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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2011-CA-000478-MR

SHANNON GARLAND — APPELLANT

v.

APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
ACTION NO. 05-CR-00079

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND DIXON, JUDGES.

DIXON, JUDGE: Appellant, Shannon Garland, appeals from an order of the Letcher Circuit Court denying his motion for post-conviction relief pursuant to RCr 11.42. Finding no error, we affirm.

In April 2005, a Letcher County Grand Jury indicted Appellant and his girlfriend, Rosemary McClain, for complicity to commit murder, complicity to

first-degree robbery, complicity to theft by unlawful taking over $300, complicity to theft of a controlled substance, and tampering with physical evidence. Appellant was also indicted for being a second-degree persistent felony offender. The charges stemmed from the robbery and brutal stabbing death of Lisa Jenkins. Following the indictments, the Commonwealth filed its notice of aggravating circumstances and intent to seek the death penalty. Prior to trial, however, Appellant filed a motion to enter a guilty plea. Pursuant to the plea agreement, Appellant gave a statement to the Commonwealth that detailed the crimes and agreed to testify against McClain[1] in exchange for the Commonwealth's dismissal of the PFO charge and recommendation of a sentence of life imprisonment. The agreement further stipulated that Appellant could not seek parole for twenty years. On July 14, 2008, the trial court sentenced Appellant accordingly.

On March 9, 2010, Appellant filed a motion to vacate his convictions and sentence pursuant to RCr 11.42 raising various claims of ineffective assistance of counsel. Specifically, Appellant alleged that counsel failed to investigate and present an extreme emotional disturbance (EED) defense; pursue suppression of his statements to police; and file a motion to sever the trial from his co-defendant. Finally, Appellant claimed that counsel used manipulation and coercion to force him to plead guilty. On February 4, 2011, the trial court denied Appellant's motion without an evidentiary hearing. This appeal ensued.

[1] McClain was subsequently convicted of murder, robbery, theft over $300, theft of a controlled substance, and tampering with physical evidence. Her appeal to the Kentucky Supreme Court was dismissed for failing to perfect the appeal. *McClain v. Commonwealth*, 2008-SC-000826.

Appellant's sole argument before this Court is that he was entitled to an evidentiary hearing on his claim that trial counsel coerced him into entering his plea. Appellant contends that because his counsel manipulated him to plead guilty, he did not understand the consequences of such and thus his plea was not knowing and voluntary. Appellant argues the affidavits of his mother and aunt that were attached to his RCr 11.42 motion clearly establish that he did not want to plead guilty and did not understand the nature of the plea agreement. We disagree.

In an RCr 11.42 proceeding, the movant has the burden to establish convincingly that he was deprived of substantial rights that would justify the extraordinary relief afforded by the post-conviction proceeding. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). An evidentiary hearing is warranted only "if there is an issue of fact which cannot be determined on the face of the record." *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993), *cert. denied*, 510 U.S. 1049 (1994); RCr 11.42(5). *See also Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001); *Bowling v. Commonwealth*, 981 S.W.2d 545, 549 (Ky. 1998), *cert. denied*, 527 U.S. 1026 (1999). "Conclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of a discovery deposition." *Sanders v. Commonwealth*, 89 S.W.3d 380, 385 (Ky. 2002), *cert. denied*, 540 U.S. 838 (2003), *overruled on other grounds in Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

Since Appellant entered a guilty plea, a claim that he was afforded ineffective assistance of counsel requires him to 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 pled guilty, but would have insisted on going to trial. *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); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

A criminal defendant may demonstrate that his guilty plea was involuntary by showing that it was the result of ineffective assistance of counsel. In such a case, the trial court is to "consider the totality of the circumstances surrounding the guilty plea and juxtapose the presumption of voluntariness inherent in a proper plea colloquy with a *Strickland v. Washington* inquiry into the performance of counsel." *Rigdon v. Commonwealth*, 144 S.W.3d 283, 288 (Ky. App. 2004) (Bronk, 58 S.W.3d at 486. (footnotes omitted)). A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render reasonably effective assistance. *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997), *cert. denied*, 521 U.S. 1130 (1997). The Supreme Court in *Strickland* noted that a court must indulge a strong presumption that counsel's

conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

However, advising a defendant to plead guilty is not, by itself, sufficient to demonstrate any degree of ineffective assistance of counsel. *Beecham v. Commonwealth*, 657 S.W.2d 234, 236-37 (Ky. 1983).

Because the trial court herein denied Appellant's RCr 11.42 motion without an evidentiary hearing, our review is limited to "whether the [RCr 11.42] motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky.1967). *See also Baze v. Commonwealth*, 23 S.W.3d 619 (Ky.2000), *cert. denied*, 531 U.S. 1157 (2001). We are of the opinion that Appellant's RCr 11.42 claims are clearly refuted from the face of the record.

In *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), the United States Supreme Court announced that a trial court, before accepting a guilty plea, must address the accused to assure that he understands the essential elements of the charge and the consequences of his plea of guilty. Likewise, RCr 8.10 requires the trial court receiving the guilty plea to determine on the record whether the defendant is voluntarily pleading guilty. Whether a guilty plea is voluntarily given is to be determined from the totality of the circumstances surrounding it. The trial court is in the best position to determine the totality of the circumstances surrounding a guilty plea.

The record herein establishes that the trial court conducted a thorough and extensive *Boykin* plea colloquy, wherein the court read the plea agreement and asked Appellant if he understood the charges against him contained therein. He answered "yes." When asked if his attorney explained the nature of the charges and the penalties they carried, he also answered "yes." In fact, Appellant even specifically acknowledged that he was guilty of the facts supporting the attempted murder charges. Appellant stated that he was satisfied with the services provided by his attorney and did not believe there was anything additional that his attorney could have done. Finally, Appellant unequivocally stated that no one, including counsel, had promised him anything beyond that which was stated in the Commonwealth's offer.

Appellant's reliance upon *Hall v. Commonwealth*, 429 S.W.2d 359 (Ky. 1968) is misplaced. Therein, our then-highest Court held that an evidentiary hearing was required to refute the appellant's claim that trial counsel coerced him into pleading guilty. Notably however, *Hall* was decided prior to *Boykin,* and the record did not affirmatively show that the trial court had inquired into the voluntariness of the appellant's plea. As was subsequently observed in *Ford v. Commonwealth*, 453 S.W.2d 551, 554 (Ky. 1970), the procedure established by the by *Boykin* Court "enables the trial court in post-conviction proceedings to refute from the record charges like the ones presented here and also averts the need of a further hearing."

As previously noted, the trial court carefully considered Appellant's plea at the time it was made and concluded that it was knowing and voluntary. Thus, we conclude that the record refutes any claim that Appellant's plea was not voluntary or that his counsel was ineffective. Therefore, Appellant was entitled to neither an evidentiary hearing nor relief pursuant to RCr 11.42.

ALL CONCUR.

BRIEF FOR APPELLANT:

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