

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000457-MR

RICKY BARBOUR

APPELLANT

v.

APPEAL FROM HART CIRCUIT COURT
HONORABLE JOHN DAVID SEAY, JUDGE
ACTION NO. 94-CR-00041

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, THOMPSON AND VANMETER, JUDGES.

THOMPSON, JUDGE: Ricky Barbour challenges the summary denial of his RCr 11.42 motion for relief of judgment due to ineffective assistance of counsel.

This motion follows Barbour's retrial on the issue of whether he is a second degree persistent felony offender (PFO II) and sentencing. Barbour argues his trial counsel was ineffective for (1) failing to preserve the issue of mitigating evidence to the Court of Appeals and failing to provide mitigating evidence; and (2) failing

to properly investigate whether Barbour's prior Arizona offenses qualified as an underlying felony for PFO II enhancement pursuant to KRS 532.080(2). Barbour also argues the trial court erred by failing to address his other arguments.

In November 1994, Barbour was convicted of first-degree attempted rape, kidnapping and fourth-degree assault. The jury recommended sentences of ten years for the attempted rape, twenty years for kidnapping and twelve months for the fourth-degree assault, to run consecutively. The jury also found Barbour to be a PFO II and recommended enhanced sentences of twenty years for attempted rape and two hundred years for kidnapping.

Barbour appealed to the Kentucky Supreme Court arguing the trial court erred in admitting records of Arizona felony convictions used to prove his status as a PFO II. The Supreme Court reversed the PFO II conviction and sentence enhancement and remanded for retrial of the PFO II charge. *Barbour v. Commonwealth*, 1995-SC-000078-MR (Ky. 1996) (unpublished).¹

On September 20, 2002, Barbour's counsel filed a motion to introduce mitigating evidence Barbour had completed a sexual offender counseling treatment program while incarcerated. On November 12, 2002, the trial court granted this motion.

On December 1, 2003, Barbour's counsel filed a motion to dismiss the PFO indictment on several grounds, including the predicate Arizona offenses were not designated as felonies at the time of Barbour's convictions. Counsel explained

¹ Barbour filed two petitions for a writ of prohibition to prohibit retrial of the PFO II charges. Both were denied.

Barbour was convicted of class six undesignated felonies, probated, and his offenses would not be designated as either felonies or misdemeanors until his probation was terminated. Counsel cited a November 17, 1999, Arizona minute entry.

On February 26, 2004, the trial court denied this motion, ruled its denial to be a final and appealable judgment and stated there was no just reason for delay. Barbour did not appeal.

On July 30, 2004, Barbour's counsel filed a motion in limine to limit the retrial to the PFO determination rather than a full truth-in-sentencing proceeding. On August 9, 2004, the trial court ruled neither mitigating evidence nor victim impact evidence would be admissible.

Barbour's counsel continued to object to the use of the Arizona convictions before retrial, challenging their admission in a second motion in limine and in a motion to dismiss the indictment. Counsel continued to object to their use during the retrial through objections to the Arizona order of probation, the jury instructions and in a motion for a directed verdict. The trial court denied these motions and overruled counsel's objections.

At the retrial on Barbour's PFO II status, Kentucky probation officer Tom LaFollett testified as to the contents of Barbour's certified order of probation and stated the Arizona court sentenced him to three years of probation for convictions of class six felonies. The jury found Barbour was a PFO II on both counts and enhanced his ten-year sentence for the attempted rape to twenty-years'

incarceration and enhanced his twenty-year sentence for kidnapping to fifty-years' incarceration. The court sentenced him to serve these sentences consecutively, for a total of seventy-years' incarceration. Final judgment was entered on October 11, 2004.

Barbour appealed, arguing in part, the trial court erred by failing to allow mitigating evidence. *Barbour v. Commonwealth*, 204 S.W.3d 606 (Ky. 2006).

The Supreme Court affirmed, determining this claim of error was waived because this issue was not preserved for review:

While [Barbour] had at one time moved the trial court to allow the introduction of mitigation evidence under the truth-in-sentencing statute, we believe that request was effectively withdrawn when he subsequently filed a motion in limine requesting that “the retrial be limited to the PFO phase and not a full truth-in-sentencing proceeding.”

.....

We cannot consider [Barbour's] alleged objection to the exclusion of mitigation evidence as grounds for reversing [Barbour's] conviction when the exclusion was prompted by his own motion and was not properly preserved by any subsequent objection.

Id. at 609-610.

On November 26, 2007, Barbour filed a *pro se* motion to vacate his sentence pursuant to RCr 11.42. The trial court granted Barbour's motion for appointment of counsel and counsel filed a supplementary brief in support of the RCr 11.42 motion.

On May, 18, 2009, Barbour filed a *pro se* motion seeking relief from judgment pursuant to CR 60.02, claiming his Arizona offenses did not qualify as a felony conviction because he was never sentenced to serve a year or more of incarceration on them. The CR 60.02 motion was held in abeyance pending resolution of the RCr 11.42 motion.

In support of the RCr 11.42 motion, Barbour's counsel provided the reporter's transcript of the March 7, 1991, Arizona plea colloquy and an October 14, 2004, minute entry designating Barbour's Arizona offenses. Neither of these documents had previously been submitted to the trial court. The plea colloquy was available prior to counsel's motion to dismiss the PFO charge but the minute entry did not occur until after resentencing. The plea colloquy confirmed trial counsel's previous representations in her motions to dismiss. The minute entry indicates Barbour's Arizona offenses were not designated as felonies by an Arizona court until October 14, 2004.

On July 21, 2011, the trial court denied Barbour's RCr 11.42 motion without an evidentiary hearing and on February 8, 2012, entered a supplemental order, making factual findings. The court found trial counsel's request for a motion in limine to forego the truth-in-sentencing phase was a sound trial strategy. The trial court found whether Barbour's Arizona convictions qualified as a felony conviction under the PFO statute was repeatedly raised by trial counsel and, although the trial court denied these motions, "it is clear from the record trial

counsel thoroughly investigated the Arizona matters and vigorously argued the matter before the court.” Barbour appealed.

Barbour must establish he was deprived of his constitutional right to counsel in order to be entitled to the extraordinary relief of RCr 11.42. *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008). Under *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984), Barbour must show his counsel’s performance was incompetent and prejudiced him because it fell below an objective standard of reasonableness and there is a reasonable probability that the result of the proceeding would have been different but for counsel’s errors. *Hatcher v. Commonwealth*, 310 S.W.3d 691, 696 (Ky.App. 2010). Proving deficient performance and prejudice is a heavy burden, especially given the presumption that counsel’s conduct was reasonable and effective. *Humphrey v. Commonwealth*, 962 S.W.2d 870, 873 (Ky. 1998).

On appeal, we examine counsel’s performance and any resulting deficiencies *de novo*. *Brown*, 253 S.W.3d at 500. When an evidentiary hearing is not held on an RCr 11.42 motion, “[o]ur review is confined 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). “In seeking post-conviction relief, the movant must aver facts with sufficient specificity to generate a basis for relief.” *Lucas v. Commonwealth*, 465 S.W.2d 267, 268 (Ky. 1971).

A hearing is required if there is a material issue of fact that cannot be determined on the face of the record; a hearing is not necessary if the record refutes the claim of error or if “the allegations, even if true, would not be sufficient to invalidate the conviction.” *Harper v. Commonwealth*, 978 S.W.2d 311, 314 (Ky. 1998). “The trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them.” *Fraser v. Commonwealth*, 59 S.W.3d 448, 452-453 (Ky. 2001).

Barbour’s first argument is counsel was ineffective for failing to preserve the issue of whether he could introduce mitigating evidence by waiving this issue after raising it by filing a motion in limine and he was entitled to an evidentiary hearing on this issue. Barbour fails to allege what mitigating evidence he would have offered, stating only it “include[s] the significant progress Barbour made in prison in the intervening ten years between his two trials.” In the motion before the trial court, Barbour’s counsel attached various certificates of programs Barbour completed while incarcerated.

Instead of alleging prejudice, Barbour attacks the trial court’s determination counsel’s actions were the result of trial strategy. We agree counsel’s actions were based on trial strategy. However, even if trial strategy should not be assumed in the absence of testimony to that effect in an evidentiary hearing, no evidentiary hearing is needed absent sufficient allegations. *See Sanders v. Commonwealth*, 89 S.W.3d 380, 390 (Ky. 2002) (overruled on other grounds by *Leonard v. Commonwealth*, 279 S.W.3d 151, 158-159 (Ky. 2009)). Additionally, counsel’s

failure to introduce evidence Barbour completed classes while incarcerated is not the type of evidence which has a reasonable probability of changing a jury's decision as to the length of Barbour's sentence enhancements after the jury heard graphic testimony from the victim about how Barbour attempted to rape her and harmed her child. *See Gillard v. Mitchell*, 445 F.3d 883, 896-897 (6th Cir. 2006).

Barbour's second argument is counsel was ineffective for failing to adequately investigate his prior Arizona offenses. Barbour claims his Arizona plea colloquy establishes he was not convicted of felonies in Arizona. Therefore, he claims his trial counsel's performance was deficient even though she moved the trial court to dismiss the PFO indictment on the basis that Barbour was not convicted of a qualifying felony.

Barbour's counsel had an obligation to conduct a reasonable investigation under the circumstances. *Wiggins v. Smith*, 539 U.S. 510, 521-522, 123 S. Ct. 2527, 2535-2536, 156 L. Ed. 2d 471 (2003); *Parrish v. Commonwealth*, 272 S.W.3d 161, 169 (Ky. 2008). The record demonstrates Barbour's counsel investigated whether his Arizona offenses qualified as felony convictions, actively pursued challenging their use as a PFO predicate offense and preserved this issue for appeal. Barbour failed to show counsel's actions fell below an object standard of reasonableness. Additionally, undesignated Arizona offenses are considered felonies, which are eligible for felony-type penalties despite a possibility the convictions may later be designated misdemeanors. *Arizona v. Arana*, 173 Ariz. 370, 371, 843 P.2d 652, 653 (1992).

Barbour's final argument is the trial court erred by failing to address the remaining arguments raised in his *pro se* brief. However, Barbour does not address the specifics of these arguments in his appellate brief beyond stating: "The unaddressed arguments are fact-intensive, and include whether counsel properly raised a double jeopardy argument and properly objected to jury instructions."

Under CR 76.12(4)(c)(v), an appellant is required to brief the issues raised on appeal:

[A] reviewing court will generally confine itself to errors pointed out in the briefs and will not search the record for errors. An appellant's failure to discuss particular errors in his brief is the same as if no brief at all had been filed on those issues. Consequently, the trial court's determination of those issues not briefed upon appeal is ordinarily affirmed.

Milby v. Mears, 580 S.W.2d 724, 727 (Ky.App. 1979) (internal citations omitted).

Barbour's brief reference to the other arguments raised before the trial court is simply insufficient to preserve these arguments for appeal or to allow the Court to address them in any meaningful way. Therefore, we affirm the denial of these claims.

Accordingly, we affirm the Hart Circuit Court's denial of Barbour's RCr 11.42 motion.

ALL CONCUR.

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