

RENDERED: AUGUST 16, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-000377-MR

JAMEY D. COPE

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JEAN CHENAULT LOGUE, JUDGE
ACTION NO. 08-CR-00008

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT, MOORE, AND VANMETER, JUDGES.

VANMETER, JUDGE: Jamey D. Cope appeals *pro se* from the September 29, 2011, and February 16, 2012, orders of the Madison Circuit Court, which denied Cope's motion for Kentucky Rules of Criminal Procedure (RCr) 11.42 post-conviction relief. Because we hold that the trial court did not abuse its discretion by denying Cope's requested relief, we affirm.

In 2008, Cope was convicted of one count each of first-degree assault, second-degree wanton endangerment, and second-degree persistent felony offender, and was sentenced to thirty years' imprisonment. Cope's conviction was affirmed on direct appeal by the Supreme Court of Kentucky.¹ Thereafter, Cope filed a motion to vacate his sentence and conviction pursuant to RCr 11.42, in which he argued that he had received ineffective assistance of trial counsel. The trial court denied Cope's motion on its face, in part, and set an evidentiary hearing to determine the merits of one remaining claim: that trial counsel was ineffective by failing to meet with him without undue delay to begin discussion of the case and defensive strategies. Following an evidentiary hearing, a final order was entered denying Cope's remaining claim. This appeal followed.

Cope argues on appeal that the trial court abused its discretion by holding that Cope had received effective assistance of trial counsel and by failing to rule on the cumulative effect of trial counsel's errors. We disagree.

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) (citation omitted). 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). While we will not disturb a trial court's findings of fact if supported by

¹ *Cope v. Commonwealth*, 2009-SC-000014-MR, 2010 WL 2471865 (Ky. 2010).

substantial evidence, we review legal issues *de novo*. *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008) (citation omitted).

Kentucky has adopted the two-prong test of establishing ineffective assistance of counsel as outlined in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985).

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 the defendant 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. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. The defendant carries the burden of establishing ineffective assistance. *Id.* at 690, 104 S.Ct. at 2066. The relevant inquiry of the trial court is whether the defendant demonstrated "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would be different." *Id.* at 694, 104 S.Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* This burden is not met by showing "that error by counsel had some conceivable effect on the outcome of the proceeding." *Sanders v. Commonwealth*, 89 S.W.3d 380, 386 (Ky. 2002) (citation omitted).

An evidentiary hearing is required on an RCr 11.42 motion only “[i]f 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*, 854 S.W.2d 742, 743 (Ky. 1993). Therefore, 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.* at 743-45.; *Brewster v. Commonwealth*, 723 S.W.2d 863, 865 (Ky. App. 1986). If an evidentiary hearing is held, we must determine whether the lower court acted erroneously in determining whether the defendant below received effective assistance of counsel. *Ivey v. Commonwealth*, 655 S.W.2d 506 (Ky. App. 1983). If an evidentiary hearing is not held, our review is limited to “whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction.” *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967).

Cope first argues, as he did before the trial court, that his trial counsel was ineffective by failing to meet with him without undue delay and discuss the case and defense strategies. Cope’s trial counsel testified that he maintained sufficient contact with the defendant, advised the defendant during the pretrial process, and attempted to form potential defense strategies. Cope does not challenge these statements, but rather just makes a general argument of error. Because he offers no support for his argument of trial court error, and his counsel’s testimony constitutes substantial evidence to support the trial court’s determination, his argument on appeal fails.

Cope next argues that his trial counsel was ineffective by failing to contact or call any witnesses; by failing to investigate, prepare, and present a defense; and by failing to challenge the evidence presented against Cope or make objections. Cope has failed to identify any precise error relating to the trial court's rejection of these claims, and instead rehashes his RCr 11.42 argument to this court. Cope's allegations are directly contradicted by both the trial record and later testimony by trial counsel. The trial record indicates that Cope presented trial counsel with a list of potential witnesses the night before trial and that the trial court subsequently denied a motion for a continuance in order to procure the witnesses. Trial counsel claimed that unsuccessful attempts had been made to contact some of the witnesses and that other witnesses would only testify as to Cope's prior bad acts. In addition, the trial record shows no evidence of trial counsel unpreparedness. Instead, the trial record demonstrates that counsel was prepared for trial, attempted to introduce bad character evidence against the victim, and further sought a jury instruction of extreme emotional distress. Lastly, Cope fails to identify what, if any, objections or evidentiary challenges trial counsel failed to make, therefore resulting in an argument comprised of pure speculation. Accordingly, Cope has failed to show that the trial court abused its discretion when it denied his motion for RCr 11.42 relief.

Cope's final argument that the trial court abused its discretion by not ruling on the cumulative effect of trial counsel's errors is clearly refuted by the trial court's conclusion that Cope had failed to show cumulative error.

For the foregoing reasons, the September 29, 2011, and February 16, 2012, orders of the Madison Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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