

RENDERED: NOVEMBER 2, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000016-MR

RICHARD ALLEN MEREDITH

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 01-CR-001304

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * **

BEFORE: CLAYTON, STUMBO, AND TAYLOR, JUDGES.

STUMBO, JUDGE: Richard Allen Meredith appeals from a November 25, 2008 order of the Jefferson Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rule(s) of Criminal Procedure (RCr) 11.42. Meredith argues on appeal that the trial court erred by denying his RCr 11.42 motion without first conducting an evidentiary hearing. Because we find that one of the issues raised in

the motion cannot be resolved upon the face of the record, we reverse and remand to the Jefferson Circuit Court for an evidentiary hearing.

Background

On May 30, 2001, a Jefferson County Grand Jury indicted Meredith on one count of complicity to murder and one count of complicity to robbery in the first degree. The charges stemmed from a robbery and murder occurring on November 22, 2000, at Harold's Hubcaps in Louisville, Kentucky, wherein the owner of Harold's Hubcaps, Harold Smith, was shot to death.

During the investigation of the murder, police obtained information that an individual named Michael Crain had been involved in the crimes. Police were able to track down Crain, but Crain fled upon being approached by police. A foot chase ensued, at the end of which Crain was found dead. It was unclear whether the shots were self-inflicted or from police fire. Following Crain's death, police received an anonymous tip that Meredith may have been involved. Meredith was subsequently arrested and indicted for complicity to the crimes.

The case proceeded as a capital matter and a jury trial was held on August 22, 2002. A Jefferson County jury found Meredith guilty of both complicity to murder and complicity to robbery. After the guilt phase of trial, Meredith waived formal sentencing and accepted a sentencing offer from the Commonwealth for life without the possibility of parole for twenty-five years (LWOP-25) on the murder charge and twenty years on the robbery charge (set to

run concurrently). The Jefferson Circuit Court sentenced Meredith in conformity with the Commonwealth's recommendation.

Meredith then appealed to the Supreme Court as a matter of right and his conviction was affirmed by the Court on May 19, 2005. Slightly less than three years later, on April 25, 2008, Meredith filed an RCr 11.42 motion alleging ineffective assistance of trial counsel. The court denied the motion on November 25, 2008. Meredith did not timely appeal from the denial of the motion. One year later, however, in December of 2009, Meredith moved to file a belated appeal. This Court allowed the belated appeal for good cause shown.

Accordingly, we now review the trial court's denial of Meredith's RCr 11.42 motion without a hearing.

Standard of review

In order to prevail on a post-conviction RCr 11.42 motion for ineffective assistance of counsel, a movant must demonstrate: (1) that his counsel's performance was deficient and (2) that he suffered prejudice as a result of that deficiency. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), as adopted by *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). A movant in an RCr 11.42 action must overcome a strong presumption that his counsel's assistance was constitutionally sufficient. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065; *Commonwealth v. Pelfrey*, 998 S.W.2d 460, 463 (Ky. 1999).

An evidentiary hearing need only be held when there is "a material issue of fact that cannot be determined on the face of the record." RCr 11.42(5).

Where the record refutes the claim of error, or “where the allegations, even if true, would not be sufficient to invalidate the conviction,” an evidentiary hearing need not be held. *Harper v. Commonwealth*, 978 S.W.2d 311, 314 (Ky. 1998).

Analysis

Meredith argues that his trial attorney (1) failed to fully explain the consequences of accepting a sentence of LWOP-25 on the murder charge, and that had his counsel fully explained, he would have chosen instead to be sentenced by the jury, and (2) that his counsel was ineffective for failing to put on medical testimony regarding his physical limitations, namely, his ability to run.

As to the first issue, despite Meredith’s protestations to the contrary, the allegation may be refuted from the face of the record. Indeed, the trial court held a plea colloquy on the record wherein Meredith testified to his understanding of the sentencing agreement, that he understood he was waiving his right to be sentenced by a jury, and that he would not be eligible for parole for at least twenty-five years. He acknowledged the plea was made freely and voluntarily.

A colloquy is “an affirmative showing, on the record, that a . . . plea is voluntary and intelligent[.]” *Simms v. Commonwealth*, 354 S.W.3d 141, 144 (Ky. App. 2011). As our Supreme Court acknowledged in *Ford v. Commonwealth*, 453 S.W.2d 551, 552 (Ky. 1970), a thorough plea colloquy “enables the trial court in post-conviction proceedings to refute from the record” allegations that the plea was not voluntary. Given that the trial judge undertook a thorough plea colloquy with

Meredith regarding his sentencing agreement, we find no evidentiary hearing was required on this issue and a denial of the motion was proper.

We now turn to the second issue raised on appeal, that Meredith's counsel was ineffective for failing to put on expert medical testimony regarding Meredith's physical abilities. Specifically, Meredith contends that he was unable to run. The testimony at trial was that the second suspect at the scene (purportedly Meredith) ran towards the getaway vehicle. Meredith contends that he was injured in a car accident in 1998 and sustained serious injuries to his knee and leg which prevent him from running or moving quickly. Thus, Meredith's argument at trial was that he could not have been the second suspect at the scene.

In order to determine the significance of this fact, we must first address the other evidence against Meredith at trial. At trial, the Commonwealth presented the witnesses Samantha Green and Barbara Ferguson who testified that they were eating at a Dairy Queen across from Harold's Hubcaps on the afternoon in question when Crain and another man entered the restaurant. The women both testified that they saw the men leave Dairy Queen and cross the street to Harold's Hubcaps. Shortly thereafter, the women saw the men run towards a red Ford Tempo and speed away. Neither woman thought anything was wrong until they saw the subsequent news stories about the robbery and murder. The women positively identified Crain from a photo lineup, however, neither was able to positively identify Meredith.

Three other individuals, Brian Davis, Ashley Meyer, and Steve Craven, also testified at trial. They testified that on the day of Crain's death, Meredith arrived at Davis's home around 10:00 p.m. Following a news story about Crain, Meredith admitted to the three men that he was the one who drove Crain to Harold's Hubcaps. Meyer testified that Meredith had previously told him he had observed the owner of Harold's Hubcaps with large amounts of cash, and that he had tried to "gas [Crain's] head up" about the robbery. The men testified that Meredith told them he dropped Crain off at Harold's Hubcaps and gave him a spare cell phone. Meredith explained that Crain quickly left the premises because a uniformed police officer was in the store. They further testified that Meredith said he drove Crain back to Harold's Hubcaps so that Crain could rob the store.

The three men testified that Crain, upon discovering there was only \$14 in the cash register, had an altercation with Smith. When Smith tried to run away, Crain shot him twice and called Meredith to pick him up. Davis testified that Meredith said Crain stole several "Indian"¹ figurines from the store before leaving. In addition, all three men testified that Meredith owned a red Ford Tempo.

Marcie Davis, a Jefferson County Police Detective, testified that when she went to Meredith's house to interview his girlfriend, she observed a curio cabinet containing several "Indian" figurines. Detective Davis also confirmed that Meredith owned a 1990 red Ford Tempo. Detective Davis further testified that

¹ While the figurines are referred to as "Indian" figurines in the record, it appears they were actually "American Indian" or "Native American" figurines.

Meredith's cell phone records showed he owned two separate phones and that, on the afternoon of the robbery, several calls were made between the phones.

Finally, Crain's girlfriend, Lisa Fusting, also testified at trial. She testified that Crain owned a gun. She further testified that on the afternoon of the robbery, Meredith came to the Archway Motel where they were staying to pick up Crain. She testified that the two returned to the motel later that evening. The shell casings retrieved from Harold's Hubcaps were later matched to Crain's gun.

Meredith never took the stand in his own defense or called any alibi witnesses. The defense did elicit from the testimony of friends and family that Meredith was unable to run.

Meredith contends that his counsel was ineffective for eliciting testimony from friends and family members that he could not run. Meredith argues it would have been far more persuasive had a medical professional testified to this fact. Meredith contends that he told his attorney that his treating physician was willing to testify at trial on his behalf that he could not run. Meredith's parents also apprised trial counsel of this fact. Despite trial counsel's awareness of his willingness to testify, trial counsel chose not to call the doctor, but to elicit this information from friends and family members of Meredith. Meredith contends that friends and family members are inherently less believable to a jury than a medical doctor.

Due to the close facts of this case, we agree with Meredith that an issue of fact is raised with respect to whether the decision not to call the physician

was the basis of a sound trial strategy. The only witnesses physically placing him at the scene of the crime claimed to have seen two individuals running towards a red vehicle. Because Meredith alleges that he cannot run due to an accident, his physician's medical opinion could have served to discredit the reliability of their eyewitness testimony. The other evidence against Meredith was not so overwhelming that this information could not have influenced the outcome of trial.

Therefore, we reverse and remand to the Jefferson Circuit Court. On remand, the trial court shall hold an evidentiary hearing to determine the nature of the doctor's testimony and whether any sound trial strategy existed for not calling him as a witness at trial.

ALL CONCUR.

BRIEF FOR APPELLANT:

William Yesowitch
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Joshua D. Farley
Assistant Attorney General
Frankfort, Kentucky