any witnesses. The court denied the RCr 11.42 motion after the hearing for the following reasons: extreme emotional disturbance is not a defense to robbery; Vanderford did not provide the names of witnesses; and, even if he had, it was not shown that this testimony would have made a difference. A written order confirming the above decision was entered the following day, and Vanderford appeals from this order.

#### STANDARD OF REVIEW

The standard of review for denial of a motion for post-judgment relief under RCr 11.42 is well-settled. Generally, to establish a claim for ineffective assistance of counsel, a movant must meet the requirements of a two-prong test by

proving: 1) counsel's performance was deficient; and 2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord *Gall v. Com.*, 702 S.W.2d 37 (Ky. 1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). Under *Strickland*, the standard for attorney performance is reasonable, effective assistance. A movant bears the burden of establishing that his counsel's representation fell below the objective standard of reasonableness. In doing so, he must overcome the strong presumption that counsel's performance was adequate. *Jordan v. Com.*, 445 S.W.2d 878 (Ky. 1969); *McKinney v. Com.*, 445 S.W.2d 874 (Ky. 1969). Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversarial process.

#### ANALYSIS

1) Counsel was ineffective because he failed to present evidence on Vanderford's behalf at the hearing requesting a competency evaluation.

Vanderford, with this argument, changes his argument on appeal. His original argument was that of extreme emotional disturbance. Moreover, this issue was addressed in the previously cited unreported Court of Appeals opinion. In that opinion, we wrote that the Fayette Circuit Court held a competency hearing wherein Vanderford was thoroughly questioned about whether he understood the nature and consequences of the proceedings against him. The record of the trial demonstrated that Vanderford understood both the nature and the consequences of the proceedings against him. The Court held that a reasonable judge in the same

situation as the trial court would have not experienced doubt regarding Vanderford's competency to stand trial, and thus, the trial court did not err.

Given that the issue of competency, albeit through an ineffective assistance of counsel claim now, has already been determined, we will not address it again. It has been clearly established that an issue raised and rejected on direct appeal may not be relitigated in an RCr 11.42 proceeding by claiming that it amounts to ineffective assistance of counsel. [\*Brown v. Com.\*, 788 S.W.2d 500 \(Ky. 1990\)](#); *Stanford v. Com.*, 854 S.W.2d 742 (Ky. 1993).

2) Counsel was ineffective because he failed to introduce mitigating evidence during the penalty phase.

Vanderford argues that Lewter did not present or attempt to present mitigation witnesses during the penalty phase. This argument was fully vetted at the hearing on the RCr 11.42 motion. At the evidentiary hearing, Vanderford had the opportunity to provide evidence of his counsel's failure to introduce mitigating evidence at the penalty phase. But Vanderford offered no such evidence. The strong presumption that counsel's performance was effective cannot be overcome by speculation and innuendo concerning the actions by counsel in preparing the case. In order to prove that his counsel's performance was below the objective standard of reasonableness, the facts must show that Vanderford was deprived of a fair trial and a reasonable result. *Strickland, supra*. Here, Vanderford at his evidentiary hearing on this issue failed to provide any evidence that counsel's actions prejudiced his ability to receive a fair trial.

Finally, we are aware that the Vanderford's motions in circuit court were not verified as required by RCr 11.42, and that motions may be summarily dismissed for failure of the movant to sign and verify the motion. RCr 11.42(2). *See Bowling v. Com.*, 981 S.W.2d 545 (Ky. 1998). But while we agree with the importance of verification, in this case we will not substitute our opinion for that of the trial court, particularly in light of the language that says the trial court "may" dismiss the case.

### CONCLUSION

For the foregoing reasons, the opinion and order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

#### BRIEFS FOR APPELLANT:

Fayette M. Vanderford, *pro se*  
Central City, Kentucky

#### BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

Gregory C. Fuchs  
Assistant Attorney General  
Frankfort, Kentucky