RENDERED: DECEMBER 14, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001551-MR

DALLAS LEE COOK — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NOS. 04-CR-001402 & 04-CR-002334

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

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

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

On May 8, 2004, Appellant and his brother, David, had spent the day consuming alcohol and drugs. Sometime that evening, the pair went to a

Walgreens store where Appellant stole a steak knife and cell phone case. After leaving the store, an argument ensued regarding Appellant's girlfriend. The argument became physical and at some point during the fight, Appellant stabbed David twice with the steak knife. David was transported to a hospital and subsequently to a long-term care facility. Appellant maintained that the stabbing was accidental.

On May 12, 2004, Appellant was indicted by a Jefferson County Grand Jury for first-degree assault and receiving stolen property. However, following David's death in August 2004, Appellant was indicted for murder and for being a first-degree persistent felony offender.

In September 2004, Appellant retained attorney David Kaplan. On the advice of Kaplan, Appellant accepted a plea offer from the Commonwealth, wherein he pled guilty to the assault, receiving stolen property, and PFO charges, in exchange for dismissal of the murder charge. On November 9, 2004, Appellant appeared in open court and entered his guilty plea. Before accepting the plea, the trial court engaged in a lengthy colloquy with Appellant to ensure that the plea was knowing and voluntary. Further, the trial court observed Appellant's emotional state and made a pointed inquiry as to whether it impaired his ability to understand the proceedings. Appellant denied any impairment. Appellant thereafter waived a separate sentencing hearing and the trial court, finding him statutorily ineligible for probation, sentenced him in conformity with the Commonwealth's recommendation of twenty-one years' imprisonment. Appellant thereafter

addressed the trial court, claiming that he did not intend to hurt his brother and the stabbing was an accident that occurred while they were both highly intoxicated.

On May 11, 2007, Appellant filed a *pro se* RCr 11.42 motion claiming that his trial counsel was ineffective for failing to (1) independently investigate his case; (2) pursue any defenses, including voluntary intoxication and extreme emotional disturbance; (3) determine Appellant's competency to enter a guilty plea; and (4) seek the exemption provided in KRS 439.3401(5) for victims of domestic violence. The trial court thereafter appointed counsel and granted Appellant's request for an evidentiary hearing.

A hearing was held on October 1, 2010, with additional testimony being taken on May 16 and 26, 2011. Subsequently, on June 24, 2011, the trial court entered an opinion and order denying Appellant's motion. The trial court initially determined that Kaplan did, in fact, fail to independently investigate Appellant's case, as well as failed to pursue either a voluntary intoxication or EED defense. Nevertheless, the trial court concluded that Appellant could not prove he was prejudiced by Kaplan's deficient representation. Specifically, the trial court noted that a voluntary intoxication defense requires evidence that the defendant was "so drunk that [he] did not know what [he] was doing." *Springer v. Commonwealth,* 998 S.W.2d 439, 451 (Ky. 2004); *see also Soto v. Commonwealth*, 139 S.W.3d 827, 867 (Ky. 2004). The Commonwealth's evidence herein, however, was that Appellant was in control of his actions and that his recorded statement to police immediately after the accident did not indicate he was extremely intoxicated.

Similarly, the trial court opined that the evidence was clearly insufficient to support an EED instruction. Accordingly, the trial court ruled:

> Despite any errors that may have been made by Kaplan, the Court cannot find Movant was prejudiced by those errors. At the time of the plea, Movant appeared articulate and cognizant of the proceedings, he both signed a statement and affirmatively stated on the record that he had read the plea sheets and understood his rights, the recommended sentence, and that he was freely, knowingly and voluntarily pleading guilty to Assault in the First Degree, Receiving Stolen Property, and being a Persistent Felony Offender in the First Degree. Movant was given ample opportunity during the Boykin colloquy to retract his plea or express dissatisfaction with Kaplan or his case in general. The record reflects Movant understood his rights and was satisfied with his counsel at the time he pled guilty.

Appellant thereafter appealed to this Court as a matter of right.

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); 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). "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), *overruled on other grounds in Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). However, when the trial court conducts an evidentiary hearing, the reviewing court must defer to the determinations of fact and witness credibility made by the trial judge. *McQueen v. Commonwealth*, 721 S.W.2d 694 (Ky. 1986); *Commonwealth v. Anderson*, 934 S.W.2d 276 (Ky. 1996); *McQueen v. Scroggy*, 99 F.3d 1302 (6th Cir. 1996).

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)

(*quoting 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). 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).

In this Court, Appellant argues that trial counsel was ineffective for failing to advise him of the possibility of any lesser included offenses. Appellant contends that had he been informed of such, he would not have pled guilty but would have instead proceeded to trial on the theory that he was not guilty of murder, but instead was guilty of second-degree manslaughter or assault in the second or fourth degree. Appellant maintains that the facts established that he and David had a close relationship and that the stabbing was simply an accident that occurred after the two had argued while intoxicated. Further, Appellant points out that causation was clearly a factual issue because David's autopsy report listed peritonitis as a result of a dislodged feeding tube as the official cause of his death, thus demonstrating that Appellant's actions were not the proximate cause of such.

Accordingly, Appellant concludes that had he gone to trial, he was far more likely to have been convicted of a lesser offense than murder or even first-degree assault.

After reviewing the record, we must agree with the Commonwealth that Appellant's claim is not properly preserved for appellate review. A thorough examination of the pleadings reveals that Appellant did not raise any issue regarding lesser-included offenses before the trial court. Appellant now contends that his argument below was that counsel failed to present any defense, implicitly including not only voluntary intoxication and EED, but also lesser-included offenses. We simply cannot agree. Lesser-included offenses and affirmative defenses are separate and distinct concepts. The trial court was never specifically asked to consider whether Appellant was prejudiced by trial counsel's failure to consider lesser-included offenses. As has oft been reiterated, Appellant "will not be 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* in *Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010)). This Court is without the authority to review issues not raised or decided by the trial court. *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989). Accordingly, we conclude that based upon the issues presented to the trial court, it properly ruled that Appellant was not prejudiced by trial counsel's deficient performance and, as such, was not entitled to post-conviction relief.

The opinion and order of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Rachel G. Cohen
Assistant Public Advocate
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

M. Brandon Roberts
Assistant Attorney General
Frankfort, Kentucky