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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000734-MR
AND
NO. 2013-CA-001277-MR

DERRYL D. BLANE — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE ANDREW SELF, JUDGE
ACTION NO. 07-CR-00405

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, NICKELL, AND TAYLOR, JUDGES.

NICKELL, JUDGE: In these consolidated appeals, Derryl D. Blane, *pro se*, challenges the Christian Circuit Court's March 6, 2013, denial of his motion for post-conviction relief pursuant to RCr[1] 11.42 without first convening an

[1] Kentucky Rules of Criminal Procedure.

evidentiary hearing, and the May 16, 2013, order from the same court denying his motion for expungement of a conviction which was vacated and reversed by the Supreme Court of Kentucky. Following a careful review, we affirm.

The historical facts underpinning the charges levied against Blane were set forth in the Opinion rendered by the Supreme Court of Kentucky in his direct appeal, *Blane v. Commonwealth*, 364 S.W.3d 140 (2012), from which we quote verbatim.

> On June 27, 2006, the Hopkinsville Police Department's (HPD) Special Investigations Unit set up a controlled narcotics purchase from Appellant at his home. HPD sent a confidential informant, Jason Alexander, equipped with a camera, audio monitoring device, and documented money, to purchase crack cocaine from Appellant. Jason went to Appellant's home and purchased two rocks of crack cocaine from him for twenty dollars.
>
> On May 17, 2007, HPD sent another confidential informant—this time Jason's wife, Connie Alexander—to purchase drugs from Appellant. HPD equipped Connie with an audio recorder, transmitter, and forty dollars in documented money. Connie went to Appellant's home where she bought two rocks of crack cocaine for forty dollars. This is the only time Connie ever served as a confidential informant on a controlled purchase for HPD.
>
> Connie's purchase served as the probable cause basis for a search warrant issued later that day, and executed the next morning at Appellant's home. The search yielded $11,452.74 in cash, approximately fifteen and one-half grams of crack cocaine, and approximately two pounds and thirteen ounces of marijuana.
>
> Appellant was charged by information in Christian Circuit Court with two counts of first-degree trafficking in a controlled substance (cocaine), trafficking in

> marijuana within 1,000 yards of a school, and possession of drug paraphernalia, second or subsequent offense. He was later indicted by a grand jury for first-degree PFO.

Id. at 144-45 (internal footnote omitted).

Blane was convicted following a jury trial of two counts of trafficking in a controlled substance in the first degree, one count each of trafficking in marijuana over eight ounces and possession of drug paraphernalia, second or subsequent offense, and being a persistent felony offender in the first degree (PFO I). He received a sentence of thirty years' imprisonment. On direct appeal, our Supreme Court reversed his convictions for trafficking in marijuana and PFO I and vacated the sentences for those counts. The Supreme Court also believed serious errors had been committed during the sentencing phase and that Blane's sentence was impermissible under KRS[2] 532.110. The remaining convictions were affirmed and the matter was remanded for a new sentencing hearing.

On remand, Blane reached a plea agreement with the Commonwealth. In exchange for entry of a guilty plea on the two counts of trafficking in a controlled substance, one count of possession of drug paraphernalia, and PFO II, the Commonwealth recommended a sentence of fifteen years in prison. On October 3, 2012, Blane appeared in open court and entered his plea in accordance with the Commonwealth's offer. The written offer, executed by the Commonwealth's Attorney, Blane, and his counsel, specifically provided for forfeiture of all items seized and contained a notation that Blane was "waiving

[2] Kentucky Revised Statutes.

appeals on all issues remaining pertaining to this case." Following a plea colloquy, the trial court accepted Blane's plea and sentenced him in accordance with the agreement.

On January 31, 2013, Blane filed a *pro se* motion for post-conviction relief pursuant to RCr 11.42 alleging ineffective assistance of trial counsel. He requested appointment of counsel and an evidentiary hearing. In support of his motion, Blane contended another individual had been previously convicted and sentenced for "the same crime" thereby rendering his conviction suspect. Blane stated his wife, Tasha Wheeler,[3] testified during his trial that she had been charged and entered a guilty plea to trafficking in a controlled substance in relation to the May 17, 2007, transaction with Connie Alexander. Wheeler further testified Blane was not at home when the transaction occurred and claimed ownership of the cocaine found in their home. Based on this testimony, Blane contended his trial counsel was ineffective for failing to discover Wheeler had been charged and convicted of trafficking in a controlled substance as a result of the transaction with Connie Alexander. He argued this error was compounded by counsel advising him on remand to enter a guilty plea and be resentenced on the trafficking charge stemming from the same factual nucleus.

On March 6, 2013, the trial court denied Blane's motion without appointing counsel and without convening an evidentiary hearing, upon finding

[3] The pair were married on June 15, 2007.

Blane had knowingly, intelligently and competently entered a guilty plea and his claims against counsel were baseless. Specifically, the trial court found

> [t]here is nothing in the record to indicate that [Blane's] counsel failed to provide adequate representation. There is nothing to indicate that [Blane] entered his guilty plea[] unknowingly, unintelligently or by coercion. There is nothing in the record to indicate that [Blane] was dissatisfied with the services and advice given to him by his attorney when he entered his guilty plea.

Blane timely appealed to this Court from the denial.

On May 13, 2013, Blane moved the trial court to expunge from his criminal record any mention of the charge against him for trafficking in marijuana within 1000 yards of a school or the amended charge of trafficking in marijuana. He argued the Supreme Court's reversal and vacation of his conviction rendered expungement appropriate pursuant to KRS 431.076. The trial court denied the motion on May 16, 2013, without comment. Blane timely appealed from this adverse ruling.

Before this Court, Blane reiterates the arguments raised below. We shall first address his claims of ineffectiveness of trial counsel, then turn to the matter of expungement.

Prior to considering the arguments presented, we note first we review the 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. 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 be considered

sound trial strategy." *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065. "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371, 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284 (2010).

On the issue of whether an evidentiary hearing is necessary, *Fraser v. Commonwealth,* 59 S.W.3d 448 (Ky. 2001), is controlling. Under *Fraser*, Blane is only entitled to an evidentiary hearing if there are allegations that cannot be conclusively resolved on the face of the record. In determining whether the allegations in a post-trial motion to vacate, set aside or correct sentence can be resolved on the face of the record, the trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them. *Id.* at 452–53. Where the trial court has denied an RCr 11.42 motion without a hearing, a reviewing court's review is confined to whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction. *See Baze v. Commonwealth*, 23 S.W.3d 619, 622 (Ky. 2000) (*overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)).

Blane persists in his assertion that because Wheeler was charged and convicted of trafficking in cocaine in relation to the transaction with Connie Alexander, his counsel performed deficiently in advising him to plead guilty to a charge having the exact same factual basis. He insists that because he was not present during the buy and Wheeler admitted the cocaine belonged to her, the charge against him was infirm and he could not have reasonably been convicted

had he gone to trial. Thus, he argues his counsel's deficient performance was prejudicial to him and mandates reversal of his conviction. We disagree.

Although inexplicably not discussed by Blane nor the Commonwealth, our review of the record reveals Blane has simply misapprehended the basis of the charge underlying the conviction from which he seeks relief. While he makes much ado about his absence during the May 17, 2007, drug transaction, he was not charged with any crime in connection with that controlled buy. Rather, that transaction served merely as probable cause for the issuance of the search warrant executed on May 18, 2007. The charging information clearly states:

> [o]n or about the 18th day (sic) May, 2007, in Christian County, Kentucky, the above named Defendant committed the offense of Trafficking in a Controlled Substance, First Degree, First Offense, Cocaine, by knowingly and unlawfully possessing a quantity of cocaine, a Schedule II Controlled Substance, with intent to sell or transfer it, or by acting as an accomplice thereto[.]

Nowhere in the charging document is there a mention of a criminal offense predicated upon the transaction between Wheeler and Connie Alexander. Blane was charged—and ultimately convicted—of trafficking in cocaine based upon the quantity of the drug located during the execution of the search warrant.

Although the record contains no documentation regarding Wheeler's conviction, according to her testimony during Blane's trial, her charge and conviction was based solely on the single transaction with Connie Alexander. Simply put, the factual basis for Blane's conviction is wholly separate from

Wheeler's. Counsel was clearly aware of Wheeler's conviction and the underlying factual background as he elicited such testimony from her during the trial. Thus, we are unconvinced by Blane's assertion that counsel failed to uncover the conviction about which Wheeler openly testified. We are likewise unconvinced Blane was prejudiced by counsel's correct advice that the charge against him was valid and his further advice for Blane to enter a guilty plea to the charge. Having discerned no deficient performance nor prejudice, we conclude Blane has failed to carry his burden under *Strickland*.

Next, Blane argues the trial court erroneously denied his motion seeking expungement of the trafficking in marijuana charge from his criminal record. We again disagree. Blane is correct that KRS 431.076 permits expungement of criminal records for those who are found not guilty or against whom the charges have been dismissed with prejudice. While we are not convinced either of these situations is applicable under the facts presented, a more basic infirmity dooms Blane's request. Expungement of criminal records is only available under KRS 431.076 if "there are no current charges or proceedings pending relating to the matter for which the expungement is sought . . . ." *See* KRS 431.076(4). Clearly, Blane had filed a notice of appeal on April 22, 2013, meaning proceedings were still pending when he moved the trial court for expungement. Further, the trial court's decision on whether to grant expungement is discretionary and will not be overturned absent a showing of an abuse of that discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575 (Ky. 2001 (citing *Commonwealth v.*

English, 993 S.W.2d 941, 945 (Ky. 1999)). Blane has failed to show the trial court's decision constituted an abuse of discretion.

Finally, Blane contends the trial court's failure to order expungement somehow constitutes a violation of his Constituional right to be free from double jeopardy. His argument is unsupported by factual or legal precedent or indeed any logical basis. We believe it to be wholly without merit and necessitating no further discussion.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

Derryl D. Blane, *pro se*
LaGrange, Kentucky

BRIEFS FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky