

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000609-MR

DENNIS D. CHILDERS

APPELLANT

v. APPEAL FROM BUTLER CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 07-CR-00056

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * ** * ** *

BEFORE: COMBS, STUMBO, AND WINE, JUDGES.

WINE, JUDGE: On November 13, 2007, a Butler County grand jury indicted Dennis Childers on charges of murder, tampering with physical evidence, kidnapping and being a persistent felony offender in the first degree (PFO I). The primary charges arose from the death of Teresa Childers in January of 2000. The

matter proceeded to trial in May and June of 2009. The Commonwealth completed the presentation of its case and the defense began the presentation of its case.

Shortly after the beginning of the defense case, Childers withdrew his plea of not guilty and entered of plea of guilty. In exchange for his guilty plea to a reduced charge of first-degree manslaughter, the Commonwealth agreed to dismiss the remaining charges and to recommend a sentence of thirteen years of imprisonment, which would run concurrently with his previous Butler County convictions. The trial court accepted Childers's guilty plea and ultimately imposed the recommended sentence.

Shortly thereafter, Childers filed a motion to vacate, set aside or correct his sentence pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. He alleged that his trial counsel coerced him into accepting the Commonwealth's guilty plea. He also maintained that his trial counsel provided ineffective assistance by failing to adequately cross-examine the Commonwealth's witnesses, by failing to investigate other exculpatory witnesses, and by engaging in improper contact with jury members. In an order entered on March 23, 2010, the trial court denied Childers's motion without an evidentiary hearing. This appeal followed.

In order to prevail on an ineffective assistance of counsel claim, Childers must satisfy a two-part test showing that his counsel's performance was deficient and that the deficiency caused actual prejudice affecting the outcome of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052,

2064, 80 L. Ed. 2d 674 (1984); *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). The burden falls on a movant to overcome a strong presumption that 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). In cases involving a guilty plea, a movant must prove that his counsel's deficient performance so seriously affected the outcome of the plea process that, but for counsel's errors, there is a reasonable probability that the movant would not have pleaded guilty but would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985); *Phon v. Commonwealth*, 51 S.W.3d 456, 459–60 (Ky. App. 2001).

Childers contends that he was entitled to an evidentiary hearing on his claims of ineffective assistance of counsel. An evidentiary hearing is necessary only where the record does not conclusively refute the allegations in the motion. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). In reviewing the trial court's denial of a request for post-conviction relief without an evidentiary hearing, our inquiry is whether the motion states grounds for relief that could not be conclusively resolved from the face of the record, and which, if true, would invalidate the conviction. *Baze v. Commonwealth*, 23 S.W.3d 619, 622 (Ky. 2000).

Childers primarily argues that his guilty plea was coerced by his counsel and was therefore not knowing and voluntary. Prior to accepting the guilty plea, May signed documents styled "Commonwealth's Offer On A Plea of Guilty"

and “Motion to Enter Guilty Plea.” (Form AOC-491.) The latter form listed the rights guaranteed to criminal defendants by the Constitution, and included a statement that “I understand that if I plead ‘GUILTY,’ I waive these rights.” The trial court conducted a colloquy with Childers as required by *Boykin v. Alabama*, 395 U.S. 238, 241–42, 89 S. Ct. 1709, 1711- 12, 23 L. Ed. 2d 274 (1969). At the hearing, Childers acknowledged that he had read the forms and understood the rights which he was waiving by pleading guilty. He also stated, under oath, that he was satisfied with the services which his attorney had provided, that no one had forced, threatened or coerced him into pleading guilty, that he was pleading guilty knowingly, willingly and voluntarily, and that he was pleading guilty because he was guilty of the offense.

In this motion, however, Childers maintains that his trial counsel coerced him into pleading guilty. In an affidavit attached to the motion, Childers’s mother stated that Childers’s counsel had spoken to her during a break in the trial. He told her that he had spoken with several jury members, who had informed him that they intended to impose a life sentence on Childers. Childers’s mother communicated this to her son to convince him to accept the guilty plea. Childers also provided an affidavit stating that his counsel told him that one or more jury members had confided in him as to the outcome of the trial. In addition, two other individuals, Chelcy Lee Lawrence and Roger Johnson, provided affidavits stating that they had read a letter from trial counsel to Childers stating that he had conferred with jury members prior to the conclusion of the trial.

Based on these allegations, Childers contends that his trial counsel either had improper contact with jury members during the trial or he falsely stated that he had in order to coerce Childers into accepting the guilty plea. In either case, Childers argues that the misconduct would undermine the voluntariness of his guilty plea. We agree.

Childers's current assertions are at odds with his sworn statements during the guilty plea proceedings. Nevertheless, Childers has provided affidavits alleging that his trial counsel either had improper contact with jury members during the trial or falsely stated that he had such contact in order to convince Childers to accept the guilty plea. Childers also contends that his counsel's representations, both to him and to his mother, induced him to accept the guilty plea over his better judgment. These allegations, if proven, would undermine the voluntariness of his guilty plea. Finally, these allegations cannot be "conclusively proved or disproved [simply] by an examination of the record." *Fraser*, 59 S.W.3d at 452. Therefore, Childers was entitled to an evidentiary hearing on this matter.

Since we are remanding for additional proceedings on this issue, we will briefly address the other issue which Childers raises in support of his motion. Childers alleges that his trial counsel had a conflict of interest because he was concurrently representing the victim's sister in a civil proceeding related to the victim's death. But unlike the previous issue, Childers does not support this conclusory allegation with any affidavits or other evidence showing that his trial counsel was engaged in a conflicting representation. The purpose of RCr 11.42 is

to provide a forum for known grievances, not to serve as a fishing expedition for possible grievances. *Gilliam v. Commonwealth*, 652 S.W.2d 856, 858 (Ky. 1983). In the absence of any evidence supporting his allegation that his trial counsel had a conflict of interest, the trial court will not be required to consider this issue on remand.

Accordingly, the order of the Butler Circuit Court denying Childers's RCr 11.42 motion is vacated and this matter is remanded for appointment of counsel and an evidentiary hearing as set forth in this opinion.

ALL CONCUR.

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