RENDERED: MAY 16, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-002309-MR

LORNE ARMSTRONG — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 07-CR-00992

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE, NICKELL, AND TAYLOR, JUDGES.

NICKELL, JUDGE: Lorne Armstrong, *pro se*, has appealed from the Warren Circuit Court's denial of his *pro se* motion for post-conviction relief pursuant to RCr[1] 11.42. Following a review of the record, the briefs, and the law, we affirm.

[1] Kentucky Rules of Criminal Procedure.

In September 2007, Armstrong, a thirty-seven-year-old man, began "chatting" online with a person whose screen name was "Kayla-princess94." Armstrong believed he was chatting with a thirteen-year-old girl. In actuality, "Kayla-princess94" was a fictitious persona created by volunteers of Perverted Justice, a not-for-profit organization which collaborates with law enforcement to catch internet child-predators. Armstrong initiated a lengthy series of online conversations with "Kayla," some of which were sexually explicit in nature, at times even using a web camera to expose his genitalia to the child. On October 18, 2007,[2] after talking online for approximately one month, Armstrong travelled from Nashville, Tennessee, to Bowling Green, Kentucky, to what he believed was the home of the thirteen-year-old child, bringing with him condoms and a bracelet to give the girl as a gift. The residence was, in fact, a sting house where law enforcement was waiting for him. Shortly after his arrival, Armstrong was confronted by Chris Hansen, a reporter for Dateline NBC, who was recording a segment for a television show known as "To Catch a Predator." Following a short videotaped conversation with Hansen, Armstrong attempted to leave the residence and was arrested by waiting officers.

Armstrong entered a guilty plea on July 14, 2008, to a charge of attempted unlawful transaction with a minor in the first degree[3] and was subsequently sentenced to serve a term of seven years' imprisonment. This

[2] Coincidentally, this was Armstrong's birthday.

[3] Kentucky Revised Statutes (KRS) 506.010 and 530.064, a Class C felony.

sentence was ordered to be served concurrently with a federal sentence stemming from the same incident.[4] Armstrong did not appeal his conviction. However, on October 30, 2009, he filed a *pro se* motion to vacate his sentence pursuant to RCr 11.42, alleging trial counsel provided ineffective assistance by failing to: 1) explore an entrapment defense; 2) explain the consequences of the plea bargain; and 3) "use a media tag along defense." Appointed counsel for Armstrong determined no supplemental filing was necessary. The trial court denied the RCr 11.42 motion by order entered on August 22, 2011, and this appeal followed.

On appeal, Armstrong reasserts that counsel was ineffective in failing to explore an entrapment defense and in failing to explain the consequences of the guilty plea. He has apparently abandoned all other allegations as they are not presented to this Court for review. However, in his brief, Armstrong has added a series of rambling and conclusory allegations and supporting "evidence" which were not presented to the trial court. It is axiomatic that a party may not "feed one can of worms to the trial judge and another to the appellate court." *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), *overruled on other grounds by Wilburn v. Commonwealth*, 312 S.W.3d 321, 327 (Ky. 2010) (citations omitted)). As the trial court was not presented with these additional arguments and evidence nor given the opportunity to rule on them, we shall not consider them for the first

[4] Ultimately, Armstrong was granted shock probation on the state charge on May 31, 2011, and was transferred to federal custody.

time on appeal. We will address only those arguments properly preserved for appellate review.

Prior to considering the arguments presented, we note first that we review a 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 411–12. In the context of a guilty plea, the movant must show that, but for the alleged errors and deficiencies of counsel, a reasonable probability exists the movant would not have entered a plea but would have insisted on going to trial. *Sparks v. Commonwealth*, 721 S.W.2d 726, 727-28 (Ky. App. 1986). 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.

Armstrong first alleges trial counsel was ineffective in failing to explore an entrapment defense. His argument is somewhat difficult to follow, is internally inconsistent, and varies greatly from the argument presented to the trial court. Armstrong first avers counsel never informed him of the existence of such a defense, followed by an allegation counsel failed to adequately explore the potential of using the defense, then shifts to an allegation that counsel wrongly determined the entrapment defense did not apply, and ultimately contends he told counsel "repeatedly that he [Armstrong] figured it would be better for a defense of entrapment." Before the trial court, he argued only that counsel failed to inform him of the existence of the defense. Thus, as stated previously, this is the only

portion of the issue properly before us, and all that shall be addressed in this Opinion.

The trial court determined Armstrong was not entitled to relief as he had failed to show the outcome of the case would have been different had counsel informed him of the possibility of an entrapment defense. It examined the record and found the defense, even if available, would have been unsuccessful under the plain language of KRS 505.010(2)(a), as the Commonwealth merely afforded Armstrong the opportunity to commit an offense. Having so found, the trial court determined there was no reasonable possibility the outcome of Armstrong's case was adversely affected by counsel's alleged failure. Our review of the record is in accord with the findings of the trial court.

Armstrong presented no evidence that any action on the part of a "public servant or the person acting in cooperation with a public servant" did anything more than provide him the opportunity to commit an offense. Contrary to his vehement arguments, nothing in the record indicates Armstrong was induced or coerced into committing a criminal act by a public servant or its ostensible agent. The record reveals Armstrong engaged in sexually explicit conversations and sent lewd photographs to a person he believed to be thirteen years of age, then travelled to Kentucky for the purpose of engaging in sexual conduct with the minor. The mere fact that the young lady requested he come for a visit does not rise to the level of coercion or inducement as the trial court correctly determined. Even assuming counsel failed to inform him of the existence of an entrapment defense,

such a defense would have clearly been futile and we therefore cannot discern any prejudice to Armstrong by counsel's alleged deficient performance. "It is not ineffective assistance of counsel to fail to perform a futile act." *Williams v. Commonwealth,* 336 S.W.3d 42, 47 n. 16 (Ky. 2011) (internal quotation marks and citation omitted).

Armstrong next contends counsel was ineffective in failing to explain the consequences of the plea agreement. Before the trial court he alleged no factual basis for this claim and has not remedied this deficiency in his brief to this Court. Where an RCr 11.42 movant "has failed to allege sufficient facts to constitute a deprivation of a substantial right, then the trial court should dismiss the claim." *Mills v. Commonwealth*, 170 S.W.3d 310, 326–27 (Ky. 2005). We will not search the record to construct the Appellant's argument for him, nor will this Court undergo a fishing expedition to find support for underdeveloped arguments. "Even when briefs have been filed, a reviewing court will generally confine itself to errors pointed out in the briefs and will not search the record for errors." *Milby v. Mears,* 580 S.W.2d 724, 727 (Ky. App. 1979). The trial court was correct to summarily deny Armstrong relief on this bald and unsupported allegation of error.

For the foregoing reasons, the judgment of the Warren Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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