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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001904-MR

KEITH LAMONT SLOAN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA ECKERLE, JUDGE
ACTION NO. 07-CR-03720

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: STUMBO, THOMPSON, AND VANMETER, JUDGES.

VANMETER, JUDGE: Keith Lamont Sloan appeals from the April 28, 2011, opinion and order of the Jefferson Circuit Court which denied Sloan's motion for relief pursuant to RCr¹ 11.42. The judgment also denied Sloan an evidentiary hearing and appointment of counsel. Because we hold that the trial court did not err when it refused Sloan an evidentiary hearing, we affirm.

¹ Kentucky Rules of Criminal Procedure.

Sloan was indicted on charges of illegal possession of a controlled substance in the first degree, and tampering with physical evidence. The charges were a result of Sloan's July 5, 2007, arrest. The uniform citation for that arrest indicated that Sloan agreed to pay cash and trade crack cocaine for sex with an undercover officer. Additionally, the citation indicated that a small baggie of cocaine was found in the backseat floorboard of the police cruiser that Sloan was transported in and that the backset had been searched prior to placing Sloan in the vehicle.

The Commonwealth made a formal plea offer which included disposition of the charges in this case in conjunction with those in another criminal action against Sloan which would reduce his potential penalty from thirty-five years to only eight. The parties appeared on March 6, 2008, for purposes of entering the guilty plea, at which time Sloan disputed the facts as alleged in the plea offer. As a result of the disagreement between the parties, the trial court discontinued the hearing.

The parties appeared again, on March 11, 2008, at which time Sloan entered a guilty plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), thereby disputing the facts as alleged by the Commonwealth but admitting that sufficient proof existed to convict him. At the time Sloan entered his plea, his trial counsel again informed the trial court that Sloan disputed the factual accuracy of the allegations against him. The trial court

then asked Sloan a series of questions regarding his plea. When asked if he agreed that the facts alleged were sufficient to support a conviction, Sloan answered: “due to my background, yes.” The trial court subsequently informed Sloan that a jury may never be presented with his past, depending upon several factors, including Sloan’s decision of whether to testify at a trial. Sloan agreed that he understood; again agreed that a jury could find him guilty; and continued with his plea. The trial court accepted the plea; found Sloan guilty of illegal possession of a controlled substance in the first degree and tampering with physical evidence; and sentenced him to a total of five years to run consecutive with a three-year sentence on another charge.

Thereafter, Sloan filed a *pro se* motion to vacate his conviction pursuant to RCr 11.42. Sloan argued that he had been denied effective assistance of trial counsel by his counsel’s failure to thoroughly investigate and prepare a defense and for his failure to move for a delay in sentencing until Sloan had undergone a complete psychiatric examination. Sloan’s motion was denied on April 28, 2011. That judgment also denied Sloan an evidentiary hearing and appointment of counsel. This appeal followed.

We review a trial court's denial of RCr 11.42 relief under an abuse of discretion standard. *Bowling v. Commonwealth*, 981 S.W.2d 545, 548 (Ky. 1998). An abuse of discretion has occurred when the trial court’s decision was “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citation omitted).

As a preliminary matter, we address the Commonwealth's argument that Sloan's motion was procedurally barred, because it was unverified as required by RCr 11.42. Although we agree that failure to verify a motion brought under RCr 11.42 may result in its dismissal, we note that the Commonwealth did not raise the deficiency to the attention of the trial court. A party is not permitted to make an argument on appeal than is different than that made to the trial court. *Harp v. Commonwealth*, 266 S.W.3d 813, 824 n. 47 (Ky. 2008) (citing *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976)). Therefore, the Commonwealth's argument was improperly preserved for our review.

Sloan's only argument on appeal is that the trial court erred when it denied him an evidentiary hearing. Sloan maintains he raised issues which could not be adjudicated by reference to the record alone. In particular, Sloan argues that an evidentiary hearing would reconcile his claim that had his trial counsel investigated and examined "crucial evidence," then he would have uncovered evidence substantiating Sloan's innocence and "more than likely" would have advised Sloan not to plead guilty. We disagree.

"Advising a client to plead guilty is not, in and of itself, evidence of any degree of ineffective assistance of counsel." *Rigdon v. Commonwealth*, 144 S.W.3d 283, 288 (Ky. App. 2004). In order to succeed on a claim of ineffective assistance of counsel, a movant must show: 1) "counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment;" and 2) the deficient performance prejudiced the defendant.

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674, 687 (1984). The trial court is therefore tasked with the determination of whether “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694, 104 S.Ct. at 2068. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* Additionally, an evidentiary hearing is required only “if the answer raises a material issue of fact that cannot be determined on the face of the record.” RCr 11.42(5); *Stanford v. Commonwealth*, Ky., 854 S.W.2d 742, 743 (Ky. 1993). Consequently, an evidentiary hearing is unnecessary when the record refutes the claims of error or when the allegations, even if true, would not be sufficient to invalidate the conviction. *Id.*; *Brewster v. Commonwealth*, 723 S.W.2d 863 (Ky. App. 1986).

Sloan makes general claims that trial counsel should have investigated police videos of the arrest and interviewed police officers to determine if any evidence could be found to corroborate Sloan’s innocence. The trial court “may not simply disbelieve factual allegations in the absence of evidence in the record refuting them.” *Fraser v. Commonwealth*, 59 S.W.3d 448, 452-53 (Ky. 2001). However, Sloan does not propose what exculpatory evidence might exist. Sloan’s allegations are therefore not factual but are instead mere speculation and therefore do not serve as a foundation for a successful claim of ineffective assistance. *See, e.g., Moore v. Commonwealth*, 983 S.W.2d 479 (Ky. 1998). Bald assertions that trial counsel “more than likely” would have suggested a different plea, based only

upon whimsy, do not support a “reasonable probability” that the outcome would have been different. *See Strickland*, 466 U.S. 668, 104 S.Ct. 2052. Accordingly, we find no error with the trial court’s refusal of an evidentiary hearing.

For the foregoing reasons, the April 28, 2011, opinion and order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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