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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000786-MR

TEDDY K. HURST — APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL K. WINCHESTER, JUDGE
ACTION NO. 07-CR-00063

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; COMBS AND STUMBO, JUDGES.

ACREE, CHIEF JUDGE: The issue before us is whether the Whitley Circuit Court erred by denying Appellant Teddy Hurst's motion to vacate his criminal conviction under Kentucky Rules of Criminal Procedure (RCr) 11.42 without conducting an evidentiary hearing and without issuing written factual findings. Finding no error, we affirm.

On May 14, 2007, Hurst was indicted on one count of murder, three counts of attempted murder, one count of first-degree burglary, and possession of a handgun by a convicted felon. Hurst entered a not-guilty plea to the charges. The Commonwealth filed notice of its intent to seek the death penalty.

In September 2008, Hurst and the Commonwealth reached a plea agreement. For Hurst's plea of guilty to the indicted charges, the Commonwealth agreed not to pursue the death penalty, and to recommend a concurrent sentence of twenty years' imprisonment on each of the charges of first-degree burglary and attempted murder charges, ten years' imprisonment on the possession of a handgun charge, and life without the possibility of probation or parole until Hurst served twenty-five years in prison on the murder charge. Hurst pleaded guilty on September 23, 2008. The circuit court conducted a plea colloquy pursuant to *Boykin v. Alabama*[1] and determined that Hurst's plea was knowingly, intelligently, and voluntarily made with advice of counsel and with a full understanding of the consequences of entering a guilty plea. By order entered December 8, 2008, the circuit court accepted Hurst's guilty plea, adjudged him guilty, and sentenced him consistent with the Commonwealth's recommendation and the plea agreement.

On or about December 2011, Hurst moved, *pro se*, to vacate his conviction under RCr 11.42 alleging ineffective assistance of counsel. Hurst asserted his trial counsel was ineffective when she: (i) failed to pursue a mental psychosis defense;

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

and (ii) failed to prepare for trial.[2] Hurst requested an evidentiary hearing and appointment of counsel. The Commonwealth opposed Hurst's motion. The circuit court issued an order, entered on March 30, 2012, denying Hurst's RCr 11.42 motion without explanation. From this order, Hurst appealed.

On appeal, Hurst argues the circuit court erred when it denied his RCr 11.42 motion without conducting an evidentiary hearing, and erred when it failed to render proper and mandatory written findings of fact addressing the basis for its denial of Hurst's motion. Hurst raises the same grounds of ineffective assistance as he did before the circuit court. Hurst further argues these grounds are not refuted by the record and can only be resolved upon an evidentiary hearing. We disagree.

An evidentiary hearing is not a vested right to which every RCr 11.42 movant is entitled. *See Stanford v. Commonwealth*, 854 S.W.2d 742, 743 (Ky. 1993) ("Even in a capital case, an RCr 11.42 movant is not automatically entitled to an evidentiary hearing."). Instead, to merit an evidentiary hearing, the movant must satisfy a two-part test. "First, the movant must show that the 'alleged error is such that the movant is entitled to relief under the rule.'" *Parrish v. Commonwealth*, 272 S.W.3d 161, 166 (Ky. 2008) (citation omitted). Second, RCr

[2] For reasons unclear to this Court, Hurst's RCr 11.42 motion is not contained in the record. However, in his brief, Hurst characterizes the ineffective-assistance arguments raised in his motion before the circuit court. The Commonwealth does not take issue with Hurst's characterization, and we adopt it as an accurate account of the ineffective-assistance claims contained in his RCr 11.42 motion. To the extent relevant, we further note that "[w]hen the record is incomplete, this Court must assume that the omitted record supports the trial court." *Chestnut v. Commonwealth*, 250 S.W.3d 288, 303 (Ky. 2008).

11.42(5) necessitates a hearing only "if the answer raises a material issue of fact that cannot be determined on the face of the record." In that regard:

> An evidentiary hearing is not necessary to consider issues already refuted by the record in the trial court. Conclusory allegations which are not supported with specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of discovery.

Hodge v. Commonwealth, 116 S.W.3d 463, 468 (Ky. 2003) (citation omitted), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009); *Newsome v. Commonwealth*, 456 S.W.2d 686, 687 (Ky. 1970) ("An evidentiary hearing [on an RCr 11.42 motion] is not required when the issues presented may be fully considered by resort to the court record of the proceeding, or where the allegations are insufficient.").

In conducting its review, "the court must 'examin[e] whether the record refuted the allegations raised' (and not 'whether the record supported the allegations, which is the incorrect test')." *Parrish*, 272 S.W.3d at 166 (quoting *Hodge*, 116 S.W.3d at 468)). The circuit court "may not simply disbelieve factual allegations in the absence of evidence in the record refuting them." *Fraser v. Commonwealth*, 59 S.W.3d 448, 452-53 (Ky. 2001).

Before us, Hurst has failed to show that the allegations raised in his RCr 11.42 motion would entitle him to relief under that rule, and failed to demonstrate that the allegations were not refuted by the trial record.

Hurst ultimately entered a plea of guilty. Consequently, to establish an ineffective assistance of counsel claim, and thus show that the claimed error is one entitling him to relief under RCr 11.42, Hurst must prove:

> (1) [t]hat counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and
>
> (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial.

Commonwealth v. Elza, 284 S.W.3d 118, 120-21 (Ky. 2009) (citation omitted).

Hurst's first allegation of ineffective assistance is that his trial counsel failed to pursue a mental, drug-induced psychosis defense. Hurst argues trial counsel did not "make an effort to allow [Hurst] the opportunity to receive an expert as to the induced psychosis caused by the mixture of the medication prescribed as well as the side effect of not having said medication to take." (Appellant's Brief at 2). After examining the record, we cannot say Hurst's trial counsel's decision not to pursue this defense constituted deficient performance.

To establish deficient performance, Hurst's trial counsel must have "made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 688, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). Likewise, in providing effective assistance, counsel has a duty to conduct a reasonable investigation, under the totality of the circumstances, including defenses to the charges. *See Wiggins v. Smith*, 539 U.S.

510, 521-23, 123 S.Ct. 2527, 2535-36, 156 L. Ed. 2d 471 (2003). "There is always a strong presumption that the conduct of counsel falls within the wide range of reasonable professional assistance[.]" *Hodge*, 116 S.W.3d at 469. Because of this, we apply "a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066; *Moore v. Commonwealth*, 983 S.W.2d 479, 485 (Ky. 1998) (explaining trial counsel's strategic trial decisions will generally not be second-guessed by hindsight).

The record reveals that, in May 2007, Hurst was admitted to the Kentucky Correctional Psychiatric Center (KCPC) and evaluated to determine whether he was competent to stand trial for the charged offenses. During that evaluation, Hurst "denied that substance abuse had been a problem for him around the time of the alleged offenses," and subsequently "denied any active substance abuse at the time of the alleged offenses." Hurst's own declarations belie his claim that, at the time of the offenses, he was suffering from a drug-induced mental psychosis. Hurst's trial counsel was entitled to rely on Hurst's own statements. Accordingly, we cannot say Hurst's trial counsel rendered ineffective assistance when she chose not to pursue or further investigate a mental, drug-induced psychosis defense.

Hurst's second allegation – that his trial counsel was ineffective because she failed to prepare for trial – lacks supporting facts and is simply conclusory. "In the presence of such a vaporous allegation the court is not required to afford an evidentiary hearing[.]" *Willoughby v. Commonwealth*, 406 S.W.2d 725, 726 (Ky. 1966). To the extent Hurst argues his trial counsel failed to prepare for trial by

failing to pursue a mental psychosis defense, we have resolved this claim; no further discussion is warranted.

In sum, Hurst's ineffective-assistance allegations are both insufficient to warrant relief, and can be resolved on the face of the record. Accordingly, an evidentiary hearing was not required, and the circuit court committed no error when it declined to hold an evidentiary hearing.

Hurst also argues the circuit court erred by failing to issue written findings of fact and conclusions of law addressing the issues raised and satisfactorily explaining why it denied his RCr 11.42 motion. We again turn to RCr 11.42 to resolve this issue. Pursuant to subsection (6) of that statute, the circuit court need only issue findings if an evidentiary hearing is held. *Stanford*, 854 S.W.2d at 743 (indicating RCr 11.42(6) "requires findings only 'at the conclusion of the hearing or hearings.'" (Quoting RCr 11.42(6)). "If there is no hearing, then no findings are required." *Id.* at 744.

As explained, an evidentiary hearing was neither held nor warranted on Hurst's RCr 11.42 motion. Therefore, because there was no hearing, the circuit court was under no obligation to issue factual findings. *Id.* We find no error with the circuit court's summary denial of Hurst's motion.

The March 30, 2012 order of the Whitley Circuit Court denying Hurst's motion for RCr 11.42 relief is affirmed.

ALL CONCUR.

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