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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001992-MR

ROCARVAN FORTNEY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE IRV MAZE, JUDGE
ACTION NOS. 05-CR-002298 AND 05-CR-003824

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; JONES AND MOORE, JUDGES.

ACREE, CHIEF JUDGE: The narrow question presented in this case is whether the Jefferson Circuit Court erred when it denied Appellant Rocarvan Fortney's motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 to vacate his criminal conviction. We find no error and affirm.

On July 28, 2005, Fortney was indicted on murder, first-degree burglary, resisting arrest, and possession of a firearm by a convicted felon. That indictment was consolidated with a subsequent indictment charging Fortney with first-degree robbery, trafficking in a controlled substance, and being a second-degree persistent felony offender. Fortney entered a not-guilty plea to the charges. The Commonwealth filed notice of its intent to seek the death penalty.

After private counsel withdrew, the circuit court appointed co-counsel to represent Fortney. An *ex parte* order was entered on December 7, 2006, providing trial counsel with all of Fortney's psychological/psychiatric records in the possession of the Kentucky Department of Corrections. Similarly, on January 25, 2007, Fortney was awarded *ex parte* funds to retain the expert psychological services of Dr. Wayne Herner.

In February 2007, Fortney and the Commonwealth reached a plea agreement. For Fortney's plea of guilty to the indicted charges, the Commonwealth agreed not to pursue the death penalty, and to recommend a concurrent sentence of life imprisonment without the possibility of parole for twenty-five years.

Fortney pleaded guilty on February 26, 2007. The circuit court conducted a plea colloquy under *Boykin v. Alabama*[1]. During the colloquy, the circuit court inquired as to Fortney's mental health. Fortney indicated he had been diagnosed and/or treated for anxiety, depression, sleeping disorders, and hearing

[1] 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

voices. Trial counsel informed the circuit court that they were aware of Fortney's mental-health issues and, to address those issues, they had Fortney privately evaluated by Dr. Herner. Dr. Herner found no issue with Fortney's competency to stand trial or mental capabilities. Dr. Herner concluded Fortney's mental-health concerns were valid, but were being addressed and did not affect his ability to understand what was going on. Trial counsel also stated they had met with Fortney on numerous occasions, experienced no problems communicating with him, and had no reason to question his ability to comprehend the proceedings.

Ultimately, the circuit court found Fortney's plea was knowingly and voluntarily entered with a full understanding of the consequences. Fortney waived separate sentencing and, by order entered February 27, 2007, the circuit court accepted Fortney's guilty plea, adjudged him guilty, and sentenced him consistent with the Commonwealth's recommendation and the plea agreement.

A short time later, Fortney moved, *pro se*, to vacate his conviction under RCr 11.42 alleging ineffective assistance of counsel. Fortney claimed his trial counsel failed to zealously pursue an insanity defense. He also requested appointment of counsel, which the circuit court granted. However, counsel chose not to supplement Fortney's *pro se* motion.

Fortney's RCr 11.42 motion lingered while the Jefferson Circuit Court Clerk's office attempted to locate Fortney's trial record. On April 14, 2011, the circuit court declared the original record lost and directed that the record be reconstructed; the parties complied. Thereafter, the circuit court issued an order,

entered on September 15, 2011, denying Fortney's RCr 11.42 motion. From this order, Fortney appealed.

Every defendant is entitled to reasonably effective counsel. *Fegley v. Commonwealth*, 337 S.W.3d 657, 659 (Ky. App. 2011). In evaluating a claim of ineffective assistance of counsel, we apply the familiar "deficient-performance plus prejudice" standard first articulated in *Strickland v. Washington*, 466 U.S. 688, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984). *Hollon v. Commonwealth*, 334 S.W.3d 431, 436 (Ky. 2010).

Under this standard, the movant must first prove that his trial counsel's performance was deficient. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. To establish deficient performance, the movant must show that counsel's representation "fell below an objective standard of reasonableness" such that "counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Commonwealth v. Tamme*, 83 S.W.3d 465, 469 (Ky. 2002); *Commonwealth v. Elza*, 284 S.W.3d 118, 120-21 (Ky. 2009).

When the movant has entered a guilty plea, the "prejudice" requirement "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985). To satisfy the "prejudice" component, the movant "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.*

In his brief, Fortney describes this appeal as a "hybrid" case because he attacks both the actions of the trial court and his trial counsel. Regarding the trial court, Fortney faults the trial court for failing to order a pre-sentence report. Fortney argues the trial court's deficiency resulted in reversible error mandating a new trial.

In *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009), the Kentucky Supreme Court distinguished between a claimed direct "error and a separate collateral claim of ineffective assistance of counsel related to the alleged error[.]" *Id.* at 158. A direct error is "alleged to have been committed by the trial court (*e.g.*, by admitting improper evidence) . . . [while an] ineffective-assistance claim is collateral to the direct error, as it is alleged against the trial attorney (e.g., for failing to object to the improper evidence)." *Id.*

Here, Fortney's claim that the circuit court failed to order a pre-sentence report is a direct error. Fortney is not attacking his trial ***counsel's*** conduct, but instead is challenging the trial ***court's*** decision. Direct errors pertaining to the rulings of the trial court are not the proper basis for an RCr 11.42 motion. In any event, the circuit court dispensed with formal sentencing, including the pre-sentence report, only at Fortney's request. Fortney stated he had already viewed a pre-sentence report,[2] did not see the need for separate sentencing in this case, and requested that the circuit court proceed immediately to sentencing.

[2] The pre-sentence report referred to by Fortney was apparently prepared prior to sentencing Fortney on a prior, unrelated charge.

Fortney also claims his trial counsel erred when they failed to pursue an insanity defense. Fortney asserts his trial counsel should have had Fortney undergo a psychological or psychiatric evaluation prior to pleading guilty.

The record indicates Fortney's trial counsel requested and received his psychiatric records from the Department of Corrections, secured funds to retain Dr. Herner, a mental-health professional, and had Fortney privately evaluated by Dr. Herner prior to entering his plea. Dr. Herner found no issue with Fortney's competence to stand trial or his mental capabilities. During the plea colloquy, trial counsel advised the circuit court of Dr. Herner's findings. Trial counsel's conduct certainly did not fall below an objective standard of reasonableness.

Fortney further argues that the lack of a mental-health evaluation in the record undermines his counsel's representations during the plea colloquy that Fortney was competent to stand trial. We find no merit in Fortney's argument. Fortney was unquestionably present during the plea colloquy and did not indicate that he disagreed with his counsel's representations regarding his mental state. Furthermore, the absence of a mental-health evaluation in the record is not conclusive proof that such an evaluation did not take place. This is particularly true in this case because the original record was lost and had to be reconstructed.

Finally, Fortney contends for the first time in his reply brief[3] that he was entitled to an evidentiary hearing on his RCr 11.42 motion. A circuit court must

[3] We have not abandoned this Court's long-standing rule that new issues cannot be raised for the first time in an appellant's reply brief. *Milby v. Mears*, 580 S.W.2d 724, 728 (Ky.App.1979). "The reply brief is not a device for raising new issues[.]"). We have chosen to address this argument simply because of the relative ease with which it can be disposed.

hold an evidentiary hearing on an RCr 11.42 motion only if the issues raised in the motion "cannot be determined on the face of the record." *Parrish v. Commonwealth*, 272 S.W.3d 161, 166 (Ky. 2008). The sole argument raised by Fortney, discussed above, can be resolved by reviewing the record. No evidentiary hearing was needed.

The Jefferson Circuit Court's September 15, 2011 order is affirmed.

ALL CONCUR.

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