

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2013-CA-001819-MR

HOWARD ROYALTY

APPELLANT

v. APPEAL FROM GRANT CIRCUIT COURT  
HONORABLE STEPHEN L. BATES, JUDGE  
ACTION NO. 11-CR-00029

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \*\* \* \*\*

BEFORE: COMBS, STUMBO, AND THOMPSON, JUDGES.

COMBS, JUDGE: Howard Royalty appeals the order of the Grant Circuit Court which denied his motion for post-conviction relief pursuant to Kentucky Rule[s] of Civil Procedure (CR) 11.42. After our review, we affirm.

On March 23, 2011, Royalty pled guilty to one charge of sexual abuse in the first degree. At the time, Royalty was in a diversion program for a separate charge.

As part of the plea bargain, the diversion was voided, and he received a sentence of three-years' incarceration. On March 4, 2013, Royalty filed a motion to vacate his sentence pursuant to CR 11.42. The trial court denied the motion on September 12, 2013. This appeal followed.

RCr 11.42 is a vehicle by which a convicted defendant may challenge his conviction and sentence on collateral grounds. RCr 11.42(1). Where – as here – the grounds are based on claims of ineffective assistance of counsel, the appellant must satisfy a two-pronged analysis:

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 the defendant 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, 80 L.Ed.2d 674 (1984), adopted by *Gall v. Commonwealth*, 702 S.W.2d 37, 39-40 (Ky. 1985).

Both prongs must be met in order for the test to be satisfied. The Court further elaborated: "The defendant must show that 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 a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

In the case of guilty pleas, "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for

counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370-71, 88 L.Ed. 203 (1985).

On appeal, we may only review a trial court's denial of a motion for an evidentiary hearing by analyzing whether the allegations are refuted by the record and, if so, whether they would nullify the conviction. *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967). No evidentiary hearing is required if the record on its face contradicts the allegations. *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986).

Royalty argues that the trial court erred in denying the motion and that it should have held an evidentiary hearing. He claims that he received ineffective assistance of counsel resulting in his guilty plea.

Royalty argues that his counsel was ineffective by failing to investigate Royalty's alleged "ironclad" alibi. Royalty was incarcerated in the Grant County jail in late 2010. While he was an inmate, the jail staff intercepted sexually explicit letters exchanged between Royalty and his daughter. As a result, both were charged with incest.

Royalty correctly points out that the indictment against him reported that the incest occurred "on or about a day or days in December, [*sic*] 2010." He claims that his incarceration during that month provided an alibi and that his counsel was ineffective by not investigating the alleged alibi.

Contrary to the indictment, the Commonwealth's evidence indicated that the incestuous relationship actually began in 2005 and continued until Royalty's incarceration in 2010. Royalty claims that the error in the indictment resulted in the voiding of his diversion. He asserts that if counsel had adequately investigated, Royalty could not have been found guilty and would have been able to complete his diversion.

There is no merit to this argument. Kentucky Rule[s] of Criminal Procedure (RCr) 6.16 provides that an indictment may be amended *at any time prior to a verdict* unless the amendment creates prejudice to the defendant. And any non-prejudicial error in an indictment does not invalidate it. RCr 6.12.

We have examined the record closely. Both at the entry of Royalty's guilty plea and at his sentencing, counsel and the court discussed that Royalty's diversion was to be voided as part of the bargain. Royalty affirmed under oath that he understood the penalties.

Furthermore, when he entered his guilty plea, Royalty stated that he had discussed the evidence and possible defenses with his attorney. He testified that he was pleading guilty because he was guilty. Royalty declared that he was satisfied with the representation provided by his counsel. "Solemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 73-74, 97 S.Ct. 1621, 1629, 52 S.Ct. 1621 (1977).

Royalty has not presented any proof to indicate that but for the improper influence of his counsel, he would not have pled guilty. As the trial court noted in

its findings, the evidence against Royalty was extraordinarily strong. Based on its considerable experience, the court believed that a jury almost certainly would have convicted him. The minimum sentence for a conviction of incest is five-years' incarceration. Royalty received a lighter sentence. Therefore, pleading guilty was advantageous to him, and we are unable to conclude that ineffective assistance of counsel was in any way a factor in the proceedings.

Finally, Royalty has not presented any issues that cannot be resolved by examining the record. Consequently, a hearing was not warranted.

We affirm the Grant Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Howard Royalty, *pro se*  
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

Jeanine Anderson  
Assistant Attorney General  
Frankfort, Kentucky