RENDERED: JUNE 1, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001062-MR

JACKIE GREGORY — APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JUDGE
ACTION NO. 08-CR-01075

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; ACREE AND CAPERTON, JUDGES.

CAPERTON, JUDGE: The Appellant, Jackie Gregory, appeals the May 24, 2011, Opinion and Order of the Fayette Circuit Court, denying his RCr 11.42 motion seeking to vacate his sentence upon a guilty plea for robbery in the first degree, burglary in the second degree, and persistent felony offender in the first degree, for which he was sentenced to 25 years in prison. The court denied the motion without an evidentiary hearing and Gregory now appeals, arguing that his RCr

11.42 motion raised material issues of fact not refuted by the record. Having reviewed the record, the arguments of the parties, and the applicable law, we affirm.

On July 9, 2008, Gregory forced entry into a residence at 1907 Westminster Drive in Lexington. A patrolling police officer arrested Gregory on charges of burglary in the second degree. The officer recognized that Gregory was wanted in connection with a robbery which occurred on either June 11 or June 17, 2008,[1] and arrested Gregory on that charge as well. The district court arraigned Gregory on July 10, 2010.[2] A grand jury later indicted Gregory for robbery in the first degree and burglary in the second degree as a result of the respective incidents, and for being a persistent felony offender in the first degree.

Below, Gregory was represented by appointed counsel Ben Cabuay, Jr. Cabuay engaged in pre-trial discovery, as a result of which he received a copy of the grand jury tape and 33 pages of discovery. Cabuay moved to suppress the identification made by the robbery victim, as well as pre-trial statements made to police. Counsel also moved to sever the burglary and robbery counts.

At the start of the suppression hearings, counsel announced a possible plea agreement. Facing a possible life sentence, Gregory accepted a plea offer to the minimum on each count, which was ten years for robbery in the first degree

[1] The indictment listed the date of the robbery as the date the arrest warrant was issued, June 17, 2008. The criminal complaint listed the date as June 11, 2008, and the arrest warrant was issued June 17, 2008. The exact date is irrelevant to the issues on appeal.

[2] There is a notation on the case jacket indicating that the public defender appeared with Gregory at that time.

enhanced to twenty years by the PFO, and five years for burglary in the second degree. The agreement was silent as to whether the sentences would be concurrent or consecutive. The plea agreement was on a standard form AOC-034-36, which Gregory personally signed. It contained assurances that Gregory had consulted with counsel and stated that:

> I believe that my attorney has done all that anyone could do to counsel and assist me, and that there is nothing about the proceedings in this case against me which I do not fully understand.[3]
>
> The trial court also entered into a detailed plea colloquy.. The colloquy between Gregory and the court included the following exchange:
> Q: Have you ever suffered from or been treated for a mental health problem?
> A: No sir, I haven't.
> Q: At this time, are you sick, ill, feeling bad in any way?
> A: No, sir.
> Q: Have you taken any drugs, consumed alcohol, taken medication? Have you put anything into your body that would affect your ability to understand these proceedings?
> A: No sir, I haven't.

Gregory affirmed that he had time to discuss the case with counsel and told counsel everything he needed to. The trial court then asked:

> Q: Has Mr. Cabuay taken all steps that you requested him to do for you in the case?
> A: Yes, sir. He has.
> Q: Are you satisfied with your attorney?
> A: Yes, I am.
> Q: Any complaints about representation of you?
> A: No, sir.

[3] See TR 1, 52 at paragraph 15.

Gregory also acknowledged that he and counsel had discussed possible defenses, including lesser included offenses. Gregory stated under oath that he was guilty of robbery in the first degree by robbing Dorothy Henry. The trial judge asked:

> Q: Tell me what you did, sir.
> A: I got up on Wednesday morning. I started using drugs, cocaine. I ran out of cocaine and I … went out and robbed Miss Henry.
> Q: Did you use some sort of dangerous instrument or dangerous weapon to do that?
> A: I had what you call a – It wasn't a knife. It was a piece of a pipe, steel like. I had it in my hand and went – And when she went to get up, I –
> Q: That's okay, take your time.
> A: I didn't mean to cut her with it. I pushed her back down and it cut her.
> Q: So you had something kind of sharpened up and it cut her when you all –
> A: Yes, sir.

A few moments later, the prosecutor noted that Gregory hit Henry in the head with a brick. The court then asked Gregory whether that was a fair description, and Gregory replied in the affirmative. During a similar exchange, Gregory acknowledged that he had known Henry for 25 years, and that she was "like my Mom," and he just "had a bad day."

Thereafter, the trial court asked about the separate burglary charge, and Gregory replied that he was guilty. Gregory confirmed that he did not know the resident, and stated, "I was looking for money to get drugs with and I looked for a house to break into and I broke into her house." Gregory also admitted that

he had committed the previous felonies thereby forming the basis for the PFO charge.

The trial court found the plea to be made knowingly, intelligently, and voluntarily, and accepted the plea. Before sentencing, Gregory wrote a letter to the trial court asking that it run the twenty-year sentence and the five-year sentence concurrently with each other. Gregory explained that the twenty-year sentence carried an 85% parole eligibility, that the two charges were unrelated to each other, and that he was already serving a 37-year sentence. Gregory further stated that he planned on getting some kind of college degree. The trial court decided to run the two sentences consecutively for a total of 25 years, and entered its final judgment on June 9, 2009.

Subsequently, on August 17, 2010, Gregory filed a motion verified under oath to vacate the judgment pursuant to RCr 11.42. Gregory gave two reasons for his motion – First, that he was not competent when he pled guilty, and secondly, that counsel was ineffective because he allegedly made no attempt to investigate a supposed alibi defense, in addition to failing to locate and interview material defense witnesses. Gregory also moved to proceed in forma pauperis, for an evidentiary hearing and asked the trial court to appoint counsel. The trial court appointed the Department of Public Advocacy to represent Gregory. Gregory then personally sent a letter to the trial court which included an allegation that he asked his trial counsel to have him psychologically evaluated because, "[B]efore all this I was very depressed and after I was arrested I tried to commit suicide at the jail . . .

." The letter was not verified under oath. According to Gregory's own brief, he continued to send letters to the court which explained his pro se arguments in greater detail, and explained that an attorney from the DPA had not contacted him.

Post-conviction counsel ultimately filed a notice of appearance with the court on January 21, 2011, as well as a motion to submit on the pleadings on March 4, 2011. Counsel notified the trial court that she would not be supplementing the pro se motion because, "After investigation of Movant's case, appointed counsel has determined that the pro se motion sufficiently addresses the issues raised." The Commonwealth filed a response and objected to the motion. The trial court issued an opinion and order denying relief on May 24, 2011. It is from that order that Gregory now appeals to this Court.

Prior to addressing the substantive arguments of the parties, we note that 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.

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,* Gregory is only entitled to an evidentiary hearing if there are allegations

that cannot be conclusively resolved upon the face of the record. Further, we note 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. We review the arguments of the parties with these standards in mind.

As his first basis for appeal, Gregory argues that the trial court erred to his substantial prejudice and denied him due process of law when it overruled his RCr 11.42 motion without holding an evidentiary hearing in order to resolve issues that were collateral to the record and could not be adjudicated by reference to the record. Specifically, he argues that the trial court should have ordered a competency hearing. Gregory notes that in his pro se motion he indicated that he had asked his trial counsel to obtain a "psychological evaluation" because he was very depressed before these events occurred, and because after he was arrested he tried to committee suicide at the jail. Gregory further notes that a uniform citation completed by Lexington Police Officer Adams following Gregory's robbery arrest stated that Gregory, "Threatened death by police officer," during his arrest. Gregory advises this Court that this statement indicated that he had expressed suicidal thoughts. He now argues that counsel's failure to request the court to order a competency evaluation, or to advise the court of those facts known to counsel concerning Gregory's competency constituted ineffective assistance of

counsel, and that this was an issue which could not be resolved on the face of the record without an evidentiary hearing.

In response, the Commonwealth argues that the record reveals no reasonable grounds to support a competency evaluation, and that Gregory's claim that counsel should have requested an evaluation is not properly before this Court and is without merit. First, the Commonwealth asserts that while Gregory argues to this Court that trial counsel was ineffective for not bringing his competency to the attention of the trial court, his verified motion does not make this claim but instead simply alleges that he was incompetent without any reference to the ineffectiveness of counsel. Alternatively, the Commonwealth argues that even if the unverified letter which Gregory sent to the court is considered and the claim of ineffective assistance of counsel evaluated, the claim fails on the merits. Upon review of the record, we agree with the Commonwealth's assertions in both regards.

First, a review of Gregory's verified motion to vacate pursuant to RCr 11.42 reveals only the assertion that Gregory's mental incompetence would have been revealed "if questioned enough." It makes no allegation that counsel was ineffective for failing to request a competency hearing, or for failure to bring the matter to the attention of the trial court. While the record does reveal that Gregory later wrote a letter to the trial judge which was not verified, claiming that, "I had also asked Mr. Cabvay [sic] to get me a psychological evaluation because before all this I was very depressed and after I was arrested I tried to commit suicide at the

jail and was rushed to UK hospital and he never did[,]" these subsequent allegations are an insufficient substitution for an verified RCr 11.42 motion, and a failure to raise this issue below. Certainly, our courts have previously held that a trial court does not abuse its discretion in refusing to consider a supplemental motion belatedly verified or, as in this case, not verified at all. *Bowling v. Commonwealth*, 981 S.W.2d 545, 548 (Ky. 1998).

Moreover, even had the RCr 11.42 motion been verified, we are in agreement with the court below when it stated as follows:

> In this Motion, the Movant in Issue I makes general, vague and unsupported claims that he allegedly suffers from a mental defect which should or would have been recognized by the Court had this Court questioned him or talked with him more. The Movant says that he suffers from a speech impairment (stuttering). At no time from the Indictment to the Sentencing in this case did this Court suspect or have brought to its attention by the Movant, the Movant's attorney, or the Commonwealth that there was any hint or claim that the Movant was suffering from any type of mental defect or was legally incompetent in any manner.

As the courts of this Commonwealth have repeatedly held, bald assertions without any factual basis will not justify an evidentiary hearing. *Bowling v. Commonwealth*, 981 S.W.2d 545, 551 (Ky. 1998). Particularly in the case of guilty pleas, our standard of review is stringent. Clearly, the second prong of *Strickland* requires the defendant to show that the deficient performance of counsel 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. *Bronk v. Commonwealth*, 58 S.W.3d 482, 486-87 (Ky. 2001).

A review of the record reveals that Gregory repeatedly informed the court that he had neither been treated for, nor suffered from, any mental problem. Further, while Gregory references an alleged suicide attempt, we note that this occurred some nine months before he pled guilty, and not in any sort of close proximity to the time that he made the guilty plea. We disagree with Gregory's assertion that counsel was deficient for failing to request a competency hearing, as the record reveals no grounds to believe one was indicated. Quite simply, an attorney cannot be found ineffective for failing to raise a non-meritorious claim. *Williams v. Commonwealth*, 336 S.W.3d 42, 47 (Ky. 2011). The evidence, when considered in its entirety, reveals that Gregory was lucid, informed, and competent at the time he made his plea. There is nothing to indicate that it was reasonably likely that the trial court would have found him incompetent to stand trial, nor that he suffered any prejudice under *Strickland.* We affirm.

As his second basis for appeal, Gregory argues that the trial court erred to his substantial prejudice and denied him due process of law by overruling his RCr 11.42 motion without an evidentiary hearing on the issue of whether trial counsel was ineffective for failing to investigate Gregory's alibi and interview prospective witnesses. In his pro se motion, Gregory asserted that he informed trial counsel that he had an alibi which would prove he was eighty miles from Lexington at the time of the robbery. Gregory asserts that while outside of

Lexington, he had visited a Dairy Mart, and had reason to believe that he would appear on the store's video surveillance. Moreover, he believed that the store clerks would remember talking with him because of his pronounced stutter. Gregory states that while trial counsel gave him assurances that he would investigate, no investigation was ever conducted. Specifically, Gregory asserts that counsel failed to locate and interview several witnesses who spoke to Gregory at the Dairy Mart on the day of the robbery, nor did he request a copy of the surveillance tape. He now argues that counsel's neglect of this duty amounted to ineffective assistance of counsel, and that the trial court should have conducted an evidentiary hearing to further explore this issue.

In response, the Commonwealth argues that Gregory's sworn testimony during the plea colloquy refutes his claim of an alibi defense and counsel's alleged failure to investigate it. The Commonwealth notes that during the course of his plea colloquy with the court, Gregory stated under oath that he was guilty of robbery in the first degree because he robbed Dorothy Henry. Having reviewed the record, we agree.

A review of the record below reveals that Gregory provided a detailed description of the manner in which he committed the crime, including shoving Miss Henry with a steel pipe, and hitting her in the head with a brick during the course of the robbery. Certainly, the sworn statements and detailed descriptions given by Gregory in the plea colloquy above refute any claim of alibi or innocence. Counsel was clearly not ineffective for failing to investigate a potential alibi

defense when Gregory himself admitted to committing the crime at issue, and then provided the court with great detail as to how the crime was committed. Having found that counsel had no such duty in this instance, and moreover, finding that Gregory himself clearly refuted any possibility of such a defense below by admitting to the crime, we affirm.

Wherefore, for the foregoing reasons, we hereby affirm the May 24, 2011, Opinion and Order of the Fayette Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Christine Foster
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky