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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002008-MR

BRANDON MCWAIN — APPELLANT

v.

APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 07-CR-00220

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, NICKELL AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Brandon McWain appeals a June 25, 2010, Order of the Rowan Circuit Court denying his motion for postconviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. McWain argues on appeal that the trial court erred by denying his RCr 11.42 motion without conducting an

evidentiary hearing. As we find that the arguments raised in his motion could be resolved without a hearing, we affirm the order of the Rowan Circuit Court.

Background

Brandon McWain and a codefendant were indicted on charges of first-degree arson and second-degree burglary in connection with a fire at the home of Dale Kelsey in 2007. After initially pleading not guilty, McWain entered into a plea agreement with the Commonwealth on September 5, 2008. In exchange for his guilty plea, the Commonwealth agreed to recommend that McWain be sentenced to twenty-years' imprisonment on the arson charge and five-years' imprisonment on the burglary charge, with the sentences to run concurrently. Following a *Boykin* hearing, the circuit court accepted the guilty plea and sentenced him in accordance with the Commonwealth's recommendation. *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)

McWain filed an RCr 11.42 motion in March of 2010, alleging that he received ineffective assistance of counsel during the plea negotiations. He claimed, more specifically, that his trial attorney coerced his acceptance of the guilty plea and failed to adequately investigate the circumstances surrounding the charges against him.[1] McWain requested that the circuit court afford him an evidentiary hearing before ruling on his motion. The circuit court denied the motion without an evidentiary hearing. This appeal followed.

[1] McWain raised a third argument in support of his request for Kentucky Rules of Criminal Procedure 11.42 relief before the trial court that need not be discussed herein because it has not been presented on appeal.

On appeal, McWain contends that the allegations in his motion could not be resolved without a hearing. Thus, he requests that this Court remand the matter for additional proceedings.

Standard of review

In order to prevail on a postconviction collateral attack under RCr 11.42, a movant must demonstrate that his counsel's performance was deficient and that he suffered prejudice as a result of such deficient performance. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Gall v. Com.*, 702 S.W.2d 37 (Ky. 1985). The burden falls upon a movant to overcome a strong presumption that his counsel's assistance was constitutionally sufficient. *Strickland*, 466 U.S. 668; *Com. v. Pelfrey*, 998 S.W.2d 460 (Ky. 1999). In cases involving guilty pleas, 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, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); *Phon v. Com.*, 51 S.W.3d 456 (Ky. App. 2001).

When reviewing an RCr 11.42 motion, the circuit court must conduct an evidentiary hearing only when there is "a material issue of fact that cannot be determined on the face of the record." RCr 11.42(5). An evidentiary hearing is not required in cases where the record refutes the claim of error, or "where the

allegations, even if true, would not be sufficient to invalidate the conviction." *Harper v. Com.*, 978 S.W.2d 311, 314 (Ky. 1998).

Analysis

McWain argued in his motion that his trial attorney failed to adequately investigate the circumstances surrounding the charges against him and that he coerced him to plead guilty. We first consider the claim that his attorney failed to adequately investigate.

McWain alleges that his counsel failed to investigate the factual basis of his arson charge. He argues that the facts did not support a charge of first-degree arson, but would permit conviction for second-degree arson and, consequently, a lesser sentence. In support of this argument, McWain identifies two documents he believes his attorney should have discovered. They include a Kentucky State Police Trooper report and a statement from the victim, Dale Kelsey. McWain contends both of these documents prove there was no "living person" inside the residence at the time of the fire. McWain believes that if his trial attorney had conducted a proper investigation, he would have discovered this fact and the Commonwealth's offer would have been significantly more favorable.

McWain's interpretation of the law is misguided. A defendant is guilty of first-degree arson where he sets a fire with the intent to destroy a building which is "inhabited or occupied," or that the defendant has reason to believe "may be inhabited or occupied." Kentucky Revised Statutes (KRS) 513.020(1)(a).[2]

[2] Under Kentucky Revised Statutes 513.020(1)(b), there is another basis for a first-degree arson conviction, but it is not at issue here.

Second-degree arson carries no requirement that the building be occupied or inhabited, or that the defendant have any belief that it is occupied or inhabited. KRS 513.030. KRS 513.020(1)(a) does not require that a "living person" actually be in the building at the time the fire is set. Rather, a defendant may be convicted of first-degree arson if he had "reason to believe the building may be inhabited or occupied[.]" KRS 513.020(1)(a).

As a matter of law, residential dwellings or buildings are presumptively inhabited. KRS 513.020 (*Kentucky Crime Commission/ LRC Commentary*). Since the allegations in this case involved the burning of a residential dwelling, McWain's counsel was not inefficient for failing to determine (or attempt to determine) whether the victim was actually in the home at the time of the fire. Even if McWain's trial attorney had discovered evidence that the resident was not actually present, there is no indication the plea offer of the Commonwealth would have been any different, or that the Commonwealth would not have succeeded at trial on a first-degree arson charge. McWain has failed to demonstrate that he suffered prejudice. Thus, the trial court properly denied the RCr 11.42 motion on this issue from the face of the record.

We now turn to the second issue presented on appeal: whether the guilty plea was coerced by counsel. McWain alleges that his counsel's "apathetic attitude and insistence that he take the commonwealths [sic] offer," coerced him to plead guilty. In addition, McWain argues that he was instructed by a bailiff to "do

as his lawyer instructed" or "it [wouldn't] be pretty." McWain hypothesizes that the bailiff's warning was "solicited" for the purpose of scaring him.

In *Boykin*, 395 U.S. 238, the United States Supreme Court held that a trial court must address the accused on the record before accepting a guilty plea, and ensure that he understands the essential elements of the charge against him and the consequences of his plea. Likewise, RCr 8.10 requires the trial court to determine on the record whether the defendant is voluntarily pleading guilty. Whether a guilty plea is voluntarily given is determined by the trial court from the totality of the circumstances. *Bronk v. Com.*, 58 S.W.3d 482 (Ky. 2001); *Sparks v. Com.*, 721 S.W.2d 726 (Ky. App. 1986).

The record in this case establishes that the trial court conducted a thorough *Boykin* colloquy. *Boykin*, 395 U.S. 238. McWain answered "yes" when asked if he understood the charges against him and the corresponding penalties, if he had adequate time to speak with counsel, if he was satisfied with his counsel's performance, and if he was entering into the plea willingly, knowingly, and voluntarily. In addition, in McWain's Motion to Enter a Guilty Plea, he affirmed that no one had "forced or threatened" him to plead guilty. As the 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-convictions proceedings to refute from the record" allegations that the plea was not voluntary.

Thus, it was not erroneous for the circuit court to deny McWain's RCr

11.42 motion on the basis of coercion without first conducting an evidentiary hearing.

Conclusion

Based on our review, McWain's RCr 11.42 motion was correctly resolved from the record, and an evidentiary hearing was not required. For the reasons stated, we affirm the Rowan Circuit Court's order denying the RCr 11.42 motion.

For the foregoing reasons, the Order of the Rowan Circuit Court is affirmed.

ALL CONCUR.

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