

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000375-MR

TIMOTHY SHEMWELL

APPELLANT

v. APPEAL FROM OHIO CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 04-CR-00039

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: CAPERTON AND THOMPSON, JUDGES; LAMBERT,¹ SENIOR JUDGE.

CAPERTON, JUDGE: The Appellant, Timothy Shemwell, appeals the October 21, 2010, order of the Ohio Circuit Court, denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion without an evidentiary hearing. Upon review of the

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

record, the arguments of the parties, and the applicable law, we reverse, and remand for an evidentiary hearing on Shemwell's claims.

In early 2004, an Ohio County Grand Jury returned an indictment charging Shemwell with one count of manufacturing methamphetamine, unlawful possession of a methamphetamine precursor, possession of anhydrous ammonia in an unapproved container (with the intent to manufacture methamphetamine), possession of marijuana (less than eight ounces), and possession of drug paraphernalia. Following trial, the jury found Shemwell guilty of all charges. Pursuant to the jury's recommendation, the court sentenced Shemwell to a total of 45 years in prison. In a unanimous decision, the Kentucky Supreme Court affirmed Shemwell's conviction and sentences.²

Subsequently, in August of 2010, Shemwell filed an RCr 11.42 motion, supporting memorandum, motion for the appointment of counsel, and motion for evidentiary hearing. In those motions, Shemwell asked that his convictions be vacated due to the alleged ineffective assistance of his trial counsel. Specifically, Shemwell argued that his trial counsel failed to competently advise him regarding the Commonwealth's plea offers and parole eligibility. Shemwell alleged that his trial counsel "grossly underestimated [his] potential maximum sentence ... if found guilty," and stated that his counsel advised him that he faced a maximum sentence of 20 years, as opposed to the 45 years to which he was actually sentenced. Shemwell also secured a copy of his trial counsel's file and

² *Shemwell v. Commonwealth*, 294 S.W.3d 430 (Ky. 2009).

discovered his counsel's voir dire script, in which she does in fact appear to suggest that Shemwell was subject to a maximum 20-year sentence. In support of his position, Shemwell attached this handwritten script to his RCr 11.42 filings. The Commonwealth filed no response to Shemwell's motions.

In an order dated October 21, 2010, the trial court denied all of Shemwell's motions. However, that order contains no explanation for the court's ruling. Shemwell now appeals the denial of his RCr 11.42 motion (and related motions) to this Court.

In his brief to this Court, Shemwell repeats many of the claims and assertions raised in his circuit court filings, and asks that the trial judge's order be reversed. Shemwell maintains that his trial counsel's erroneous advice regarding the maximum penalty he faced impacted his decision to enter into a plea agreement, and caused him prejudice. The Commonwealth states that upon review of the certified record, Shemwell's brief, and relevant legal authorities, it believes that it does, in fact, agree with Shemwell that an evidentiary hearing is warranted to address the factual bases of Shemwell's claims.

Upon review of the record, we are in agreement with both Shemwell and the Commonwealth that an evidentiary hearing is warranted in this matter. 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)).

To establish an ineffective assistance of counsel claim under RCr 11.42, a movant must satisfy a two-prong test showing both that counsel's performance was deficient and that the deficiency caused actual prejudice, resulting in a proceeding that was fundamentally unfair, and, as a result, was unreliable. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

As established in Bowling v. Commonwealth, 80 S.W.3d 405 (Ky. 2002):

The *Strickland* standard sets forth a two-prong test for ineffective assistance of counsel: First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984). To show prejudice, the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is the probability sufficient to undermine the confidence in the outcome. Id. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 695.

Bowling at 411–412.

Additionally, we note that the burden is on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient, or, that under the circumstances counsel's action “might [have been] considered sound trial strategy.” Strickland, 466 U.S. at 689, 104 S. Ct. at 2065.

On the issue of whether an evidentiary hearing was proper, Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001), is controlling in this matter. Under *Fraser*, Shemwell is only entitled to an evidentiary hearing if there are allegations that cannot be conclusively resolved upon the face of the record. Indeed, the law is clear in this Commonwealth that in determining whether the allegations in a post-trial motion to vacate, set aside or correct sentence can be resolved on the face of the record, the trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them. *Id.* at 452-53.

In the matter *sub judice*, Shemwell has produced support for his factual allegation. Our review of the record reveals no evidence to refute those factual allegations. Accordingly, we believe that a hearing is necessary to determine the validity of same, and the affect that such advice, if given, had on Shemwell’s decision to plead guilty in this matter.

Wherefore, for the foregoing reasons, we hereby reverse the October 21, 2010, order of the Ohio Circuit Court denying Shemwell’s RCr 11.42 motion, and remand this matter for an evidentiary hearing.

ALL CONCUR.

BRIEF FOR APPELLANT:

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