RENDERED: MARCH 30, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001769-MR

WILLARD STEWART — APPELLANT

v.

APPEAL FROM OHIO CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 07-CR-00031

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, COMBS AND KELLER, JUDGES.

ACREE, JUDGE: The issue before us is whether the Ohio Circuit Court erred in denying Appellant Willard Stewart's motion to vacate his criminal conviction pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 without conducting an evidentiary hearing. Finding no error, we affirm.

On April 27, 2007, Stewart was indicted on first-degree possession of a controlled substance, possession of drug paraphernalia, trafficking in a controlled substance in or near a school building, and being a first-degree persistent felony offender (PFO I). The charges stemmed from an incident on February 6, 2007, when Stewart's girlfriend, Jennifer Aguilar, reported to Stewart's probation and parole officer, Jim Peck, that Stewart assaulted her the previous evening. Specifically, Aguilar claimed she and Stewart were at the home of Riley and Sara Scott engaging in the use of illicit drugs, including methamphetamine, and cutting and preparing methamphetamine for re-sale.[1] Aguilar and Stewart began arguing; Stewart then hit Aguilar in the face.

At the time of this incident, Riley Scott was on parole and Sara Scott was on probation; it happens that Officer Peck was their probation and parole officer. Based upon Aguilar's report, Officer Peck and other law enforcement officers went to the Scotts' home to investigate. Only Riley Scott and his minor child were present when the police officers arrived. Officer Peck proceeded to search the residence and, in doing so, discovered methamphetamine and substantial drug paraphernalia. Riley was immediately arrested.

In April 2007, Officer Peck testified before the Ohio County Grand Jury. He recounted Aguilar's description of the events of February 6, 2007, and described the items found during his search of the Scotts' residence the next day.

[1] Aguilar was apparently still under the influence of methamphetamine at the time she made the assault allegation and was unaware she was implicating herself as well as the Scotts.

Officer Peck also testified that, after the search, all the parties involved, including Stewart, admitted to trafficking drugs. Based on Officer Peck's testimony, the grand jury returned an indictment against Stewart.

On October 25, 2007, the Commonwealth tendered an offer of five years in jail in exchange for Stewart's plea of guilty to first-degree possession of a controlled substance and possession of drug paraphernalia; the Commonwealth agreed to dismiss the charges of trafficking in a controlled substance in or near a school building and PFO I.[2] Stewart accepted the Commonwealth's offer and entered a plea of guilty. The circuit court subsequently accepted Stewart's plea, adjudged him guilty of first-degree possession of a controlled substance and possession of drug paraphernalia, and sentenced him to five years in the Ohio County jail.

On July 14, 2010, Stewart moved, *pro se*, to vacate his conviction pursuant to RCr 11.42 alleging ineffective assistance of counsel. Stewart asserted his trial counsel was deficient in: (1) failing to investigate the facts of his case; (2) failing to interview or question eight (8) witnesses who were willing to testify on Stewart's behalf; (3) failing to inform Stewart of the legal elements of the charges against him; (4) failing to raise a valid defense; and (5) coercing and advising him

[2] The Commonwealth originally offered a ten-year sentence in exchange for Stewart's plea of guilty to trafficking in a controlled substance within 1,000 yards of a school in addition to the aforementioned charges. Prior to entering his guilty plea, however, the Commonwealth changed the recommended sentence from ten years to five years and agreed to dismiss the charge of trafficking within the vicinity of a school.

to plead guilty when he had a valid defense to the indicted charges.[3] He also moved for an evidentiary hearing on his RCr 11.42 claims and for appointment of counsel. The Commonwealth did not respond to any of these motions. On July 30, 2010, the circuit court denied Stewart's motions without conducting an evidentiary hearing. This appeal followed.

Stewart contends the trial court improperly ruled on his motion seeking RCr 11.42 relief without conducting an evidentiary hearing. He asserts the errors he raised could not be refuted by a simple review of the case file and record, but could only be determined by holding an evidentiary hearing. We disagree.

RCr 11.42 permits a person convicted of a crime to collaterally attack his sentence if he believes he received ineffective legal assistance from his trial attorney. No RCr 11.42 movant is automatically entitled, however, to an evidentiary hearing. *See Stanford v. Commonwealth*, 854 S.W.2d 742, 743 (Ky. 1993). Instead, a circuit court need only conduct an evidentiary hearing if (1) the movant shows the alleged error(s) is such that the movant would be entitled to relief under RCr 11.42, and (2) the motion raises an issue of fact that cannot be determined on the face of the record. *Parrish v. Commonwealth*, 272 S.W.3d 161, 166 (Ky. 2008); *Hodge v. Commonwealth*, 68 S.W.3d 338, 342 (Ky. 2001); RCr 11.42(5). With respect to the second prong, we are obligated to determine "whether the record refute[s] the allegations raised," not "whether the record

[3] Stewart also claims trial counsel was deficient in advising him to plead guilty to trafficking in a controlled substance within 1,000 yards of a school because no school existed within the requisite vicinity. However, we will not address this argument because, as explained, Stewart did not plead guilty to this offense.

support[s] the allegations." *Parrish*, 272 S.W.3d at 166; *see also Skaggs v. Commonwealth*, 803 S.W.2d 573, 576 (Ky. 1990) (explaining that when there is nothing outside the record which is material to the determination, a hearing is not necessary). Determining whether Stewart was entitled to an evidentiary hearing also requires us, in effect, to determine whether Stewart received ineffective assistance of counsel. *Parrish*, 272 S.W.3d at 167 (explaining the appellant's procedural claim that the circuit court erred in refusing to grant him an evidentiary hearing is intertwined with his substantive claim that he received ineffective assistance of counsel).

Stewart pleaded guilty; therefore, to establish an ineffective assistance of counsel claim, he must prove:

> (1) [t]hat 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.

Commonwealth v. Elza, 284 S.W.3d 118, 120-21 (Ky. 2009) (citing *Bronk v. Commonwealth*, 58 S.W.3d 482, 486-87 (Ky. 2001)); *see also Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). Thus, the inquiry requires the trial court to "evaluate whether the errors by trial counsel significantly influenced the defendant's decision to plead guilty in a manner which gives the trial court reason to doubt the voluntariness and validity of the plea." *Bronk*, 58 S.W.3d at 487.

Stewart first claimed his trial counsel was ineffective for failing to investigate the facts of his case, for failing to interview several witnesses, and for failing to inform Stewart of the legal elements of the charges against him. We need not address the substance of these claims, however, because Stewart failed to articulate specific facts to support them. RCr 11.42 requires that a movant seeking to vacate his conviction must both "state specifically the grounds on which the sentence is being challenged and *the facts* on which the movant relies in support of such grounds." RCr 11.42(5) (emphasis added). As explained by our Supreme Court, "[t]he requirement for the statement of 'facts on which the movant relies' means more than a shotgun allegation of complaints." *Stanford*, 854 S.W.2d at 748 (quoting RCr 11.42(5)); *see also Sanders v. Commonwealth*, 89 S.W.3d 380, 393 (Ky. 2002) ("It has been previously held that a motion for ineffective assistance must set out all of the facts necessary to establish the existence of a constitutional violation and the court will not presume facts omitted from the motion[.]") *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). "[C]onclusory allegations which are not supported by particular facts do not justify an evidentiary hearing" and may be summarily dismissed. *Haight v. Commonwealth*, 41 S.W.3d 436, 443 (Ky. 2001), *overruled on other grounds by Leonard*, 279 S.W.3d at 151.

Here, Stewart asserts the grounds on which he is seeking RCr 11.42 relief, but fails to assert any facts in support of those grounds. Specifically, Stewart fails to explain what particular facts of his case his attorney failed to investigate; he fails

to identify the eight witnesses he claims should have been interviewed and fails to state what testimony those witnesses could have offered; and, he fails to identify what elements of the offense(s) his attorney was unwilling or failed to explain. As a result, Stewart failed to establish a "minimum factual basis" in support of these ineffective assistance of counsel claims. *Stanford,* 854 S.W.2d at 748. Accordingly, the circuit court did not err in disposing of these claims without an evidentiary hearing. *See Skaggs*, 803 S.W.2d at 576.

Stewart next claims he received ineffective assistance of counsel because his attorney failed to raise a valid defense. His argument has two parts.

First, Stewart contends his attorney was deficient in failing to inform the Commonwealth that Officer Peck lied to the members of the grand jury when he told them Stewart was present at the Scotts' residence when Officer Peck searched the home. The transcript of the grand jury proceedings refutes this contention. Specifically, Officer Peck testified multiple times that, when law enforcement searched the Scotts' residence, only Riley Scott and his minor child were present. At no point did Officer Peck erroneously testify that Stewart was also present at the time of the search.

Second, Stewart argues that his attorney was ineffective because he ignored the fact that Stewart's absence from the Scotts' residence when law enforcement discovered drugs and other paraphernalia there precluded his conviction of first-degree possession of a controlled substance and possession of drug paraphernalia. We disagree. The mere fact that Stewart was not present at

the time law enforcement searched the Scotts' residence did not, by itself, give rise to a valid defense to the possession charges. This is especially true in light of Officer Peck's grand jury testimony concerning Aguilar's statement to him describing the events of February 6, 2007, and Stewart's subsequent admission to trafficking drugs, a fact Stewart does not dispute. Because the record refutes Stewart's claim, the circuit court did not err in refusing to hold an evidentiary hearing on this issue.

Stewart also contends his attorney was deficient in coercing and advising him to plead guilty when he had a valid defense to the indicted charges. However, as previously explained, a defense based solely on the fact that he was not present at the time law enforcement searched the Scotts' residence, ignoring other evidence including his own confession, is simply not a valid one.

In view of our analysis of Stewart's more specific arguments, we see no reason to further address his additional, vague and unsupported, over-arching claim that an evidentiary hearing was necessary.

For the foregoing reasons, we affirm the Ohio Circuit Court's July 30, 2010 order denying Stewart relief pursuant to RCr 11.42.

ALL CONCUR.

BRIEF FOR APPELLANT:

Willard Stewart, *Pro se*
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Jeanne Anderson
Assistant Attorney general
Frankfort, Kentucky