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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001016-MR

PEGGY CHAFFIN — APPELLANT

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS,[1] JUDGE
ACTION NOS. 02-CR-00133 AND 02-CR-00139

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, LAMBERT, AND NICKELL, JUDGES.

CAPERTON, JUDGE: The Appellant, Peggy Chaffin, pled guilty on October 24, 2002, to receiving stolen property in an amount over $300, driving under the influence, and no operator's license,[2] and also pled guilty to four counts of criminal

[1] The matter *sub judice* was presided over predominately by Hon. Lewis D. Nicholls, though various motions were also heard and decided by Hon. Robert Conley.

[2] Case number 02-CR-00133.

possession of a forged instrument in the second degree.[3] Her sentences[4] were ordered to run concurrently. She now appeals the denial of Kentucky Rules of Criminal Procedure (RCr) 11.42 relief by the Greenup Circuit Court.

As noted, Chaffin pled guilty to the aforementioned charges and was sentenced to a total of three years' imprisonment. She was placed on probation in both cases on November 21, 2002, on the specific condition that she successfully completes drug court. The term of probation was set at five years for case 02-CR-00133. No order specifically fixing the term of probation for case 02-CR-00139 could be located.

On May 21, 2003, the circuit court was notified that Chaffin had violated probation due to excessive positive drug tests, failure to report for drug testing, repeated violations and arrests, and excessive use of alcohol. On that date, Chaffin was terminated from drug court. The court subsequently held a probation revocation hearing, which included participation by Chaffin and her counsel on July 24, 2003. Thereafter, Chaffin's probation was revoked in an order entered on July 31, 2003, due to her failure to successfully complete drug court.

The court later shock probated Chaffin in both cases in an order entered on December 4, 2003. Chaffin's probation was for a period of five years, and was again conditioned upon her completion of drug court. Nevertheless, on July 13, 2004, the court was again notified, in case 02-CR-00133, that Chaffin had

[3] Case number 02-CR-00139.

[4] Chaffin was sentenced to two years for the forgery conviction and three years for receiving stolen property, DUI, and failure to possess an operator's license.

violated probation by absconding from the drug program and walking away from treatment. Accordingly, on July 13, 2004, the court terminated Chaffin from drug court. It conducted a second probation revocation hearing on January 6, 2005, in which Chaffin and her counsel participated. Chaffin's probation was thereafter revoked in an order entered on January 19, 2005, the stated reason being that she had obtained new convictions in the Boyd County District and Circuit Courts.

Subsequently, on February 12, 2009, Chaffin filed a pro se motion in case 02-CR-00133 styled simply, "Motion,"[5] in which she asked the court to set aside her felony conviction for receiving stolen property over $300. Chaffin attached appraisals claiming that the property in question, a car, was valued at less than $300. She also complained that her attorneys were inefficient and incompetent, and attached printouts of her Department of Corrections resident card containing an unexplained notation about being "mentally ill." Chaffin also threatened to sue various people for enumerated reasons, including deprivation of freedom, and lack of medical care for mental illness.

On February 26, 2009, the Commonwealth referred to that motion in court as an RCr 11.42 motion for ineffective assistance of counsel that was made outside of the statutory time limit. The video record reflects no action on the motion,[6] although the court docket sheet from that date, signed by the judge,

[5] T.R. p. 82.

[6] Our review of the video record in this regard reveals the Commonwealth describing the motion as "an 11.42 motion," the Judge writing something down, and then calling the next case. No further action is evidenced on the video log at that time.

indicates that the court overruled the "*Pro Se* Motion to Set Aside Felony Charges."

Thereafter, Chaffin filed a pro se "Motion Under 1142"[7] (sic) in both of her cases on April 22, 2009. Therein, she alleged "insufficient counsel" and "criminal abuse" by prosecutors. She further stated that the prosecution covered up a baby theft ring run by a drug court specialist and an employee from the Department of Human Services. She claimed that the drug court worker said he would get her out of trouble if she would relinquish her baby to him. Further, Chaffin listed the judges and prosecutors that she claimed knew or should have known about the baby theft operation, and further stated that they wanted her out of the way. Chaffin also alleged that these individuals must "take blame for baby theft ring and white slavery and driving her out of her mind." Finally, Chaffin asserted that she was "entitled to have 11.42 properly represented by a competent attorney at no cost to her." She attached her DOC resident card to the motion.

The Commonwealth responded to Chaffin's motion, pointing out that it was untimely filed, and requested a hearing. The court considered the motion in open court on April 30, 2009. At that time, the Commonwealth indicated that a hearing date would be needed. The Court stated that it would look at the motion and was unsure if a hearing was needed or not. A docket sheet dated April 30, 2009, in case 02-CR-00133 indicates that the court took the motion under submission.

[7] T.R. p. 92.

Thereafter, on May 7, 2009, orders were entered in both cases overruling Chaffin's RCr 11.42 motion. The order first states that Chaffin had filed for shock probation, but then states that the motion "is well over three (3) years from date of the order revoking probation, which is outside the time period an 11.42 can be made."

Subsequently, on May 22, 2009, Chaffin filed several documents and attachments, including a motion to proceed with an appeal *in forma pauperis*; two copies of her previous motion to set aside felony charges in case 02-CR-00133; a notice of appeal of the court's May 7, 2009, order; a motion "with leave to file a late motion of appeal"; a copy of her "Motion under 1142"; a copy of her DOC resident record card; a copy of the Commonwealth's response to her RCr 11.42 motion; copies of the appraisals of the value of the stolen car she received; and a copy of the court's May 7, 2009, order overruling her RCr 11.42 motion as untimely made. A copy of the docket sheet reflecting that the court sustained her motion to proceed *in forma pauperis* was entered on May 28, 2009.

Thereafter, this Court required the Department of Public Advocacy (DPA) to review the case record on August 21, 2009. Chaffin filed a pro se brief with this Court on August 24, 2009. Thereafter, the DPA moved this Court to deny Chaffin's request for appointed counsel on October 1, 2009. On October 9, 2009, this Court denied the motion for counsel to be appointed and ordered Chaffin to file a brief within 60 days of the order.

Subsequently, on November 16, 2009, Chaffin filed her pro se brief in this matter. This November brief was identical to the August 24, 2009, brief except insofar as the August brief included an attached document directed to the parole board which the November brief did not contain, and the November brief contained a copy of the May 7, 2009, trial court order overruling Chaffin's April 22, 2009, RCr 11.42 motion, which the August brief did not contain. We review the November 16, 2009, brief as Chaffin's brief for purposes of this appeal.

We note at the outset that to prevail on a claim of ineffective assistance of counsel a criminal defendant must meet a two-prong test. The test was initially set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The first prong of that test required a defendant to show that counsel's performance was deficient, which is to say that the defendant must show that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. The second prong in *Strickland*, the "prejudice" prong, was modified by *Hill v. Lockhart*, 474 U.S. 52, 59 (U.S. Ark. 1985), and became "whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."

The standard established by *Strickland* and modified by *Lockhart* is set forth in *Sparks v. Commonwealth,* 721 S.W.2d 726, 727-28 (Ky. App. 1986) (citations omitted) as:

> 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 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.

On the issue of whether an evidentiary hearing is required, we note that RCr 11.42 requires an evidentiary hearing only if the answer raises a material issue of fact that cannot be determined on the face of the record. *Bowling v. Commonwealth*, 981 S.W.2d 545, 549 (Ky. 1998). Thus, if the record refutes the claims of error, there is no need for an evidentiary hearing, nor is a hearing necessary where the allegations, even if true, would be insufficient to invalidate the conviction. *Id*. Indeed, as explained by this Court in *Brewster v. Commonwealth*, 723 S.W.2d 863, 865 (Ky. App. 1986):

> In making its decision on *actual* prejudice, the trial court obviously may and should consider the totality of the evidence presented to the trier of fact. If this may be accomplished from a review of the record, the defendant is not entitled to an evidentiary hearing.

We review the trial court's denial of an RCr 11.42 motion for an abuse of discretion. The test for abuse of discretion is whether the trial judge's decision

was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English,* 993 S.W.2d 941, 945 (Ky. 1999) (citing 5 Am. Jur. 2d *Appellate Review* § 695 (1995)). We review this matter in light of the foregoing.

In her brief recitation of the facts of the matter *sub judice*, Chaffin states that she filed a "motion" on February 12, 2009, and a "second supplementary motion" on April 22, 2009. We first address the February 12, 2009, motion styled by Chaffin as "Motion to Set Aside Felony Charges" in case 02-CR-00133. As noted, that motion was overruled by the trial court on February 26, 2009. In her brief to this Court, Chaffin argues that she is mentally ill and had incompetent representation at the time of her plea. Accordingly, she asserts that the trial court should have granted her motions. We disagree.

We find that Chaffin's motions must necessarily fail for several reasons. First, we note that Chaffin filed her February 12, 2009, motion over six years following her October 24, 2002, guilty plea, which resulted in a final judgment dated November 21, 2002. Certainly, this was outside of the three-year limit in which to file a collateral attack as mandated by RCr 11.42(10). Moreover, Chaffin never appealed the February 26, 2009, docket sheet order overruling her motion. This aside, we find the motion substantively lacking as well.

In reviewing the February 12, 2009, motion, we find that while Chaffin referred to indications on her DOC resident record card which show a citation for being mentally ill, she offers no additional details as to her mental status, any medical reports concerning that status, or any other information which

might substantiate her claims in this regard, or indicate to this Court that she was not fully competent when she made her guilty plea below. Pursuant to RCr 11.42(2), Chaffin was required not only to state the grounds for her motion, but also the facts which supported those grounds. As she did not do so, summary dismissal was warranted.

Chaffin also argued that her attorneys were "inefficient" and "incompetent." In support thereof, she asserts that counsel failed to have the car which she illegally possessed appraised to determine if it was worth $300 or more. She also states that she was threatened with twenty years' imprisonment if she did not plead guilty. We are not persuaded that these allegations alone are sufficient to sustain a claim for ineffective assistance of counsel, or to warrant an evidentiary hearing.

Our review of the record reveals that Chaffin and her counsel advised the court that they were aware of any defenses to the charges, as well as her right to produce evidence at trial, and that she chose to waive those rights and defenses by entering her plea. Chaffin also indicated clearly that her plea was made knowingly and voluntarily, and without any threats of coercion. Further, Chaffin pled to a sentence which was ultimately much less than she would have faced had she gone to trial. Accordingly, we find that her allegations concerning mental illness and ineffective counsel were conclusively refuted by the record, and a hearing was not necessary. Accordingly, we affirm.

Concerning Chaffin's second motion, filed on April 22, 2009, and entitled, "Motion Under 1142," we again affirm. As was the case with the February 2009 motion, Chaffin's April 2009 motion was filed beyond the three-year time limit set forth in RCr 11.42(10). Regardless, we find this motion to be without merit. This motion included bizarre allegations concerning a purported child theft and white slavery ring, which Chaffin asserts drove her "out of her mind." She did not specify what her counsel did that was ineffective, erroneous, or prejudicial to her case. Further, she again provides no support for her claim of mental illness aside from her DOC resident record card. Accordingly, we believe summary dismissal of her motion was warranted pursuant to RCr 11.42, and we affirm.

Wherefore, for the foregoing reasons, we hereby affirm the orders of the Greenup Circuit Court denying Chaffin's requests for relief pursuant to RCr 11.42.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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