

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-001925-MR

ARNETT RANDY MULLINS

APPELLANT

v. APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 09-CR-00042

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, DIXON AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Arnett Randy Mullins (Mullins) appeals, *pro se*, from an order of the Breathitt Circuit Court denying his motion for post-conviction relief filed pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 without conducting an evidentiary hearing. After careful review, we affirm.

Having reviewed the record, we adopt the following facts as stated in the opinion of the Supreme Court of Kentucky in Mullins's direct appeal:¹

In September 2008, and October 2008, Shane Humphrey, acting with Operation UNITE, participated in a "controlled drug buy" wherein Humphrey proceeded to Appellant's home and purchased controlled substances. As part of the operation, UNITE provided Humphrey with "buy money" and concealed on his person certain video and audio surveillance equipment so as to record the transaction

On the strength of the controlled buys, the Commonwealth indicted Appellant.

. . . .

In the Commonwealth's case-in-chief, Humphrey testified that during the first "buy" he purchased contraband from Appellant. Humphrey also testified that during the second buy, he gave money to and received contraband from Appellant.

. . . .

Following the conclusion of the trial, the jury found Appellant guilty as charged and sentenced him to twenty-five years' imprisonment.

The Supreme Court of Kentucky affirmed Mullins's conviction and sentence on October 21, 2010.

On September 9, 2011, Mullins filed a *pro se* RCr 11.42 motion in the Breathitt Circuit Court arguing that his trial counsel was ineffective for failing to request a competency hearing and that the jury considered matters outside of the

¹ *Mullins v. Commonwealth*, 2009-SC-000566-MR, 2010 WL 4156766 (Ky. Oct. 21, 2010).

record during deliberations.² Additionally, Mullins filed a motion for an evidentiary hearing. Without conducting a hearing, the trial court denied Mullins's RCr 11.42 motion and request for appointment of counsel in a judgment entered on September 13, 2011. As to the competency issue, the trial court stated:

From the Court's observation, the Defendant appeared to be able to understand the nature of the proceeding against him, as well as, participate in his own defense. Apparently, the Defendant was able to understand the nature and consequence[s] of his actions per the audio/video recording of the sale regarding the herein charges.

The next day, the trial court entered an amended judgment and stated the following:

Trial counsel was not ineffective for declining to request a mental competency hearing before Defendant's trial where Defendant assisted him in his defense, Defendant seemed lucid and was able to converse with attorneys and others, the Court's observations were consistent with same, and Defendant testified in his own defense.

This appeal followed.

In order to prevail on a claim of ineffective assistance of counsel, the defendant must satisfy the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). *See Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). Under this standard, a defendant asserting such a claim is required to show: (1) that the trial counsel's performance was deficient in that it fell outside the range of professionally competent

² We note that Mullins raised multiple claims of ineffective assistance of counsel in the lower court; however, we only address those issues raised on appeal.

assistance; and (2) that the deficiency was prejudicial because there is a reasonable probability that the outcome would have been different but for counsel's performance. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. In meeting these standards, a defendant must overcome a strong presumption that counsel's performance falls within the wide range of reasonable professional assistance. *Id.* at 690, 104 S. Ct. at 2066.

On appeal, Mullins argues that: (1) his trial counsel was ineffective for failing to request a competency hearing; (2) the jury considered matters outside of the record during deliberations; and (3) the trial court erred in failing to conduct an evidentiary hearing.

Before addressing the issues raised by Mullins on appeal, we note the following general provisions. An RCr 11.42 motion must "be signed and verified by the movant and shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion." RCr 11.42(2). In an RCr 11.42 proceeding, the movant has the burden to identify specific errors, demonstrate that those errors were unreasonable, rebut the presumption that counsel's actions were the result of trial strategy, and show that the errors prejudiced his right to a fair trial. *Simmons v. Commonwealth*, 191 S.W.3d 557, 561-62 (Ky. 2006), *overruled on other grounds*, *Leonard v. Commonwealth*, 279 S.W.3d 151, 159 (Ky. 2009). With the above standards of

review and general provisions in mind, we address the issues raised by Mullins on appeal.

1. Competency Evaluation

On appeal, Mullins first alleges that his counsel was ineffective for failing to request a competency hearing. We disagree.

“In Kentucky, the standard of competency is whether the defendant has a substantial capacity to comprehend the nature and consequences of the proceedings against him and to participate in his defense.” *Alley v. Commonwealth*, 160 S.W.3d 736, 739 (Ky. 2005) (citing *Commonwealth v. Strickland*, 375 S.W.2d 701 (Ky. 1964)). In his RCr 11.42 motion, Mullins asserted that “he was very sick and not himself at all” and that he had a prior history of daily substance abuse. While Mullins did allege specific grounds which he claimed rendered him incompetent, the trial court did not find in the record any clear evidence of incompetency that would have justified Mullins’s counsel requesting a competency hearing. Furthermore, Mullins did not allege specific reasons how his alleged prior substance abuse or his “sickness” rendered him unable to understand the nature and consequences of the proceedings against him or prohibited him from participating in his defense. In short, the allegations do not meet the specificity requirement of RCr 11.42. Therefore, the trial court correctly ruled against Mullins on this issue.

Although the preceding disposes of this issue, we briefly address Mullins’s argument that the trial court mischaracterized the record. In its judgment, the trial

court stated that Mullins “testified in his own defense,” a statement that is not supported by the record. However, as set forth above, the trial court correctly ruled against Mullins on this issue. As set forth in *Lynn v. Commonwealth*, 257 S.W.3d 596, 599 (Ky. App. 2008), “an appellate court may affirm the decision of a trial court for any reason sustainable under the record.”) Therefore, although erroneous, the trial court’s statement is not dispositive.

2. Juror Misconduct

Next, Mullins contends that the jurors considered improper outside information during the guilt phase of the trial. Specifically, in his RCr 11.42 motion, Mullins claimed that his counsel “failed to object to the jury discussing deaths that occurred during a house fire of [Mullins’s] children during jury deliberations” Mullins further asserted that counsel failed to “question the jurors as to how they gathered information about a house fire that killed [Mullins’s] children, which was discussed during the deliberation phase of finding [Mullins] guilty or innocent.”

We note that Mullins has not identified any jurors or which jurors participated in the alleged discussion about the fire, or how he learned of the jurors’ discussion. Nor did Mullins point to anything in the record to support his allegation. Thus, his conclusory allegation of juror misconduct does not meet the specificity requirement of RCr 11.42.

3. Evidentiary Hearing

Finally, we conclude that, because the record refutes the allegations raised in Mullins's motion, the trial court did not err when it denied his motion for an evidentiary hearing. RCr 11.42(5); *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993).

For the foregoing reasons, we affirm the Breathitt Circuit Court.

ALL CONCUR.

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