RENDERED: NOVEMBER 14, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000499-MR

CHARLES R. BLACKWELL APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY BURRESS, JUDGE
ACTION NO. 08-CR-00319

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MOORE, AND NICKELL, JUDGES.

NICKELL, JUDGE: Charles R. Blackwell, *pro se,* appeals an order entered by the Bullitt Circuit Court denying his motion for RCr[1] 11.42 relief claiming ineffective assistance of counsel. The trial court deemed the motion to be both duplicative and frivolous. Blackwell claims the attorney representing him at the time he entered a guilty plea denied him effective assistance of counsel by opposing his efforts to

[1] Kentucky Rules of Criminal Procedure.

withdraw his guilty plea prior to final sentencing. Upon review of the briefs, the record and the law, we affirm.

FACTS

We quote the facts of this case from a prior Opinion of this Court affirming Blackwell's conviction on direct appeal.

> Blackwell entered a plea of guilty to one count of fleeing or evading police, first degree; one count of third-degree burglary; one count of wanton endangerment in the first degree and one count of being a persistent felony offender in the second degree. The charges stemmed from an incident on August 20, 2008, where Blackwell went to the home of a former girlfriend, assaulted her and then fled the scene as police arrived in response to a 911 call from the residence. He crashed into two police cruisers while attempting to flee the scene.
>
> Blackwell submitted to a court ordered mental evaluation and, after a hearing, was found competent to stand trial. Blackwell's attorney informed the trial court that during previous discussions with the Commonwealth and his client, he thought a plea agreement had been reached. But when he met with Blackwell on the morning the plea was to be entered "[i]t was as though we had not spoken before."
>
> Blackwell indicated he believed the plea agreement permitted concurrent sentences for a total of five years instead of consecutive sentences for a total of fifteen years, his actual sentence as reflected by the record. Later on that afternoon, Blackwell returned to the trial court and entered a guilty plea to the amended charges pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). The plea agreement, which counsel acknowledged "took all day" provided for consecutive sentences for a total of fifteen years. Sentencing was set for November 9, 2009.

On November 2, 2009, counsel orally indicated to the trial court that Blackwell wished to withdraw his plea. At the hearing on the request to withdraw his plea, counsel indicated that Blackwell believed he had been coerced. Blackwell himself indicated that he suffers from dyslexia and has been diagnosed as bipolar, and that he sometimes understands things as he would like them to be rather than as he is told. Blackwell is unable to read[[2]] but it was clear from questioning by counsel and the Commonwealth that his attorney had read the plea agreement to him. He returned however to his position that he thought the plea involved five-year sentences that would run concurrent for a total of five years.

Counsel indicated to the trial court that during the plea negotiations, Blackwell had requested a reduction in the total sentence to twelve years but that was refused by the Commonwealth although Blackwell denied such a conversation ever took place. The trial court then terminated the hearing and indicated it would review the video tape [sic] of the plea prior to issuing a ruling.

On December 7, a newly appointed attorney appeared for Blackwell. Although the Commonwealth and the trial court were prepared for sentencing, Blackwell had filed a new motion to set aside his plea based on "11.42 reasons." The trial court continued the hearing for one week allowing Blackwell's new attorney time to review the reports and record.

On December 14, 2009, counsel appeared with Blackwell and indicated that he had reviewed the record and although he could not find anything specific, asked the court to allow Blackwell to withdraw the plea based on Blackwell's repeated statements that he did not understand the plea agreement. Blackwell again indicated he believed the plea agreement would result in

[2] While the Opinion states Blackwell could not read, during the guilty plea colloquy on October 7, 2009, Blackwell told the Bullitt Circuit Court he could read and write and had completed twelve years of school. Later in the colloquy, defense counsel told the court he had read the Commonwealth's offer and the plea form to Blackwell. During a hearing on November 9, 2009, Blackwell told the court he could not read. (Footnote added).

> concurrent sentences for a total of five years and not consecutive sentences resulting in a total sentence of fifteen years. The trial court then overruled Blackwell's motion and sentenced him to serve consecutive sentences for a total of fifteen years.

Blackwell v. Commonwealth, 2010 WL 4669445 (Ky. App. 2010, unpublished). Notably, in affirming the direct appeal, this Court held: the trial court established a sufficient factual basis to accept Blackwell's guilty plea; *there was no indication the guilty plea resulted from coercion;* and, *the trial court did not abuse its discretion in denying Blackwell's motion to withdraw his guilty plea* because the record showed Blackwell knew he would be sentenced to serve three consecutive terms for a fifteen-year term rather than three concurrent five-year terms—as evidenced by the plea form he signed and his attempt to have counsel negotiate a reduced sentence of twelve years—a deal the Commonwealth rejected.

Blackwell's direct appeal was affirmed November 19, 2010. On March 8, 2012, he filed a *pro se* CR[3] 60.02 motion but because he offered "no grounds or exhibits in support of modification," the motion was denied on April 18, 2012. An attempted appeal to this Court was dismissed because the notice of appeal was not accompanied by a timely filed motion to proceed *in forma pauperis*. *Blackwell v. Commonwealth,* 2012-CA-1386, finality endorsed December 27, 2012.[4]

---

[3] Kentucky Rules of Civil Procedure.

[4] A second CR 60.02 motion was filed January 8, 2013, alleging new photographs—taken shortly after the 2008 incident—refuted one of the four charges to which he pled guilty. Resolution of this motion does not appear in the record.

On September 26, 2012, Blackwell filed a *pro se* RCr 11.42 motion—supported by memorandum of law—alleging three separate attorneys had provided ineffective assistance of counsel. He alleged Hon. Graham Whatley—the attorney who negotiated the *Alford* plea on his behalf—coerced him into pleading guilty and did not effectively represent him during a hearing on a motion to withdraw the guilty plea; Hon. Stephen Wright—the appointed attorney who represented Blackwell at final sentencing after Whatley withdrew from the case—did not prepare possible claims; and, finally, Hon. Gene Lewter—the attorney who prepared the direct appeal—did not argue conflict of trial counsel. The Department of Public Advocacy was appointed to represent Blackwell on the RCr 11.42 motion, but was allowed to withdraw upon determining it was not a "proceeding that a reasonable person with adequate means would be willing to bring at his or her own expense." KRS 31.110(2)(c).

On November 29, 2012, the trial court entered a one-page order denying Blackwell's RCr 11.42 motion because:

> [t]he Court has considered the arguments of [Blackwell] and finds them to be duplicate arguments which have previously been raised in previous proceedings. The Court finds those motions to be frivolous and it is hereby ORDERED that [Blackwell's] motion to vacate, modify or amend is [sic] his sentence is OVERRULED. This is a final and appealable Order and there is no just cause for delay in its entry.

This appeal flows from that order.

ANALYSIS

On appeal to this Court, Blackwell's singular complaint is Whatley did not provide effective legal representation because he opposed Blackwell's motion to withdraw the guilty plea, abandoned his role as counsel and became an adversary during a hearing on the motion to withdraw. Since he focuses solely on Whatley's conduct, Blackwell has abandoned his complaints about Wright and Lewter.

The Commonwealth argues the trial court properly overruled the motion to vacate because it was filed outside the sequence of post-conviction attacks dictated by RCr 11.42 and *Gross v. Commonwealth,* 648 S.W.2d 853, 856 (Ky. 1983), and, therefore, our review is procedurally barred. Alternatively, the Commonwealth argues Whatley did nothing unprofessional in representing Blackwell and, thus, the trial court did not abuse its discretion in denying the motion to vacate.

We review a trial court's denial of an RCr 11.42 motion for an abuse of discretion—the question being 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); *cf. Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994)).

To establish an ineffective assistance of counsel claim under RCr 11.42, Blackwell must satisfy a two-prong test showing both that counsel's performance was deficient, and that his deficiency caused actual prejudice resulting in a proceeding that was fundamentally unfair and 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):

> [t]he *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. Additionally, Blackwell must overcome the strong presumption counsel's assistance was constitutionally sufficient. *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065. We review Blackwell's claim of Whatley's ineffectiveness with these principles in mind.

Gross succinctly explains Kentucky's approach to criminal appeals.

> In *Howard v. Commonwealth*, Ky., 364 S.W.2d 809, 810 (1963), we stated:
>
> > "It has long been the policy of this court that errors occurring during the trial should be corrected on *direct* appeal, and the grounds set forth under the various subsections of CR 60.02 deal with *extraordinary* situations which do not as a rule appear during the progress of a trial. Although the rule does

> permit a direct attack by motion where the judgment is voidable—as distinguished from a void judgment—this direct attack is *limited to specific subsections* set out in said rule . . ." (emphasis added).

> RCr 11.42 provides a procedure for a motion to vacate, set aside or correct sentence for "a prisoner in custody under sentence or a defendant on probation, parole or conditional discharge." It provides a vehicle to attack an erroneous judgment for reasons which are not accessible by direct appeal. In subsection (3) it provides that "the motion shall state *all* grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude *all* issues that could reasonably have been presented in the same proceeding." (emphasis added).
>
> Rule 60.02 is part of the Rules of Civil Procedure. It applies in criminal cases only because Rule 13.04 of the Rules of Criminal Procedure provides that "the Rules of Civil Procedure shall be applicable in criminal proceedings to the extent not superseded by or inconsistent with these Rules of Criminal Procedure."
>
> The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete. That structure is set out in the rules related to direct appeals, in RCr 11.42, and *thereafter* in CR 60.02. CR 60.02 is not intended merely as an additional opportunity to raise *Boykin* defenses. It is for relief that is not available by direct appeal and not available under RCr 11.42. The movant must demonstrate why he is entitled to this special, extraordinary relief. Before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.

Gross, 648 S.W.2d at 856. While the Commonwealth correctly argues Blackwell filed a CR 60.02 motion *before* filing the RCr 11.42 motion, that is not the reason

we deny relief. Rather, we deny relief because Whatley rendered reasonable legal representation and the trial court did not abuse its discretion in denying the motion to withdraw the guilty plea.

In his pleadings, Blackwell acknowledges Whatley could not ethically argue he, himself, was ineffective. *Humphrey v. Commonwealth,* 962 S.W.2d 870, 872 (Ky. 1998). Furthermore, according to the record, Whatley spent considerable time negotiating a plea with the Commonwealth on Blackwell's behalf and explaining the Commonwealth's offer to Blackwell. When it came time for the plea colloquy, however, Whatley explained to the court he thought a deal had been reached, but now it was as if he and Blackwell had never spoken—perhaps a result of Blackwell's poor short-term memory—so a trial date was needed. The trial court told Blackwell it would accept a guilty plea through the end of the day, but if no plea was entered that day, no guilty plea would be accepted and a trial would be scheduled.

Later that afternoon, the trial court engaged Blackwell—and Whatley—in an extensive plea colloquy in which Blackwell assured the court he understood what was happening, he had received all the time necessary to thoroughly discuss the plea with Whatley, he was satisfied with Whatley's legal representation, he had been promised nothing beyond the Commonwealth's offer of fifteen years, he had not been coerced or threatened to plead guilty, and he was pleading guilty of his own free will. During the colloquy, the trial court reviewed with Blackwell the range of penalties for the crimes to which Blackwell was

pleading guilty, and the terms of the Commonwealth's offer—five years to be served consecutively on each of three charges for a total of fifteen years and the Commonwealth would oppose probation. Thereafter, Blackwell's *Alford* plea was accepted, and at Blackwell's request, Whatley asked that the jailer be ordered to provide medical treatment for Blackwell's ear discharge. The trial court stated the medical issue should be discussed with the jailer because the court had no control over the jailer due to the separation of powers. While Blackwell may have wanted the three five-year terms to run consecutively, that was not the Commonwealth's offer and it was not going to become the Commonwealth's offer. Blackwell himself said he often hears what he wishes to hear rather than what is actually said. Here, the recommended sentence was clearly reflected on the written offer and guilty plea—both of which Blackwell signed and acknowledged in open court.

Although originally charged with seven crimes—two of them Class B felonies (first-degree burglary and attempted murder) and being a persistent felony offender (PFO)—Whatley negotiated a favorable agreement by which Blackwell pled guilty to three Class D felonies and being a second-degree PFO. Having previously determined Blackwell's plea was not coerced and the trial court had not abused its discretion in denying Blackwell's motion to withdraw his guilty plea, it was highly unlikely the trial court would reverse course to find coercion and an abuse of discretion.

We have carefully reviewed Blackwell's court appearances—including both the guilty plea colloquy and the hearing on the motion to withdraw

the plea. Our review has revealed no missteps by Whatley. The actions taken by Whatley that Blackwell characterizes as abandoning him as a client, cross-examining him, becoming an adversary, and discussing with the trial court whether he should continue representing Blackwell, are examples of Whatley's candor with the trial court—and compliance with SCR[5] 3.130 (3.3). Thus, we discern no deficient performance by Whatley and no abuse of discretion by the trial court.

WHEREFORE, we affirm the order of the Bullitt Circuit Court denying Blackwell's motion to vacate, set aside or correct the *Alford* plea he voluntarily entered.

ALL CONCUR.

BRIEF FOR APPELLANT:

Charles R. Blackwell, *pro se*
Sandy Hook, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Ken W. Riggs
Assistant Attorney General
Frankfort, Kentucky

[5] Supreme Court Rule.