RENDERED: JULY 2, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000082-MR

MICHAEL S. MIDDLETON — APPELLANT

v.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE STEVE D. HURT, JUDGE
ACTION NOS. 10-CR-00091, 10-CR-00195,
11-CR-00214, 11-CR-00265, & 11-CR-00272

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, D. LAMBERT, AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Michael Shane Middleton brings this *pro se* appeal from the order of the Harlan Circuit Court denying his motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 without an evidentiary hearing. After careful review, we affirm.

On March 15, 2012, Middleton pleaded guilty to over twenty felony charges under five indictments, including first-degree assault and a first-degree

persistent felony offender (PFO) enhancement. In his motion to enter a plea, Middleton indicated that he was making a knowing, intelligent, and voluntary plea after giving all pertinent information to his counsel and having plenty of time to discuss the same. He further indicated that he was fully satisfied with his defense counsel's legal representation. A guilty plea hearing was held in which Middleton reaffirmed these representations. The trial court accepted Middleton's plea as knowing, intelligent, and voluntary and sentenced him to the agreed upon twenty-years' imprisonment.

On October 28, 2013, Middleton filed a "Motion for the Reduction of Sentence in Support of Movants RCR 60.02 Motion." In that motion, Middleton claimed various instances of ineffective assistance of trial counsel. On December 6, 2013, the trial court entered an order denying Middleton's motion. This appeal followed.

We initially note that much leeway is afforded *pro se* litigants and we do not impose the same standards on prisoners proceeding *pro se* as we do on legal counsel. *Commonwealth v. Miller,* 416 S.W.2d 358, 360 (Ky. 1967). Here, Middleton styled his post-conviction motion "RCR 60.02," making it uncertain under which rule he requests relief. However,"[t]he structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete. That structure is set out in the rules related to direct appeals, in RCr 11.42, and *thereafter* in CR 60.02."

Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983). Thus, procedurally, Middleton's motion is one for RCr 11.42 relief, and we will treat it as such.

Our standard of review in RCr 11.42 post-conviction actions is well settled. Generally, a movant must meet the requirements of a two-prong test to establish a claim for ineffective assistance of counsel by proving that: (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Gall v. Commonwealth,* 702 S.W.2d 37 (Ky. 1985). Pursuant to *Strickland,* the standard for attorney performance is reasonable, effective assistance. A movant bears the burden of showing that his counsel's representation fell below an objective standard of reasonableness. In doing so, a movant must overcome a strong presumption that his counsel's performance was adequate. *Jordan v. Commonwealth,* 445 S.W.2d 878 (Ky. 1969); *McKinney v. Commonwealth,* 445 S.W.2d 874 (Ky. 1969).

Challenging a guilty plea based on ineffective assistance of counsel requires a showing that: (1) 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. *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). *See also*, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984);

McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970); *Sparks v. Commonwealth*, 721 S.W.2d 726, 727-28 (Ky.App. 1986).

If an evidentiary hearing is not held, as in this case, our review is limited 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." *Lewis v. Commonwealth,* 411 S.W.2d 321, 322 (Ky. 1967). *See also Sparks,* 721 S.W.2d at 727.

Middleton first argues that his attorney was ineffective for failing to request a mental health evaluation. This specific claim was not raised before the trial court and we may not review issues not raised or decided by the trial court. *See Bowling v. Commonwealth*, 80 S.W.3d 405, 419 (Ky. 2002). Therefore, we decline to review this argument. We note however, that contrary to Middleton's assertion, the record shows that on July 22, 2010, trial counsel filed an *ex parte* motion for psychiatric evaluation and payment of expenses. The trial court granted the motion on July 26, 2010, and ordered Middleton committed to the KCPC forensic psychiatric facility to undergo psychological and psychiatric examinations.

Middleton next claims that his counsel was ineffective for failing to prepare an adequate defense, failing to investigate, and failing to subpoena any witnesses. Middleton failed to offer any support for his vague and general allegations. RCr 11.42(2) requires claims be pled with specificity or face summary dismissal. Kentucky courts have consistently maintained that "vague allegations,

including those of failure to investigate, do not warrant an evidentiary hearing and warrant summary dismissal of an RCr 11.42 motion." *Mills v. Commonwealth*, 170 S.W.3d 310, 330 (Ky. 2005), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). We will not search the record to find support for underdeveloped arguments. *See Milby v. Mears*, 580 S.W.2d 724, 727 (Ky.App. 1979). Therefore, no further discussion of this alleged error is required. Because Middleton's allegation lacked sufficient specific support, the trial court correctly denied this claim without an evidentiary hearing.

Middleton finally argues that his trial counsel's assistance was ineffective based upon coercive scare tactics used to convince him to plead guilty. Specifically, Middleton insists that his attorney informed him that he could receive more that ninety-years' imprisonment if he did not accept the plea offer. We agree with the Commonwealth that the record of the guilty plea hearing conclusively establishes that Middleton entered his plea knowingly, intelligently, and voluntarily; that he had been fully informed of his constitutional rights; and that he understood the plea agreement. Further, Middleton stated under oath that he was satisfied with his attorney and that he and his counsel were both fully informed with regard to the facts of the case and any possible defenses. This court gives a strong presumption of truth to solemn declarations made in open court, and "admissions made during a *Boykin* hearing can conclusively resolve a claim that the plea was involuntarily obtained." *Fraser v. Commonwealth*, 59 S.W.3d 448, 457 (Ky. 2001).

It is not evidence of intimidation or manipulation for an attorney to inform his client of the consequences of proceeding to trial. We have held that where a plea of guilty might result in a lower sentence than might otherwise be imposed at trial, influencing a defendant to accept a plea offer is proper assistance of counsel. *Osborne v. Commonwealth*, 992 S.W.2d 860, 864 (Ky.App. 1998). Here, Middleton faced over twenty charges under five indictments. Under the plea agreement, he was sentenced to the absolute minimum sentence he could have received based on his charges. Considering the evidence and the number of charges, we believe that Middleton's counsel acted effectively by advising him to accept the plea agreement rather than risk receiving a higher sentence if convicted. Accordingly, Middleton's claim of coercion is refuted by the record, and he is not entitled to RCr 11.42 relief. An evidentiary hearing is not required when a movant's allegations are refuted by the record. *Hensley v. Commonwealth*, 305 S.W.3d 434, 436 (Ky.App. 2010).

For the foregoing reasons, the order of the Harlan Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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