

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2009-CA-001991-MR

JAMES EARL PORTER

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE THOMAS D. WINGATE, JUDGE  
ACTION NOS. 05-CR-00188 AND 06-CR-00105

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON, MOORE, AND VANMETER, JUDGES.

CAPERTON, JUDGE: The Appellant, James Earl Porter, appeals the October 19, 2009 order of the Franklin Circuit Court denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion and refusing to appoint him counsel for same, in which Porter sought to vacate his ten-year sentence for four counts of criminal

possession of a forged instrument in the second degree and two counts of fraudulent use of a credit card over \$100 within a six-month period.

Beginning on or about June 27, 2005, Porter and Mary Trent wrote four checks on accounts which they did not own and without permission of the owners. Three of these checks were drawn on the account of David Penny in the total amount of \$1,055 and one was drawn on the account of Sheena Gossi in the amount of \$300.

As noted, Porter was indicted on four charges of criminal possession of a forged instrument in the second degree, on August 24, 2005. A public advocate was appointed to represent Porter and the case was scheduled for trial, which was ultimately continued until March 14, 2006. On January 11, 2006, Porter was released on his own recognizance.

On March 6, 2006, while out on bond, Porter broke into a car and stole the owner's checkbook, credit card, and debit card. The credit and debit cards were used for transactions totaling more than \$600. Accordingly, on May 17, 2006, Porter was indicted on two counts of fraudulent use of a credit card over \$100.00 within a six-month period.<sup>1</sup>

Thereafter, the Commonwealth made an offer in both cases, whereby, in exchange for Porter's guilty plea, he would serve five years for each of the four counts of criminal possession of a forged instrument in the second degree, running concurrently for a total sentence of five years to serve in Case Number 05-CR-

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<sup>1</sup> That case number is 06-CR-00105. Porter obtained private counsel who represented him on both charges, which were consolidated.

00188. The offer further provided that Porter would serve five additional years on each of the two counts of fraudulent use of a credit card over \$100 within a six-month period, running concurrently in case number 06-CR-00105, but consecutively to the five-year sentence in 05-CR-00188, for a total of ten years' time to be served. Restitution was also ordered.

On December 11, 2006, Porter entered a guilty plea. Porter was released from custody pending sentencing which was scheduled for January 19, 2007. He was rearrested for unrelated charges prior to sentencing. Following a continuing of his sentencing date at his own request, Porter appeared before the court on March 2, 2007, and asked to withdraw his plea and for new counsel to be appointed. The court declined to withdraw his plea but did appoint a public advocate to represent him.

On March 16, 2007, Porter appeared before the court with his new counsel and his sentence was imposed as recommended in his plea. Porter's only request at that time was that his transfer to the penitentiary be expedited. Porter made no mention of any further request to withdraw his plea at that time and did not appeal the court's decision to deny his request for withdrawal of the plea.

Subsequently, on September 11, 2009, Porter filed a motion to vacate under RCr 11.42 as well as a motion to proceed in forma pauperis, a motion for appointment of counsel, and a motion for findings of fact and conclusions of law pursuant to CR 52.04. In so doing, he asserted innocence on all charges and alleged that counsel did not investigate or advise the court of his medical or mental

health status. He further asserted that counsel did not investigate the criminal charges against him and that counsel forced him to take a guilty plea by discussing his codefendant's personal problems and by telling him that he could smoke and would get better food in prison. In the memorandum in support of his motion, Porter stated that he entered his plea so he could get out of jail and that he was influenced by his female codefendant's problems, in addition to drugs and alcohol, and mental health issues.

In an opinion entered on September 28, 2009, the trial court denied Porter's motion to vacate without an evidentiary hearing. The court denied Porter's motion under CR 52, and with respect to his motion to proceed in forma pauperis and for appointment of counsel, the court stated as follows:

Likewise, the Court purposely neglected to sign the Movant's Motion to Proceed In Forma Pauperis because KRS [Kentucky Revised Statutes] 453.190, KRS 31.110, and KRS 454.410 only apply to civil actions. Still, had this been a civil action, this Court "concludes as a matter of law" that it would be without power to sign the In Forma Pauperis Motion, due to the "fact" that the Warden did not attach a certified copy of the inmate's account for the six (6) months preceding the filing of the motion. As a result, this Court would have "concluded as a matter of law" that Movant failed to comply with KRS 454.410.

See October 19, 2009 Opinion and Order of Franklin Circuit Court, p. 2, fn 1.<sup>2</sup>

<sup>2</sup> Concerning the court's commentary in this regard, we are in agreement with the court that KRS 453.190 is a provision intended to apply to civil actions, that is, when an inmate intends to sue another civilly. While Porter argues that the provision applies to him because it includes reference to "inmates," we disagree. Concerning KRS 31.110, however, we disagree with the trial court and find that it does in fact pertain to criminal proceedings since it specifically addresses situations under which the Department of Public Advocacy (DPA) may be appointed to represent defendants, and particularly includes scenarios wherein the defendant requests post-conviction relief. Nevertheless, the court was correct in noting that in order to proceed in forma

In specifically addressing the merits of the RCr 11.42 motion, the trial court found that the issues raised were frivolous and would never entitle Porter to relief under RCr 11.42. It found that no coercive influence existed and that the only possibly meritorious claim (that discoverable evidence may have existed but was not obtained by counsel)<sup>3</sup> did not rise to the level necessary to prove inadequacy of counsel. In so finding, the court stated:

The only claim which could ever have any merit, presupposing it is true, is that there are audio and video tapings and security records somewhere in existence, which would have exonerated the movant. However, even assuming that these tapes existed, this simply does not equate to inadequate counsel. The Defendant had a duty to assist in his own defense.

*See* October 19, 2009 Opinion and Order of the Franklin Circuit Court. This appeal followed.

We note at the outset that to prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish that performance of counsel was deficient and below the objective standard of reasonableness, and prejudicial in such a way as to deprive the defendant of a fair trial and a reasonable result. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). Thus, the critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the

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pauperis, an inmate must attach documentation necessary to establish indigency. As Porter did not do so in this instance, we believe the court was ultimately correct in denying his motion, and we decline to address this issue further herein.

<sup>3</sup> Such as information from the crime scenes that maintained security audio and videotapings of the transactions at issue.

hands of probable victory. *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992). To prove prejudice under a Sixth Amendment claim, a defendant must show that, but for counsel's errors, he or she would not have been convicted. *See United States v. Donathan*, 65 F.3d 537, 541 (6th Cir. 1995).

When considering a claim of ineffective assistance of counsel, the reviewing court must consider the totality of evidence before the judge or jury and assess the overall performance of counsel throughout the case to determine whether the acts or omissions at issue overcome the presumption that counsel rendered reasonable professional assistance. *Morrow, supra*, citing *Kimmelman v. Morrison*, 477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). A reviewing court must be highly deferential in scrutinizing counsel's performance when attempting to determine whether counsel has been ineffective. *See Harper v. Commonwealth*, 978 S.W.2d 311, 315 (Ky. 1998).

Further, we note that the standard of review is even more stringent when the court denies an RCr 11.42 in a case where the defendant has entered a valid guilty plea to the charges. In such a situation, a showing that counsel's assistance was ineffective in enabling a defendant to intelligently weigh 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 pled

guilty but would have insisted on going to trial. *Bronk v. Commonwealth*, 58 S.W.3d 482, 486 (Ky. App. 1990).

Finally, 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.

On appeal, Porter argues that the trial court erred in overruling his RCr 11.42 motion without holding an evidentiary hearing. In so arguing, Porter asserts that there were matters in dispute which could not be adjudicated by reference to the record alone. Although Porter raised several grounds for

ineffective assistance of counsel in his initial RCr 11.42 motion, on appeal he relies only on the assertion that he received ineffective assistance of counsel and was denied due process of law when defense counsel failed to conduct any pretrial investigation.

Specifically, Porter argues that counsel made no efforts to obtain any of the information from the actual crime scenes that maintained security audio and video tapings of all transactions, and that counsel did not consult with him regarding these alleged events. He asserts that this issue involves matters which are collateral to the record and which cannot be determined on the face of the record. He therefore argues that at a minimum, he was entitled to an evidentiary hearing.

In response, the Commonwealth argues that Porter clearly received effective assistance of counsel, who negotiated him a very fair plea deal in a case where he would almost certainly have been convicted. Thus, the Commonwealth argues that Porter's counsel was certainly not ineffective for recommending that he take that deal. As for Porter's specific allegations that counsel was ineffective for failing to obtain security footage from the locations where the crimes occurred, the Commonwealth directs this court's attention to discovery provided to Porter's counsel indicating that "an investigation revealed that James Porter was on video using the cards at both locations."<sup>4</sup>

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<sup>4</sup> TR 24, 06-CR-00105.



Having reviewed the record, we are in agreement with the Commonwealth that Porter received effective assistance of counsel. Porter received a sentence lower than that which would have accompanied a conviction on all charges, a sentence which could have amounted to more than thirty years. Porter entered into a guilty plea which the court found to be voluntary and valid, and we see no reason to find otherwise now. Moreover, while Porter argues that counsel failed to conduct an adequate pretrial investigation, particularly into whether or not security footage existed of the crimes being committed, the record is clear that his counsel received discovery indicating that video footage of Porter using the cards at both locations existed. Accordingly, further investigation in this regard was unnecessary and certainly did not rise to the level of ineffective assistance of counsel as it has been defined by the courts of this Commonwealth.

Ultimately, the question of whether or not an attorney meets the test for effective assistance of counsel is an issue of fact to be determined by the trial court and its findings will not be set aside on appeal unless they are clearly erroneous. *See Ivey v. Commonwealth*, 655 S.W.2d 506 (Ky. App. 1983). We do not find that to be the case in the matter *sub judice*, nor do we find that an evidentiary hearing was necessary for the court to decide the issues raised by Porter. These issues could clearly be resolved on the basis of the record alone. Whereby, for the foregoing reasons, we hereby affirm the October 19, 2009 order of the Franklin Circuit Court denying Porter's RCr 11.42 motion without an evidentiary hearing.

ALL CONCUR.

BRIEF FOR APPELLANT:

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