

RENDERED: JULY 26, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

OPINION OF APRIL 26, 2013, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000054-MR

CHARLES T. HAYES

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 08-CR-003080

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, COMBS, AND DIXON, JUDGES.

CAPERTON, JUDGE: The Appellant, Charles Thomas Hayes, appeals the order of the Jefferson Circuit Court denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to vacate judgment. Hayes previously entered an *Alford* plea to criminal facilitation to commit robbery in the first degree, criminal facilitation to commit tampering with physical evidence, and criminal facilitation to commit

burglary in the first degree. Hayes was sentenced to concurrent terms of imprisonment for a total of fifteen years. Upon review of the record, the arguments of the parties, and the applicable law, we affirm.

As noted, Hayes entered a guilty plea to the charges pursuant to *Alford v. North Carolina*, 400 U.S. 25, 91 S.Ct.160, 27 L.Ed.2d 162 (1970).

Accordingly, there was no trial or evidence adduced. The guilty plea documents set forth the facts as follows:

On July 11, 2008, in Jefferson County, Kentucky, Barbara Gibson solicited Charles Hayes to scare Fidel Lopez and rob him. Charles Hayes used a baseball bat to beat Mr. Lopez which caused serious physical injury to Mr. Lopez. Frederick Fenwick was present when this happened.¹

On July 24, 2008, the Jefferson County grand jury indicted Hayes, Gibson, and Fenwick. In particular, the grand jury charged Hayes with: (1) Assault in the first degree; (2) Complicity to commit robbery in the first degree; (3) Complicity to commit tampering with physical evidence; and (4) Tampering with physical evidence.

The second set of guilty plea documents stated as follows: On July 7, 2008, in Jefferson County, Kentucky, the defendant Charles Hayes entered a home located at 3733 Woodruff Avenue and struck Bobby Risen with a tire iron causing physical injury.

On October 26, 2008, the Jefferson County grand jury indicted Hayes and Fenwick for complicity to commit burglary in the first degree, alleging that they entered the home of Bobby L. Risen with a weapon for the purpose of committing a crime.

¹ T.R. 08-CR-222, Vol. II, p. 205.

All of the charges were scheduled for a jury trial on November 9, 2009. However, by that date, the prosecutor and Hayes had discussed a plea agreement and the case was continued for a status hearing on November 18, 2009. When the case was called on that date, Hayes and the Commonwealth had reached a plea agreement, and Hayes entered *Alford* pleas to the charges of criminal facilitation to commit robbery in the first degree, criminal facilitation to commit tampering with physical evidence, and criminal facilitation to commit burglary in the first degree. In exchange for Hayes's guilty pleas, the Commonwealth agreed to amend the charges and recommend sentences of imprisonment totaling fifteen years.

In accordance with the terms of the plea agreement, on December 6, 2010, the Jefferson Circuit Court entered judgment against Hayes, sentencing him to imprisonment for a total of fifteen years. The trial court specifically found that there was "a factual basis for the defendant's plea of guilty." Hayes did not file a direct appeal from the trial court's determination that there was a factual basis for the guilty pleas.

Thereafter, on November 10, 2011, Hayes filed motions to vacate the judgment pursuant to RCr 11.42, alleging that he was actually innocent of the charges and that his trial counsel was ineffective for advising him to enter the *Alford* pleas. On November 30, 2011, the trial court dismissed the motion, finding that there was no factual basis upon which to grant relief. It is from that order that Hayes now appeals to this Court.

On appeal, Hayes continues to argue that he is innocent of the underlying crimes for which he was sentenced, and asserts that he would not have entered an *Alford* plea but for the serious errors of defense counsel. More specifically, Hayes asserts that his previous counsel, Hon. Frank Campisano, advised him that “solid legal grounds” existed to seek suppression of an alleged audio/video recording of the assault at issue, which was reflected in a correspondence dated October 15, 2008. Hayes asserts that he showed this letter to his subsequent counsel, Hon. Ryan Vantrease, who concurred in the viability of a suppression effort. Furthermore, Hayes asserts that Vantrease affirmatively stated that he would file a motion seeking suppression but ultimately failed to do so. Hayes asserts that there was no reason for counsel not to seek suppression and that this omission was prejudicial to his interests.

Hayes also argues that his counsel was repeatedly urged by both Hayes and Hayes’s grandmother, Leara Owen, to prepare a viable defense of actual innocence but he did not do so despite being informed by both Hayes and Owen that a solid alibi witness existed and that Hayes’s two codefendants had falsely implicated him. Hayes attached an affidavit from Leara Owen to this effect to his RCr 11.42 motion. Hayes also argues that his counsel failed to conduct any pretrial investigation pertaining to his case, to his substantial prejudice, including not seeking to obtain Hayes’s cell phone, which he argues would have had contact information for “material witnesses.” Finally, Hayes asserts that his counsel persuaded him to plead guilty by deliberately deceiving him about the legal

implication of an *Alford* plea and how it differs from a guilty plea by telling him that an *Alford* plea would substantially improve his custody and parole considerations.

In response, the Commonwealth argues that the trial court properly denied Hayes's RCr 11.42 motion to vacate judgment since the nature of a guilty plea under *Alford* is an admission that the evidence against the defendant would be sufficient to convict him. The Commonwealth thus argues that there was no factual basis to support Hayes's claim of ineffective assistance of counsel.

In reviewing the arguments of the parties on this issue, we note first 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, 104 S.Ct. at 2065.

On the issue of whether an evidentiary hearing is necessary, *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001), is controlling in this matter. Under *Fraser*, Hayes 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.

Upon review of the brief submitted by Hayes to this Court, we note that he claims to be “factually innocent of all charges,” despite his decision to enter the *Alford* plea. Turning to *Alford*, we note that therein, the defendant pled guilty to murder in exchange for the prosecutor’s agreement not to seek the death penalty. In so doing, *Alford* acknowledged that if he were to go to trial, the evidence would have been sufficient to convict him. After receiving a reduced sentence in exchange for his plea, *Alford* claimed that he was factually innocent of the crime. Our United States Supreme Court stated as follows:

The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant An individual accused of [a] crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.

Alford, 400 U.S. at 31, 37, 91 S.Ct. at 164, 167. Thus, a defendant who chooses to enter an *Alford* plea does so despite his protestations of innocence in light of the various alternatives available to him at the time.

In the matter *sub judice*, Hayes did not file a direct appeal from the trial court’s initial determination that there was a factual basis for the entry of his guilty plea. We thus decline to grant Hayes’s motion to vacate the judgment and to permit him to challenge the Commonwealth’s evidence, the sufficiency of which

was already determined by virtue of his *Alford* plea. Moreover, we note that a claim for insufficient evidence is not properly brought in an RCr 11.42 motion, but is instead the proper subject of a direct appeal. See *Boles v. Commonwealth*, 406 S.W.2d 853, 855 (Ky. 1966). Indeed, as this Court noted in *Taylor v. Commonwealth*, 724 S.W.2d 223, 225 (Ky. App. 1986):

Entry of a voluntary, intelligent plea of guilty has long been held by Kentucky Courts to preclude a post-judgment challenge to the sufficiency of the evidence. The reasoning behind such a conclusion is obvious. A defendant who elects to unconditionally plead guilty admits the factual accuracy of the various elements of the offenses with which he is charged. By such an admission, a convicted appellant forfeits the right to protest at some later date that the state could not have proven that he committed the crimes to which he pled guilty. To permit a convicted defendant to do so would result in a double benefit in that defendants who elect to plead guilty would receive the benefit of the plea bargain which ordinarily precedes such a plea along with the advantage of later challenging the sentence resulting from the plea on grounds normally arising in the very trial which the defendant elected to forego.

Sub judice, while Hayes did not admit that he was guilty of the crimes charged, his *Alford* plea was an acknowledgement that the Commonwealth had enough evidence to convict him if he were to choose a jury trial. Accordingly, he made a voluntary and intelligent choice among alternative reasonable courses of action and this Court finds that the trial court correctly denied his motion to set aside that plea.

Having so found, we likewise find that Hayes failed to establish the defective performance and prejudice necessary to prove that he was denied effective assistance of counsel. As our courts have previously held, it is acceptable to advise a defendant to plead guilty if the decision was reasonable in light of the circumstances. In *Commonwealth v. Campbell*, our Kentucky Supreme Court held that:

When an attorney, after making an adequate investigation, in good faith and in the exercise of reasonable judgment induces his client to take this course [entering a plea of guilty] we cannot discern in what respect this constitutes ineffective representation.²

Commonwealth v. Campbell, 415 S.W.2d 614, 616 (Ky. App. 1967).

Sub judice, had Hayes been convicted by a jury, he could have received a sentence of up to life imprisonment, without the possibility of parole for 20 years. See Kentucky Revised Statutes (KRS) 439.3401. Instead, by pleading guilty to the amended charges, Hayes was sentenced to fifteen years' imprisonment, with the possibility of parole after serving fifteen percent of the sentence, or approximately two years and three months.³ Ultimately, Hayes has failed to establish, on the basis of the record before us, that but for counsel's

²See also *Quarles v. Commonwealth*, 456 S.W.2d 293, 694 (Ky. App. 1970).

³ The 15% parole eligibility was noted on the Commonwealth's guilty plea offer. T.R. 08-CR-2222, Vol. 11, p. 144.

erroneous advice he would have pled guilty and proceeded to trial.⁴ Accordingly, we believe that his motion was appropriately dismissed by the court below.

Wherefore, for the foregoing reasons, we hereby affirm the November 28, 2011, order of the Jefferson Circuit Court dismissing Hayes's motion to vacate sentence pursuant to RCr 11.42, the Honorable A.C. McKay Chauvin, presiding.

ALL CONCUR.

BRIEF FOR APPELLANT:

Charles T. Hayes, *Pro Se*
Eddyville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Perry T. Ryan
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⁴ In so finding, we do note Hayes's assertion in the brief submitted to this Court that he "exhibited extreme reticence" to plead guilty. However, Hayes did not include the video of his guilty plea with the record on appeal. Pursuant to Kentucky Rules of Civil Procedure 75.01, it is the Appellant's responsibility to designate the contents of the record on appeal, and to obtain transcriptions or videotapes of all proceedings upon which his appeal relies. Moreover, as we have previously held, when the complete record is not before this Court, we must assume that the omitted record supports the decision of the trial court. *See Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985).