

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000532-MR

KURT ROBERT SMITH

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 10-CR-00035

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; JONES AND VANMETER, JUDGES.

VANMETER, JUDGE: Kurt Robert Smith appeals *pro se* from the Boyle Circuit Court's order denying his *pro se* motion for post-conviction relief pursuant to RCr¹ 11.42. For the following reasons, we affirm.

Smith pled guilty to assault in the third degree and riot in the first degree after he was indicted for striking a corrections officer with an object causing

¹ Kentucky Rules of Criminal Procedure.

physical injury and for knowingly participating in a riot at the Northpoint Training Center. At the time the alleged crimes occurred, Smith was serving a life sentence for the wanton murder of his infant son. *Smith v. Commonwealth*, 2003 WL 22415620 (Ky. 2003). Pursuant to his guilty plea, Smith received five years in prison on each count, to run concurrently with each other and concurrently with his life sentence. A judgment was entered accordingly. Thereafter, Smith filed a *pro se* RCr 11.42 motion to vacate his sentence, which the trial court denied. Smith now appeals.

On appeal, Smith claims the trial court erred by denying his RCr 11.42 motion for two reasons: (1) his trial counsel rendered ineffective assistance by failing to advise him of the parole eligibility calculation before he pled guilty and (2) his trial counsel rendered ineffective assistance by failing to conduct a reasonable investigation, which Smith claims would have uncovered an audio recording of the victim that absolved him of liability.

Since Smith entered a guilty plea, his ineffective assistance of counsel claim requires him to show:

that [his guilty plea] was the result of ineffective assistance of counsel. In such an instance, the trial court is to “consider the totality of the circumstances surrounding the guilty plea and juxtapose the presumption of voluntariness inherent in a proper plea colloquy with a *Strickland v. Washington* [466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)] inquiry into the performance of counsel.” To support a defendant’s assertion that he was unable to intelligently weigh his legal alternatives in deciding to plead guilty because of

ineffective assistance of counsel, he must demonstrate the following:

(1) that 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.

Advising a client to plead guilty is not, in and of itself, evidence of any degree of ineffective assistance of counsel. The Kentucky Supreme Court has stated that “[g]enerally, an evaluation of the circumstances supporting or refuting claims of coercion and ineffective assistance of counsel requires an inquiry into what transpired between attorney and client that led to the entry of the plea, *i.e.*, an evidentiary hearing.”

Rigdon v. Commonwealth, 144 S.W.3d 283, 288-89 (Ky. App. 2004) (internal footnotes omitted). “In appealing from the trial court’s grant or denial of relief based on ineffective assistance of counsel the appealing party has the burden of showing that the trial court committed an error in reaching its decision.” *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008).

Smith claims his trial counsel failed to advise him that crimes committed within a penal institution must be calculated as consecutive time for parole eligibility purposes. 501 KAR² 1:030 § 3(4) provides:

If an inmate commits a crime while confined in an institution . . . and receives a concurrent or consecutive sentence for this crime, eligibility time towards parole consideration on the latter sentence shall not begin to accrue until he becomes eligible for parole on his original sentence.

² Kentucky Administrative Regulations.

Thus, Smith's parole eligibility for his most recent sentence does not begin to accrue until he becomes eligible for parole on his original sentence. Smith maintains that his counsel failed to advise him of the extended parole eligibility date, and had he been so advised, he would not have pled guilty and would have insisted on going to trial.

The trial court found this claim to be meritless, noting that the Department of Corrections calculates parole eligibility according to 501 KAR 1:030 regardless of whether the sentences are ordered to run concurrently or consecutively, and Smith's counsel could not negotiate a plea contrary to the administrative regulation. The court found that Smith's counsel competently negotiated a deal for concurrent sentencing, thus placing Smith in the best possible position for parole consideration.

Further, during the guilty plea colloquy, the trial court advised Smith that the sentence imposed would run concurrently and may affect parole eligibility. The court asked Smith if he was familiar with the possible effects, to which Smith responded yes. Smith requested no clarification. We fail to appreciate Smith's present claim that his counsel was deficient for failing to clarify something Smith himself stated he understood. Since Smith has not met the first prong of the *Strickland* test, we need not proceed any further in discussing this claim of error.

Next, Smith claims his trial counsel was ineffective for failing to conduct a reasonable investigation. Smith asserts that the discovery materials included a

statement by the victim that “I know it was Nolan . . . flung the rock, . . . hit me.”

Smith argues that had he known about this audio recording, he would not have pled guilty and would have insisted on going to trial.

The trial court found Smith’s claim of error amounted to a bare allegation with no factual support and summarily dismissed it. *See Roach v. Commonwealth*, 384 S.W.3d 131, 140 (Ky. 2012) (“[c]onclusory allegations that counsel was ineffective without a statement of the facts upon which those allegations are based do not meet [RCr 11.42(2)’s] specificity standard and so ‘warrant a summary dismissal of the motion.’” (quoting RCr 11.42(2))). Smith provided the aforementioned ten-word quote (with two ellipsis) purportedly made by the victim as his sole evidence that his counsel failed to conduct a reasonable investigation. However, this alleged evidence does not disprove that Smith participated in the riot, nor does it conclusively disprove that Smith threw a rock at the victim. Nor does it demonstrate how the 3,000 pages of discovery the prosecutors intended to present against Smith were disproved. The court found Smith’s counsel rendered competent assistance, and refused to second-guess counsel’s actions in hindsight without any factual basis for doing so. The court further found that based on the record, counsel’s decision to advise Smith to plead guilty was reasonable and Smith’s guilty plea was knowingly, intelligently, and voluntarily made. As a result, the court denied Smith’s request for RCr 11.42 relief. Based on the record, we are unable to say the court’s decision was erroneous.

The Boyle Circuit Court’s order is affirmed.

ALL CONCUR.

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