

RENDERED: AUGUST 21, 2015; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2013-CA-001671-MR

RODNEY SPARKS

APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT  
HONORABLE RODNEY BURRESS, JUDGE  
ACTION NO. 09-CR-00231

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, DIXON AND KRAMER, JUDGES.

DIXON, JUDGE: Appellant, Rodney Sparks, appeals *pro se* from an order of the Bullitt Circuit Court denying his motion for post-conviction relief pursuant to RCr 11.42. Finding no error, we affirm.

In July 2009, Appellant was indicted by a Bullitt County Grand Jury on six counts of first-degree rape and one count of first-degree sodomy stemming from acts committed against his minor step-daughter. During the police investigation

prior to his arrest, Appellant admitted to having sexual relations with the victim on six occasions. The victim also confirmed she had been sexually assaulted by Appellant. During subsequent discovery, forensic testing identified Appellant's DNA (sperm and non-sperm fractions) on the victim's bedding.

On February 21, 2011, Appellant filed a motion to enter an *Alford* plea to six counts of first-degree rape. Pursuant to the plea offer, the Commonwealth recommended a sentence of fourteen years' imprisonment on each of the six counts, to run concurrently. In addition, the Commonwealth recommended that the first-degree sodomy count be dismissed. Appellant appeared in open court on February 22, 2011, with his counsel and, following the requisite plea colloquy with the trial court, was sentenced in accordance with the Commonwealth's recommendations. Appellant's final sentence of imprisonment was entered on May 4, 2011.

On May 17, 2013, Appellant filed a *pro se* motion for post-conviction relief pursuant to RCr 11.42 alleging that counsel rendered ineffective assistance for failing to discuss with him the various defenses that existed and forcing him to enter a guilty plea, and for failing to challenge his confession because he was under the influence of drugs at the time he admitted to committing the offenses. The trial court subsequently appointed Appellant counsel and scheduled the motion for a hearing.

At the July 15, 2013 hearing, the Department of Public Advocacy moved to withdraw from the case on the grounds that after reviewing the record "it [was] not

a proceeding that a reasonable person would be willing to bring at his or her own expense.” KRS 31.110(2)(c). Appellant did not object to the Department of Public Advocacy’s motion, which the trial court granted. Thereafter, the trial court gave Appellant the opportunity to argue the merits of his RCr 11.42 motion. Appellant testified that he felt he received “insufficient counsel” because he was denied a fair trial and was “pushed into” accepting the plea agreement. Appellant said that he was “not the kind of person” that would commit the crimes he was convicted for and that he “wanted to go home” so that he could marry his girlfriend.

By order entered on August 6, 2013, Appellant’s RCr 11.42 motion was denied. This appeal ensued.

In an RCr 11.42 proceeding, the movant has the burden to establish convincingly that he was deprived of substantial rights that would justify the extraordinary relief afforded by the post-conviction proceeding. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). An evidentiary hearing is warranted only “if there is an issue of fact which cannot be determined on the face of the record.” *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993), *cert. denied*, 510 U.S. 1049 (1994); RCr 11.42(5). *See also Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001); *Bowling v. Commonwealth*, 981 S.W.2d 545, 549 (Ky. 1998), *cert. denied*, 527 U.S. 1026 (1999). “Conclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of a

discovery deposition.” *Sanders v. Commonwealth*, 89 S.W.3d 380, 385 (Ky. 2002), *cert. denied*, 540 U.S. 838 (2003), *overruled on other grounds in Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). However, when the trial court conducts an evidentiary hearing, the reviewing court must defer to the determinations of fact and witness credibility made by the trial judge. *McQueen v. Commonwealth*, 721 S.W.2d 694 (Ky. 1986); *Commonwealth v. Anderson*, 934 S.W.2d 276 (Ky. 1996); *McQueen v. Scroggy*, 99 F.3d 1302 (6th Cir. 1996).

Since Appellant entered a guilty plea, a claim that he was afforded ineffective assistance of counsel requires him to show: (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 pled guilty, but would have insisted on going to trial. *Bronk v. Commonwealth*, 58 S.W.3d 482, 486-87 (Ky. 2001). *See also Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

A criminal defendant may demonstrate that his guilty plea was involuntary by showing that it was the result of ineffective assistance of counsel. In such a case, 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* inquiry into the performance of

counsel.” *Rigdon v. Commonwealth*, 144 S.W.3d 283, 288 (Ky. App. 2004) (Quoting *Bronk*, 58 S.W.3d at 486. (footnotes omitted)). A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render reasonably effective assistance. *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997), *cert. denied*, 521 U.S. 1130 (1997). The Supreme Court in *Strickland* noted that a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. However, advising a defendant to plead guilty is not, by itself, sufficient to demonstrate any degree of ineffective assistance of counsel. *Beecham v. Commonwealth*, 657 S.W.2d 234, 236-37 (Ky. 1983).

In this Court, Appellant initially confused the role of an RCr 11.42 motion and raised numerous issues in his appellate brief pertaining to alleged trial court error. However, in his reply brief, Appellant argues that his trial counsel was ineffective because she did not raise the fact that he was under the influence at the time of his confession, she did not explain the contents of his plea agreement to him, and she did not honor his request to withdraw his guilty plea. Appellant disagrees that he received a favorable plea deal as he was sentenced to fourteen years' imprisonment.

All of Appellant's claims of ineffective assistance are based on conclusionary allegations which are not supported by any evidence or testimony. Certainly, there was no evidence in the record, either from his trial counsel or otherwise, that Appellant was impaired at the time of his confession. Furthermore, the Commonwealth's formal plea offer and the motion to enter the guilty plea belie any claim that Appellant did not understand the nature and terms of his plea. Our Supreme Court has determined that these forms, when properly signed, are in and of themselves evidence that the plea was knowingly and voluntarily entered. *See Commonwealth v. Crawford*, 789 S.W.2d 779 (Ky. 1990).

Unfortunately, the video of the guilty plea hearing is not contained in the record. In the absence of a record to the contrary, it is presumed that the matters occurring at the hearing are consistent with and supportive of the final judgment. *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985); *Lawson v. Commonwealth*, 403 S.W.2d 281 (Ky. 1966). Furthermore, in the trial court's order accepting Appellant's plea, the Court stated:

The Court thereupon read the indictment in its entirety to the Defendant. After having ascertained the Defendant was fully competent, was cognizant of his constitutional rights, had been adequately advised by his counsel and was fully satisfied with her services and fully understood the indictment against him, the Court permitted the Defendant to file his "Motion to Enter Guilty Plea Pursuant to North Carolina v. Alford" whereupon the Defendant entered a plea of guilty as herein above set out.

Thus, the record adequately establishes that the trial court engaged in the proper plea colloquy during which Appellant had the opportunity to raise any objection that he may have had to the plea process. He did not do so and we will not second guess the trial court's determination that his plea was knowingly and voluntarily entered.

We are of the opinion that Appellant has failed to demonstrate that counsel's performance was deficient. Furthermore, given the evidence against him and the maximum potential sentence he faced if he went to trial, we simply cannot conclude that Appellant received erroneous advice from trial counsel to plead guilty. Therefore, the trial court properly ruled that trial counsel did not render ineffective assistance of counsel and Appellant was not entitled to post-conviction relief.

The order of the Bullitt Circuit Court denying Appellant's motion for post-conviction relief pursuant to RCr 11.42 is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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