

RENDERED: JANUARY 14, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000890-MR
AND
NO. 2009-CA-000682-MR

VERNON L. MCCOMBS

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 04-CR-00135

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; DIXON, JUDGE; ISAAC,¹ SENIOR JUDGE.

ISAAC, JUDGE: Vernon L. McCombs appeals from the denial of his motions for post-conviction relief under Kentucky Rule(s) of Criminal Procedure (RCr) 11.42 and Kentucky Rule(s) of Civil Procedure (CR) 60.02. He argues: (1) that his

¹ Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

counsel failed to adequately investigate the facts of the case before advising him to plead guilty; (2) he did not understand the sentence he was to receive due to ineffective assistance of counsel; and (3) counsel failed to investigate alleged misconduct before the grand jury. We affirm.

McCombs was indicted by the Hardin County Grand Jury on one count each of first-degree rape, incest, and distribution of obscene matter to a minor. Pursuant to a plea bargain, McCombs pled guilty to criminal attempt to first-degree rape and to the other charges and in exchange, the Commonwealth recommended a total sentence of ten years' imprisonment. Approximately one month later, McCombs filed a motion to withdraw his guilty plea, which the trial court denied. The trial court entered judgment and sentenced McCombs in accordance with the plea agreement. McCombs appealed and this Court affirmed the judgment in an unpublished opinion. *McCombs v. Commonwealth*, 2006 WL 574415 (Ky.App. 2006)(2005-CA-000252-MR).

In 2007, McCombs filed a motion for post-conviction relief pursuant to RCr 11.42. The trial court denied the motion without an evidentiary hearing. Subsequently, McCombs filed a motion for post-conviction relief pursuant to CR 60.02. His appeal from the denial of his RCr 11.42 motion was abated pending the determination of his motion for relief under CR 60.02. Following an evidentiary hearing at which issues concerning both the RCr 11.42 and CR 60.02 motions were heard, the trial court denied the motion for relief. This appeal followed.

McCombs first argues his counsel was ineffective by failing to adequately investigate the facts of his case. Specifically, McCombs contends that: (1) his trial counsel failed to adequately assess the victim's version of events; (2) failed to assess the extent of his mental disorder; and (3) failed to investigate DNA evidence to support a claim of actual innocence.

The standard of review for a claim of ineffective assistance of counsel following a guilty plea is well established. In order for a defendant to prove ineffective assistance of counsel when a guilty plea has been entered, he must show: (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 pleaded guilty, but would have insisted on going to trial. *Sparks v. Commonwealth*, 721 S.W.2d 726, 727-28 (Ky.App.1986).

We have reviewed the record. McCombs did not raise the issue of counsel's alleged failure to assess the victim's statement until his motion for reconsideration of the denial of his CR 60.02. A party cannot use a motion to reconsider, which is equivalent to a motion to alter, amend, or vacate judgment, to raise issues that could have been presented in the proceedings prior to entry of the judgment. *Hopkins v. Ratliff*, 957 S.W.2d 300, 301 (Ky.App. 1997). Therefore, we will not address that claim.

McCombs argues counsel failed to adequately investigate the extent of his mental disorder. McCombs pled guilty and the guilty plea was affirmed by this Court on direct appeal. Although McCombs was diagnosed by the Army as having an unspecified personality disorder in 1994, he neither brought this to the attention of the trial court during his plea colloquy nor did he raise the issue on direct appeal challenging the validity of his guilty plea. Importantly, even now, McCombs does not allege that he was actually incompetent to enter a guilty plea. He simply states that counsel should have requested a competency hearing to determine whether or not he was competent to enter the guilty plea. Therefore, as McCombs has not demonstrated that he was actually incompetent at the time of the guilty plea, he cannot show that he was prejudiced by counsel's failure to request a psychological evaluation.

McCombs next argues his counsel was ineffective for failing to insist that linens from the victim's bed be tested for DNA evidence to prove his innocence. As the trial court noted, the victim's bed was not the crime scene. Moreover, this evidence was known to McCombs prior to the entry of his plea, yet he still chose to plead guilty. This argument amounts to a sufficiency of the evidence claim, which was forfeited by the guilty plea. *Taylor v. Commonwealth*, 724 S.W.2d 223, 225 (Ky.App. 1986). We agree with the trial court that this evidence was of marginal relevance at best. Therefore, we cannot conclude that if this evidence was developed that there was a reasonable probability that McCombs would have insisted on going to trial.

McCombs next argues that counsel was ineffective for failing to adequately explain the terms of the agreed-upon sentence. Specifically, he argues counsel guaranteed that he would be released from jail in seven months (in addition to his time already served) rather than simply be eligible for parole.

At the plea colloquy, the trial court fully explained the terms of the agreed-upon sentence. The record reflects that McCombs was informed that the amended charge of attempted first-degree rape brought McCombs into the 20% parole eligibility rule rather than the 85% he would have faced had he been convicted of the indicted offense. McCombs stated that he fully understood the circumstances surrounding his guilty plea and that no one promised him anything different from the terms as they were explained at the plea colloquy. At the evidentiary hearing, trial counsel stated that in explaining the parole eligibility to McCombs, she was presenting the “best case” scenario and offered no guarantees because the actual grant of parole is within the jurisdiction of the parole board. McCombs has not established that counsel was ineffective in this regard.

Finally, McCombs argues that counsel was ineffective by failing to investigate misconduct before the grand jury and that counsel failed to challenge the sufficiency of the indictment.

McCombs argues that a detective lied to the grand jury and that trial counsel should have moved to dismiss the indictment. After the allegations were made, the victim was examined by a doctor. The detective read a portion of the report to the grand jury. The report stated, “The normal anogenital examination is

normal except for the vaginal discharge which does not appear to be physiologic.” However, the detective stated, “The normal anogenital examination is not normal except for the vaginal discharge which does not appear to be physiologic.” At the evidentiary hearing, the detective admitted that he inadvertently made a misstatement, but also added that the grand jury was provided with the written report which was accurate.

In *Commonwealth v. Baker*, 11 S.W.3d 585, 588-89 (Ky.App. 2000),

this Court stated:

Generally, a defendant must demonstrate a flagrant abuse of the grand jury process that resulted in both actual prejudice and deprived the grand jury of autonomous and unbiased judgment. A court may utilize its supervisory power to dismiss an indictment where a prosecutor knowingly or intentionally presents false, misleading or perjured testimony to the grand jury that results in actual prejudice to the defendant. The requirement that the defendant show both a flagrant abuse of the process and actual prejudice was explained in *United States v. Roth*:

The first requirement, that the government know the evidence was perjured, is intended to preserve the principle that an indictment cannot be challenged on the basis of the insufficiency of the evidence on which the grand jury acted What makes the government's knowing use of perjured testimony different is that it involves an element of deceit, which converts the issue from the adequacy of the indictment's evidentiary basis to fraudulent manipulation of the grand jury that subverts its independence. The second requirement in the cases, that the indictment would not have been issued except for the perjured testimony, confines judicial intervention to cases of prejudicial misconduct, that is, to cases where the misconduct made a difference to the defendant.

(Internal citations omitted).

McCombs has not demonstrated a flagrant abuse of the grand jury process nor was this isolated misstatement the only evidence linking him to the alleged crimes. McCombs complains about other inconsistencies and misstatements. However, McCombs waived the right to cross-examine any witnesses by pleading guilty. Moreover, under *Baker*, McCombs has simply not demonstrated the flagrant abuse of process or willful deceit that is necessary to invalidate the indictment. He has merely raised possible issues of fact and issues regarding the credibility of witnesses.

McCombs next argues that his counsel was ineffective to failing to challenge the indictment on the grounds that the indictment named the victim by the initials, J.M., instead of L.M. As the trial court noted, this is an error that could have easily been corrected. McCombs clearly had notice of the charges against him and had notice of the identity of the victim. McCombs has not demonstrated any prejudice from this error in the indictment. Relief is unwarranted. *See McKinney v. Commonwealth*, 445 S.W.2d 874, 876 (Ky. 1969).

McCombs next argues that the prosecutor committed a *Brady* violation. Issues raised in an RCr 11.42 motion are limited to those “that were not and could not have been raised on direct appeal.” *Hodge v. Commonwealth*, 116 S.W.3d 463, 467-68 (Ky. 2003). This argument regarding alleged *Brady* violations could and should have been raised in his direct appeal and are thus improperly raised for the first time in this collateral attack on his conviction.

Finally, McCombs argues that he is entitled to relief based upon the cumulative effect of trial counsel's errors. We have reviewed the record and hold that McCombs has not demonstrated circumstances warranting relief from his guilty plea.

Accordingly, the orders of the Hardin Circuit Court are affirmed.

ALL CONCUR.

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