

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000127-MR

ROBERT THOMAS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NOS. 09-CR-001539 & 10-CR-002578

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, JONES AND MAZE, JUDGES.

JONES, JUDGE: Acting without the assistance of counsel, Robert Thomas, appeals from an order of the Jefferson Circuit Court denying his Kentucky Rule of Criminal Procedure (RCr)11.42 motion and his corresponding motion for an evidentiary hearing. For the reasons set forth below, we affirm.

I. Background

On August 19, 2009, Rosemary Stinson was stabbed to death. On that same day, Mary Perry was stabbed with a pair of scissors. Both women had been at Thomas's house that day. Ultimately, Thomas was indicted for murder, attempted murder, tampering with physical evidence, and with being a persistent felony offender in the first degree. The court appointed Amy Hannah to represent Thomas.

A review of the record indicates that the Commonwealth had a fairly strong case against Thomas for the stabbing of Perry, including Perry's identification of Thomas as the perpetrator. The Commonwealth's case against Thomas for Stinson's murder was not as strong. The discovery produced by the Commonwealth indicates some conflicting testimony regarding the identity of Stinson's killer.

Ultimately, on the advice of counsel, Thomas pled guilty to the amended charge of assault under extreme emotional disturbance (for Criminal Attempt Murder), tampering with physical evidence, and persistent felony offender first degree in exchange for a recommended total sentence of ten years. In exchange for the plea, the Commonwealth dismissed the murder charge. Before accepting Thomas's guilty plea, the trial court reviewed the signed plea agreement with Thomas and his counsel. During the plea colloquy, Thomas verbally affirmed that he had not been threatened or coerced in any way and was pleading guilty freely and voluntarily. He also indicated that he had been able to discuss his

plea with his counsel, was satisfied with her advice, and did not need any more time with his counsel to discuss the case. On November 4, 2011, Thomas was sentenced in accordance with the plea agreement.

In August of 2013, Thomas filed an RCr 11.42 motion to vacate, set aside or correct his judgment and sentence on the basis of ineffective assistance of counsel. Thomas also requested an evidentiary hearing. In his motion, Thomas alleged that Hannah lacked the requisite experience to try his case, resorted to misinformation and scare tactics to coerce his guilty plea, and failed to conduct an adequate investigation of the facts.

The trial court denied Thomas's motion concluding that "trial counsel's representation of Thomas simply did not fall below the standard of reasonable professional assistance, nor was Thomas sufficiently prejudiced by any errors alleged against Hannah." The trial court also denied Thomas's request for an evidentiary hearing.

This appeal followed.

II. Analysis

The standards for assessing ineffective assistance of counsel are set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The two-pronged *Strickland* test requires Thomas to show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. *Id.* at 687. An attorney's performance is evaluated “by the degree of its departure from the quality of conduct customarily provided by the legal profession.” *Henderson v. Commonwealth*, 636 S.W.2d 649, 650 (Ky. 1982). In addition, courts should “indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.” *Commonwealth v. Pelfrey*, 998 S.W.2d 460, 463 (1999).

When a defendant contends that his guilty plea is the result of ineffective assistance of counsel, his conviction may only be set aside when he demonstrates both that he received ineffective assistance of counsel and that, but for the ineffective assistance, he would not have entered a guilty plea. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *Sparks v. Commonwealth*, 721 S.W.2d 726, 727-28 (Ky. App. 1986). We review the circuit court's factual findings for clear error, and we review all legal issues *de novo*. See *Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998).

Thomas alleges that Hannah met with him only a handful of times and during those meetings was focused only on getting Thomas to accept a plea, not

investigating his case for potentially exculpatory evidence. "The fact that counsel consulted only briefly with his client before his client entered a guilty plea does not, absent more, establish ineffective assistance of counsel; it is only a factor to be considered in the totality of the circumstances." *Rigdon v. Commonwealth*, 144 S.W.3d 283, 290 (Ky. App. 2004). Moreover, vague allegations that counsel should have investigated more are insufficient to demonstrate ineffectiveness. *See Sanders v. Commonwealth*, 89 S.W.3d 380, 390 (Ky. 2002) (overruled on other grounds by *Leonard v. Commonwealth*, 279 S.W.3d 151, 158–159 (Ky. 2009)).

While Hannah may not have met with Thomas as much as he liked, he has wholly failed to demonstrate that Hannah performed deficiently. It is clear that Hannah did meet with Thomas several times to discuss his case. While those discussions may have focused more heavily on obtaining a plea than on other matters, it is important to note that case strategy and how to obtain the best result in each case is largely left up to defense counsel. While Thomas may believe that Hannah should have spent more time investigating the underlying facts, he has failed to identify any specifics in this regard. Accordingly, we agree with the trial court that Thomas failed to identify any deficiency in Hannah's failure to investigate or prepare. Likewise, we agree that no evidentiary hearing was warranted with respect to this portion of Thomas's claim.

Thomas's next argument is that Hannah used "scare tactics" to coerce him into accepting a plea. For example, he asserts that Hannah told him that he was facing a life sentence, that the Commonwealth might very well prevail on all

charges at trial, that he could be convicted on circumstantial evidence, and that she was not experienced enough to win his case at trial. While Thomas may view these statements as scare tactics, we see them far differently. Hannah was under no obligation to sugarcoat the very serious charges Thomas was facing. Indeed, we believe she had an obligation to provide Thomas with an accurate assessment of the worst case scenario. Thomas was charged with murder. If convicted, he could have been sentenced to life without parole. KRS 532.030. Because of his PFO status, Thomas also faced enhancements if convicted on any of the charges. Providing Thomas with accurate information regarding the sentence he faced and the possibility that he could be convicted on circumstantial evidence may have scared him, but it was not ineffective. It was necessary to impress upon him the gravity of the charges he faced and the likelihood that the jury might convict him on those charges.

Hannah may have told Thomas that she did not believe she could win his case based on the evidence against him. Once again, however, such a statement is not a scare tactic if counsel sincerely believes it to be the case based on the evidence. We believe Hannah had an obligation to tell Thomas whether she believed he had a winnable case and to recommend that he accept the Commonwealth's plea offer if she believed it was the best course of action for him under the circumstances. *See Beecham v. Commonwealth*, 657 S.W.2d 234, 237 (Ky. 1983).

Additionally, Thomas told the trial court that he voluntarily entered his guilty plea and was not coerced to do so. There is nothing in the record that calls his assertions of voluntariness before the trial court at the time of his plea into question. He has not offered any evidence to suggest that his statements to the trial court in this regard were unreliable or untrue at the time he made them.

In sum, Thomas was facing serious charges that could have resulted in the imposition of a life sentence without the possibility of parole. There was very strong eyewitness evidence against Thomas on the attempted murder charge and at least fair circumstantial evidence on the murder charge. In response, Thomas's counsel advised him to accept the Commonwealth's plea offer whereby the Commonwealth agreed to dismiss the murder charge and amend the attempted murder charge to assault under extreme emotional disturbance in exchange for his guilty plea. The Commonwealth also recommended a ten-year sentence.

Given the number and type of charges Thomas faced in combination with his PFO status, we believe that counsel's advice was sound, even if it was not what Thomas wanted to hear. While Thomas may have believed he could win at trial, his counsel apparently did not and advised him of that fact. Zealous advocacy does not require counsel to guarantee victory at trial. It simply requires counsel to work diligently to provide her client with the best possible outcome under the circumstances. Thomas failed to allege any facts to indicate that Hannah's representation was not zealous.

III. Conclusion

For the reasons set forth above, we affirm the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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