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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-002142-MR

DARRYL G. GRIGSBY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY SHAW, JUDGE
ACTION NO. 06-CR-01771

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, J. LAMBERT, AND MAZE, JUDGES.

MAZE, JUDGE: Appellant, Darryl Grigsby, appeals from the denial of his motion to set aside his 2007 guilty plea and sentence pursuant to RCr[1] 11.42. He also appeals from the denial of a motion to alter, amend, or vacate that order pursuant to CR[2] 52.02 and CR 59.05. Observing no error in the trial court's orders, we affirm.

[1] Kentucky Rules of Criminal Procedure.
[2] Kentucky Rules of Civil Procedure.

Background

On May 31, 2006, a Jefferson County grand jury indicted Grigsby on charges of Murder, Robbery in the first degree, Abuse of a Corpse, Tampering with Physical Evidence, Arson in the third degree, and being a Persistent Felony Offender. These charges stemmed from the murder of Tiphanie Noell Durham three weeks prior. Based upon the theory that the murder took place during a robbery, the Commonwealth filed notice of its intent to seek the death penalty.

Prior to the October 8, 2007 trial date, Grigsby entered an *Alford* plea as part of an agreement with the Commonwealth under which the Robbery and Abuse of a Corpse charges were dismissed. In exchange, Grigsby received a sentence of life imprisonment without the possibility of parole for twenty years. During the October 5 plea hearing, Grigsby's attorneys were present and the trial court undertook the following colloquy:

> COURT: The attorneys have stated that you wish to plead guilty based on this recommendation of the Commonwealth. Is that what you wish to do today?
> GRIGSBY: Yes, Ma'am.
> COURT: And I've just got to make sure you've had enough time to talk to your attorneys about this. You're satisfied with their advice?
> GRIGSBY: Yes.
> COURT: Then other than this recommendation by the Commonwealth no one has promised you anything to get you to plead guilty here today?
> GRIGSBY: No.
> COURT: No one's threatened or coerced you?
> GRIGSBY: No.

COURT: I just want to make sure you're doing it of your own free will.
GRIGSBY: [indicates yes].

….

COURT: And since this is an *Alford* plea, you're not admitting on the record that those are the true facts, but what you are saying is that if it had gone to trial, there is a significant likelihood that you could have been convicted. Do you understand all that?
GRIGSBY: Yes, ma'am."

….

COURT: Two more questions. We've just got to make sure that you went over this plea with your attorneys.
GRIGSBY: Yes.
COURT: And is this consistent with the advice that they gave you?
GRIGSBY: Yes.

Grigsby appealed his plea and sentence to the Kentucky Supreme Court, arguing that his plea was invalid under *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). The Court affirmed Grigsby's plea and sentence, specifically concluding that Grigsby entered his plea knowingly and voluntarily. *See Grigsby v. Commonwealth*, 302 S.W.3d 52 (Ky. 2010).

On August 5, 2010, Grigsby filed a *pro se* motion to set aside his plea pursuant to RCr 11.42. In this motion, Grigsby alleged that his plea was not knowing and voluntary due to several incidences of ineffective assistance of counsel leading up to the plea. Specifically, he alleged that his trial counsel coerced him to plead by wrongly informing him that he could receive the death

penalty if the case went before a jury; and that his counsel was ineffective in failing to assert defenses or challenge one of three witness's identification of him. The Department of Public Advocacy later supplemented Grigsby's *pro se* motion.

In an October 2, 2013 order, the trial court overruled Grigsby's motion and declined his request for an evidentiary hearing. Grigsby filed a motion to alter, amend, or vacate; however, the trial court overruled that motion as well. This appeal follows. Additional facts are provided below as needed.

Analysis

Grigsby's *pro se* and supplemental motions alleged several grounds for ineffective assistance leading to his allegedly involuntary plea. Where, as here, a trial court has denied an RCr 11.42 motion without the benefit of an evidentiary hearing, the sole issue upon review of the denial is whether the motion on its face stated grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction. *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); *Lewis v. Commonwealth*, 411 S.W.2d 321 (Ky. 1967). An evaluation of an ineffective assistance of counsel claim presents mixed questions of law and fact. We review questions of law *de novo*; however, we defer to the trial court's determinations of fact and credibility, setting them aside only if they are clearly erroneous. *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008), *citing McQueen v. Commonwealth*, 721 S.W.2d 694 (Ky. 1986); *see also* CR 52.01.

I. Counsel's Advice to Plead Guilty

On appeal, Grigsby alleges that counsel coerced him to plead guilty with threat of the death penalty, failed to properly advise him regarding the defenses of self-defense and extreme emotional disturbance, and failed to challenge the reliability of a witness's identification of him. In evaluating whether the record refutes one or more of these allegations, we begin as other courts have with Grigsby's plea colloquy. *See Commonwealth v. Elza*, 284 S.W.3d 118, 122 (Ky. 2009) (utilizing a defendant's "statements and demeanor" at the plea colloquy as evidence against allegations of coercion and deficient performance).

A. Coercion and Available Defenses

Grigsby's statements during the plea colloquy directly refute his allegation that his plea was involuntary or unknowing due to his counsel's threats or alleged improper advice. Pursuant to *Boykin*, the trial court questioned Grigsby at length regarding his right to proceed to trial, the rights he would waive as part of his plea, and his satisfaction with his trial counsel's advice. Grigsby responded that he was satisfied with his counsel's advice, that he had not been coerced, and that his plea and the consequences of it were consistent with the advice counsel provided. His demeanor was calm and his answers were firm.

"Solemn declarations in open court carry a strong presumption of verity." *Edmonds v. Commonwealth*, 189 S.W.3d 558, 569 (Ky. 2006). Nothing in the record negates the presumption that the plea was knowing and voluntary, and we see nothing challenging the conclusion of the Supreme Court to that effect.

Looking to counsel's performance, Grigsby's allegations of coercion and improper advice find additional resistance in the record. Express in Grigsby's *pro se* motion, and implied in his supplemental motion, is the allegation that trial counsel used an unwarranted threat of a jury's death sentence to persuade Grigsby to plead guilty when the death penalty was, according to Grigsby, legally improbable or impossible to obtain. The record shows that this was not the case.

In a July 2006 pleading, the Commonwealth stated its intent to seek the death penalty under the theory that Grigsby murdered his victim in the course of robbing her. The Commonwealth pointed out that certain personal effects were missing from the victim's body. Hence, Grigsby undeniably faced a possible death sentence had the case proceeded to trial and had the Commonwealth proven its case. "Defense counsel's truthful warning that the death penalty was a very real possibility[]" is insufficient by itself to show coercion or involuntariness. *See Elza*, 284 S.W.3d at 122. Grigsby's allegation of coercion is similarly insufficient.

Regarding Grigsby's available defenses, the trial court found that the record did not contain sufficient evidence supporting the defenses of self-defense and extreme emotional disturbance. We agree.

A defense of extreme emotion disturbance requires evidence that, at the time of a crime, the defendant was in "a temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or malicious purposes." *McClellan v. Commonwealth*, 715

S.W.2d 464, 468-69 (Ky. 1986). Likewise, a person acting in self-defense cannot be found guilty of an intentional criminal act. Kentucky Revised Statutes 503.020, *et seq*.

As the trial court pointed out, Grigsby's own description of the events leading to the murder does not support his argument that his counsel should have informed him of, or asserted, these defenses. Grigsby's *pro se* RCr 11.42 motion alleges that an unidentified man in a ski mask was robbing him when he accidentally shot Ms. Durham. Hence, by Grigsby's own, apparently unwitting admission in the record, he would not have been entitled to an extreme emotional disturbance or self-defense instruction at trial. By his own account, his actions were accidental, a defense which is not only distinct, but mutually exclusive of the defenses of which Grigsby claims he should have been advised. *See Grimes v. McAnulty*, 957 S.W.2d 223 (Ky. 1997).

Overall, we observe nothing improper in counsel's advice to Grigsby; nor do we see any apparent reason Grigsby would have insisted on proceeding to trial. Grigsby faced possible death for a heinous crime. Under the circumstances, it was entirely reasonable for counsel to advise Grigsby to accept a plea that not only spared his life, but created the possibility of his parole after twenty years.

B. Reliability of Witness Testimony

Grigsby's motion next questioned his counsel's alleged failure "to challenge the identification of Grigsby by witness David Busby," and he contends

on appeal that the record did not refute this allegation. However, Grigsby's allegations are impermissibly broad; and they are refuted in the record.

David Busby was a night clerk at the hotel Grigsby and his victim departed shortly before the murder. During the investigation, Busby was one of three witnesses who selected Grigsby's photo out of a photo pack as fitting the description of the person they saw with the victim the day of her murder. Grigsby specifically alleges that Busby only identified him in the photo pack because of "police misconduct which was never looked into by trial counsel."

The record refutes Grigsby's allegation regarding Busby. We again point out that Grigsby, in entering an *Alford* plea, has admitted that the Commonwealth possessed sufficient evidence, including Busby's witness identification, to obtain a conviction. This was part of the record, and it must mean something. Additionally, by Grigsby's own admission, the Department of Public Advocacy interviewed Busby – an interview to which Grigsby's *pro se* motion repeatedly cites. Finally, Grigsby's motion acknowledges, but glosses over the importance of, the fact that two other witnesses identified him as being with the victim before the murder. Hence, it is exceedingly unlikely he would have insisted on going to trial even if Busby's testimony was challenged and disallowed.

Grigsby's *pro se* allegations regarding Busby merely seek to reopen the investigation and relitigate the facts of the case against him. They are supported only by broad and conclusory accusations of unsubstantiated police misconduct and minute differences between his appearance and the description

Busby provided. In the absence of more, we decline Grigsby's invitation to explore his allegations further.

III. Necessity of an Evidentiary Hearing

The record refutes each of Grigsby's allegations on appeal; however, we would be remiss if we did not address a common thread running through his allegations: that where uncertainty exists concerning counsel's advice to a client, an evidentiary hearing must always be held. We reject this, as we believe the procedural and constitutional imperatives *Fraser*[3] promotes cannot be so expanded.

It is indeed difficult to rule concerning counsel's performance when the exact content of counsel's conversations with a client is inevitably unknown to anyone other than counsel and the client. Under such circumstances, and adopting Grigsby's logic, few, if any, motions alleging deficient performance would not be entitled to an evidentiary hearing. This is untenable.

"[A]n evidentiary hearing is often necessary in cases where a defendant claims his plea was involuntary due to counsel's ineffective assistance in order to determine what transpired between attorney and client[.]" *Elza*, 284 S.W.3d at 122, *quoting Rodriguez v. Commonwealth*, 87 S.W.3d 8 (Ky. 2002) (*quotations omitted*). However, it first falls to a defendant to demonstrate the necessity for such a hearing by identifying, with particularity, instances of alleged

[3] *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001).

coercion or deficient performance. *See Fraser,* 59 S.W.3d at 453 ("The trial judge shall examine the motion to see if it is properly signed and verified and whether it specifies grounds and supporting facts that, if true, would warrant relief. If not, the motion may be summarily dismissed.") (Citation omitted).

The evidentiary hearing prescribed in *Fraser* and its progeny was not designed as a tool to discover what evidence, if any, exists to support or dispel broad and conclusory allegations. *See Edmonds v. Commonwealth*, 189 S.W.3d 558, 569 (Ky. 2006) ("The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). Stated in starker terms, "RCr 11.42 exists to provide the movant with an opportunity to air known grievances, not an opportunity to conduct a fishing expedition for possible grievances[.]" *Mills v. Commonwealth*, 170 S.W.3d 310, 325 (Ky. 2005), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). A defendant must plead specific acts or statements allegedly constituting deficient and prejudicial counsel in his motion. Grigsby's implication that defendants may always capitalize on the inherent mystery surrounding attorney-client conversations, regardless of the sufficiency of their claims, is therefore misguided.

Conclusion

Cases where a defendant has alleged ineffective assistance of counsel after pleading guilty present a unique challenge.

> The added uncertainty that results when there is no extended, formal record and no actual history to show how the charges have played out at trial works against the party alleging inadequate assistance. Counsel, too, faced that uncertainty. There is a most substantial burden on the claimant to show ineffective assistance. The plea process brings to the criminal justice system a stability and a certainty that must not be undermined by the prospect of collateral changes … where witnesses and evidence were not presented in the first place.

Premo v. Moore, 562 U.S. 115, 132, 131 S.Ct. 733, 745-46, 178 L.Ed.2d 649 (2011).

Grigsby's allegations do not meet this heightened standard; therefore, they cannot successfully overcome the validity of his plea, which two Courts have now held he entered knowingly and voluntarily. Furthermore, these facts are evident on the face of a record abbreviated by his plea. Accordingly, the orders of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Darryl G. Grigsly, *Pro se* LaGrange, Kentucky	Jack Conway Attorney General of Kentucky Taylor Payne Assistant Attorney General Frankfort, Kentucky