

RENDERED: JANUARY 7, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001482-MR

PHILLIP J. MUNDY

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NO. 07-CR-00514

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: ACREE, CAPERTON, AND CLAYTON, JUDGES.

CAPERTON, JUDGE: The Appellant, Phillip J. Mundy, pled guilty to two counts of Trafficking in a Controlled Substance in the First Degree, Subsequent Offense, and was sentenced to twenty years of imprisonment. Mundy filed a Kentucky Rules of Criminal Procedure (RCr) 11.42 motion which was denied by the trial court without an evidentiary hearing on June 17, 2009. On appeal, Mundy argues

that the court erred in denying his motion without a hearing. The Commonwealth disagrees. Upon review of the record, the arguments of the parties, and the applicable law, we affirm.

On September 5, 2007, Mundy was indicted for two counts of Trafficking in a Controlled Substance in the First Degree, Subsequent Offense, as well as for Persistent Felony Offender (PFO) in the First Degree. Mundy went to trial, and after the Commonwealth closed its case, Mundy decided to enter into a plea agreement with the Commonwealth. Pursuant to that agreement, the Commonwealth dismissed the PFO charge and recommended a twenty-year sentence on the two counts of trafficking. Accordingly, on March 27, 2008, Mundy pled guilty to the two counts of Trafficking in a Controlled Substance in the First Degree, Subsequent Offense. Thereafter, on May 1, 2008, Mundy was sentenced to twenty years of imprisonment. On May 13, 2009, Mundy filed an RCr 11.42 motion, alleging ineffective assistance of counsel. That motion was denied by the trial court without an evidentiary hearing on June 17, 2009. It is from that order that Mundy now appeals to this Court.¹

¹ In addressing Mundy's arguments on appeal, we note that Mundy outlines two arguments under the heading, "Preserved for Appeal," in his brief. Those arguments, specifically, are: (1) that he received ineffective assistance of counsel during the plea bargaining process because counsel failed to fully investigate or request a hearing to determine if he was competent to enter a guilty plea; and (2) that the judgment against him should have been set aside because he received ineffective assistance of counsel. Nevertheless, in his "Statement of State," which this Court assumes to be his Statement of the Case, he also makes arguments concerning KRS 532.080, and whether counsel properly objected to the authenticity of the documents establishing his prior felony convictions. However, it is unclear whether this matter was properly preserved for our review. Because Mundy does not establish proper preservation nor address this matter in the actual argumentative portion of his brief, we decline to address it further herein.

On appeal, Mundy argues first that counsel did not fully investigate his competency to enter a guilty plea. He argues that the trial court and counsel were on notice of the possibility that he was incompetent to stand trial and that the court should have sent him to the Kentucky Correctional Psychiatric Center for evaluation. In connection with this argument, Mundy also cites this Court to a number of statistics pertaining to racial discrimination and disparity in sentencing between blacks and whites.²

In response, the Commonwealth notes that Mundy never raised this issue before the trial court and that it was not part of his initial RCr 11.42 motion. Thus, the Commonwealth asserts that this argument cannot now be presented for the first time on appeal. Further, the Commonwealth directs this Court's attention to the fact that Mundy specifically and expressly disclaimed any mental incompetency during the course of his guilty plea colloquy with the trial court.

As his second basis for appeal, Mundy argues that trial counsel did not properly investigate his PFO charge. Mundy acknowledges that he had two convictions prior to the matter *sub judice*, but claims that one of the prior felony convictions used to enhance for the PFO charge was also used as the subsequent offense for the trafficking charges to enhance his charges to Class B felonies.

Mundy states that:

² Upon review of this argument, the Court fails to see any connection between this argument and Mundy's assertions concerning his mental competence. Further, we find no evidence of any racism in the court's conviction of Mundy or in its sentencing procedures. Accordingly, we decline to address this issue further herein.

Trial counsel coerced Appellant into entering a plea of guilty when he misinformed Appellant that if he did not enter said plea he would be convicted of both charges of Trafficking (Class B) and that both priors would also be used to support the First degree (sic) PFO 1 charge he guaranteed that Appellant would be sentenced to life imprisonment where appellant (sic) would have to serve mandatory ten (10) years before Appellant would be eligible for parole.

See Appellant's Brief, p. 11.

The Commonwealth acknowledges that one of Mundy's prior felony convictions for PFO purposes was also used as the subsequent offense for the trafficking charges. However, the Commonwealth argues that because Mundy was charged with Class B felonies, there was no difference in sentencing between Persistent Felony Offender in the First Degree and Persistent Felony Offender in the Second Degree. The Commonwealth asserts that under either Mundy was facing a sentence of 20 to 50 years, or life imprisonment. Regardless, the Commonwealth notes that under the plea agreement, it actually agreed to dismiss the persistent felony offender charge and recommend a sentence of twenty years of imprisonment instead.

As his final basis for appeal, Mundy argues that his counsel did not properly prepare to confront the police officers who arrested him. In conjunction with this argument, Mundy makes unfounded assertions of racism toward the police officers.

In response, the Commonwealth argues that counsel did effectively cross-examine all witnesses against Mundy during the course of the Commonwealth's presentation of its case. It further asserts that Mundy's

allegation of racism is completely unsupported in the record and that it was properly dismissed by the trial court.

In reviewing the issues raised on appeal, 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 as 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. 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 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 547, 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, as our Kentucky Supreme Court has held, an evidentiary hearing is not required when the issues presented may be fully considered by resort to the court record of the proceeding, or where the allegations are insufficient. *See Lawson v. Commonwealth*, 386 S.W.2d 734 (Ky. 1965), and *Maye v. Commonwealth*, 386 S.W.2d 731 (Ky. 1965). Additionally, 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 guilty plea. 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*, 799 S.W.2d 51, 54 (Ky. App. 1990).

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 \(1995\)](#)).

Upon review of the record, we note that Mundy engaged in a thorough and comprehensive guilty plea colloquy with the trial court. Mundy informed the

court that he had never suffered from a mental disease or defect, that he was not under the influence of drugs or alcohol, and that he was not impaired in his judgment. Mundy advised the court that he had no complaints concerning counsel's representation, and was fully satisfied with the representation of his counsel. Mundy acknowledged that he had committed the crime of trafficking on both of the alleged occasions. Mundy stated that he had advised his attorney of all facts known to him concerning the charges, that he believed his attorney was fully informed about the case, and that they had fully discussed the charges and available defenses. Mundy acknowledged that he understood both the charges and the potential defenses to the charges. Mundy declared that his guilty plea was freely, knowingly, intelligently, and voluntarily made; that counsel had fully explained his constitutional rights, as well as the nature of the proceeding; and all matters addressed in the motion to enter a guilty plea. Following that colloquy, the court accepted Mundy's plea, and his conviction and sentence followed.

Concerning Mundy's first argument, that his counsel erred in failing to raise issues of his mental competency, we are in agreement with the Commonwealth that this issue was not preserved below. As we have repeatedly held, errors to be reviewed by the appellate court must be precisely preserved and identified in the lower court. *See Skaggs v. Assad*, 712 S.W.2d 947, 950 (Ky. 1986). Essentially, appellants are not permitted to feed one can of worms to the trial judge and another to the appellate court. *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), *overruled on other grounds by Wilburn v.*

Commonwealth, 312 S.W.3d 321 (Ky. 2010). Accordingly, as this issue was neither raised nor addressed below, we decline to address it now for the first time on appeal. Even if we were to address this issue, however, we are in agreement with the Commonwealth that Mundy's express declaration of his mental competency to the court below severely undermines any argument he now makes to the contrary.

We now turn to Mundy's second argument, that trial counsel did not properly investigate his PFO charge and that one of his prior felony convictions used for PFO purposes was also being used as the subsequent offense for the trafficking charges to enhance his charges to Class B felonies. As the Commonwealth acknowledges, one of Mundy's prior convictions was used to enhance his charges to Class B Felonies. However, as is undisputed, the Commonwealth, pursuant to the plea agreement, actually dismissed the Persistent Felony Offender in the First Degree charge altogether. Thus, Mundy's argument, that he would have had only one prior felony remaining to support the charge after the other was used to enhance his felonies to Class B, is moot. Clearly, neither of the convictions was used to enhance his sentence under PFO 1st Degree because that charge was dismissed

Finally, we turn to Mundy's last argument on appeal that counsel failed to properly confront the police officers who arrested him. Although the basis for this argument is somewhat unclear, it appears that Mundy is asserting that the police officers who arrested him were doing so because he was African-

American, and that counsel should have conducted some sort of investigation to determine whether these individuals were racist. Our review of the record reveals no evidence in support of this assertion and we find that this argument was properly dismissed by the trial court.

Wherefore, for the foregoing reasons, we hereby affirm the June 17, 2009, order of the Daviess Circuit Court denying Mundy's RCr 11.42 motion without an evidentiary hearing.

ALL CONCUR.

BRIEF FOR APPELLANT:

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