

RENDERED: JULY 25, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002080-MR

BILLY BROWN

APPELLANT

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 11-CR-00023

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, STUMBO AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Billy Brown appeals from the June 28, 2012, and October 24, 2012, orders of the Knox Circuit Court, which denied his motion for Kentucky Rules of Criminal Procedure (RCr) 11.42 relief. We affirm.

On January 28, 2011, Brown was indicted for trafficking in a controlled substance, second degree, second offense; trafficking marijuana, less

than eight ounces; trafficking in a controlled substance, first degree, second offense; and persistent felony offender (PFO), second degree. Trial was set for April 7, 2011, with a pretrial conference on March 31, 2011. During the pretrial conference, Brown pleaded guilty pursuant to an offer from the Commonwealth. As a result of that plea bargain, Brown was charged with second degree trafficking in a controlled substance and sentenced to ten years, enhanced to twelve by his PFO status. The remaining two charges were dismissed.

On June 8, 2011, the majority of House Bill (HB) 463 became effective. That bill effectuated sweeping changes to the Commonwealth's criminal justice system. In particular, the bill lowered the felony classifications and the sentences for trafficking charges.

On February 25, 2012, Brown filed a motion to vacate his sentence and conviction pursuant to RCr 11.42. Brown argued that his attorney misadvised him to accept a plea agreement which, in light of the impending changes in law, was against Brown's best interests. Brown indicated he was scheduled for trial after the effective date of HB 463, and that he would have benefited from a reduced sentence if he had forgone the plea agreement and chosen to go to trial. Brown further maintained that his attorney misinformed him that he would be eligible for parole after he had served twenty percent of his sentence.

An order was entered on June 28, 2012, in which the trial court found that his arguments pertaining to HB 463 were directly refuted from the record. Contrary to Brown's claims that he was scheduled for trial after the June 8

effective date of HB 463, he was actually scheduled for trial two months earlier. The trial court denied Brown's motion as it pertained to that claim. It was determined, however, that an evidentiary hearing should be held as to Brown's remaining claim that he was misadvised as to his parole eligibility. An evidentiary hearing was held and, on October 24, 2012, a second order was entered denying Brown's motion as to his remaining claim. The trial court found Brown's trial counsel's testimony directly refuted his claim that she misinformed him as to parole eligibility. This appeal followed.

It is well established that the Commonwealth abides by the prevailing ineffective assistance analysis found in *Strickland v. Washington*, which requires a showing that counsel's performance was deficient and that the deficient performance prejudiced the movant. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We review a trial court's denial of RCr 11.42 relief under an abuse of discretion standard. *Bowling v. Com.*, 981 S.W.2d 545, 548 (Ky. 1998). 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). A trial court's findings of fact are conclusive if they are supported by substantial evidence. RCr 9.78.

Brown argues that he received ineffective assistance of counsel when he was misadvised regarding parole eligibility. In support of its decision to deny Brown's motion for relief on this claim, the trial court found:

[trial counsel] testified that, in her long experience as a defense attorney, she is extremely familiar with the impact that a plea of guilty to PFO in the First Degree will have on parole eligibility, and that she knew that in Movant's case, it would require service of 10 years before being parole eligible. The Court finds trial counsel's testimony on this issue to be credible. The Court finds incredible Movant's assertion that trial counsel would have told him he would be eligible after 29 months; such advice would have been contrary to what counsel testified that she knows from her experience. Moreover, Movant is a previously convicted felon, and has some familiarity with the workings of the criminal justice system and parole eligibility.

The trial court's findings are supported by substantial evidence. Accordingly, we find no abuse of discretion with the trial court's denial of relief to Brown on this claim.

Brown next argues that he received deficient performance when he was advised to enter a guilty plea one month before the relevant portions of HB 463 became effective. He further argues that the trial court erred when it failed to hold an evidentiary hearing as to this claim. Again, we disagree that there is any error.

An evidentiary hearing is not required if a movant's allegations are refuted by the record. *Hensley v. Commonwealth*, 305 S.W.3d 434, 436 (Ky.App. 2010). In this case, the record is clear that Brown was scheduled for trial two months before the relevant portions of HB 463 were to become effective. Accordingly, we find no error with the trial court's conclusion that Brown's argument was conclusively refuted by the record and no evidentiary hearing was required. In his reply brief, Brown presents a new argument that his trial counsel provided

deficient assistance when she failed to secure a trial continuance so that Brown could have benefited from the changes made by HB 463. This argument is unpreserved and, thus, not subject to our review.

Based on the foregoing, the June 28, 2012 and October 24, 2012, orders of the Knox Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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