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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000556-MR

SHANE PURVIS — APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE THOMAS L. JENSEN, JUDGE
ACTION NO. 11-CR-00010 AND 11-CR-00049

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, NICKELL, AND VANMETER, JUDGES.

VANMETER, JUDGE: Shane Purvis appeals from an order entered by the Laurel Circuit Court denying his motion for relief pursuant to RCr[1] 11.42. After careful review, we affirm.

BACKGROUND

[1] Kentucky Rules of Criminal Procedure.

Purvis was indicted in January 2011 in two separate cases for two counts of first-degree robbery and one count of theft by unlawful taking (over $500). Each incident occurred on different dates and in different locations within Laurel County.

Approximately one week prior to the start of trial, Purvis appeared in court with his attorney, Deaidra Douglas, and announced that he was rejecting the Commonwealth's plea offer. The day before the start of the scheduled trial, Purvis appeared before the trial court with Douglas and asserted that he was unhappy with his counsel due to poor communication. He further advised that he was not ready for trial and did not wish to enter into a plea agreement. Purvis also claimed that his counsel did not obtain statements from the witnesses on his witness list. In response, Douglas explained that Purvis provided this witness list one week prior, and that her investigator was attempting to locate the witnesses. The trial court denied Purvis's request for new counsel.

Later that day, Purvis once again appeared before the trial court to enter guilty pleas and accept the Commonwealth's recommendation that he serve thirteen years. After delivering the necessary colloquy to determine that Purvis's plea was being entered into knowingly, voluntarily, and intelligently, the trial court accepted his guilty pleas.

Prior to final sentencing, Purvis filed a motion to withdraw his plea. Purvis requested conflict counsel to represent him at a new hearing on his motion. The trial court granted Purvis's request and ordered the Department of Public

Advocacy (DPA) to provide conflict counsel. The DPA did not assign counsel until January 2012, after the trial court issued a show cause order.

A hearing on Purvis's motion to withdraw his plea was held on January 20, 2011. Purvis was represented by conflict counsel. At the onset of the hearing, conflict counsel advised that she was unaware that the motion would be heard on that day. She advised that Purvis wanted additional time to discuss the matter with her, but also stated that she was prepared to go forward. The trial court offered to pass the motion to a later day, but conflict counsel reiterated that she was prepared to go forward. After this exchange, the hearing began. Purvis called one witness, his former counsel, to testify. Based upon a review of the guilty plea colloquy, his competency evaluation, and his acknowledgement of his guilty plea in open court, the trial court found Purvis's plea to be knowing, intelligent, and voluntary.

On January 26, 2012, the trial court sentenced Purvis according to the terms of the plea agreement. Purvis appealed to this court, arguing that he was entitled to a full evidentiary hearing on his motion. Affirming the trial court, this court held that the hearing held by the trial court, along with the plea colloquy, the competency report, and the arraignment proceedings were sufficient to determine that Purvis's plea was valid.

On March 4, 2014, Purvis filed a motion seeking relief pursuant to RCr 11.42. Purvis claimed his guilty pleas were not entered into knowingly, voluntarily, and intelligently due to his trial counsel's ineffective assistance. He

further alleged ineffective assistance on the part of his conflict counsel. The trial court held that the record clearly refutes his claim that his guilty pleas were not entered into knowingly, voluntarily, and intelligently. The court further held that it was bound by the Court of Appeals' prior opinion, which expressly rejected this allegation. The trial court also denied Purvis's claims that his trial counsel was deficient in failing to inform him of changes in the law, failed to perform investigation, and used scare tactics to coerce guilty pleas. Finally, the trial court rejected Purvis's claim that conflict counsel was ineffective for failing to call two witnesses, finding that Purvis could not demonstrate prejudice. This appeal followed.

STANDARD OF REVIEW

We review a trial court's denial of RCr 11.42 relief under an abuse of discretion standard. *Bowling v. Commonwealth,* 981 S.W.2d 545, 548 (Ky. 1998). An abuse of discretion has occurred when the trial court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English,* 993 S.W.2d 941, 945 (Ky. 1999) (citation omitted).

To succeed on a claim of ineffective assistance of counsel, a defendant must meet two requirements:

> 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. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The trial court must therefore determine whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.,* 466 U.S. at 694, S.Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* As the Kentucky Supreme Court recently noted,

> In the guilty plea context, to establish prejudice the challenger must "demonstrate 'a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.' " *Premo v. Moore,* 562 U.S. 115, 129, 131 S.Ct. 733, 743, 178 L.Ed.2d 649 (2011) (quoting from *Hill v. Lockhart,* 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)). In *Padilla,* the Supreme Court stated that "to obtain relief [on an ineffective assistance claim] a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." 130 S.Ct. at 1485. *See also Williams v. Commonwealth,* 336 S.W.3d 42 (Ky. 2011). As noted above, at the pleading stage it is movant's burden to allege specific facts which, if true, would demonstrate prejudice. A conclusory allegation to the effect that absent the error the movant would have insisted upon a trial is not enough. *See, e.g., United States v. Arteca,* 411 F.3d 315, 322 (2nd Cir. 2005). The movant must allege facts that, if proven, would support a conclusion that the decision to reject the plea bargain and go to trial would have been rational, *e.g.,* valid defenses, a pending suppression motion that could undermine the prosecution's case, or the realistic potential for a lower sentence.

Stiger v. Commonwealth, 381 S.W.3d 230, 237 (Ky. 2012).

ANALYSIS

As an initial matter, we must address the extent to which the issues raised on this appeal have been previously addressed by this court on Purvis's prior appeal. *See Purvis v. Commonwealth*, Nos. 2012-CA-000323-MR, 2012-CA-000324-MR, 2013 WL 3897259 (Ky. App. July 26, 2013). Purvis appealed the trial court's denial of his motion to withdraw his pleas, arguing that his entry of a guilty plea was involuntary. Purvis claimed he did not receive an adequate hearing on his motion. *Id*. at *2. This court disagreed, and held that the trial court properly determined that his plea was made knowingly, intelligently, and voluntarily. *Id*. at *3.

Because this court has already decided overlapping issues in the previous appeal, we consider the applicability of "law of the case" doctrine. "'Law of the case' refers to a handful of related rules giving substance to the general principle that a court addressing later phases of a lawsuit should not reopen questions decided by that court or by a higher court during earlier phases of the litigation." *Brown v. Commonwealth*, 313 S.W.3d 577, 610 (Ky. 2010). One of these rules provides that issues decided in earlier appeals should not be revisited in subsequent ones. *Id*. Thus, to the extent that this court has already decided that Purvis's plea was made knowingly, intelligently, and voluntarily, the "law of the case" doctrine applies.

First on appeal, Purvis alleges that conflict counsel rendered ineffective assistance in representing Purvis at the hearing on his motion to withdraw his plea. He claims that conflict counsel was unprepared on the day of the hearing, and did not know the hearing would proceed. Purvis claims that he wanted to call witnesses at the hearing, but was unable to do so because conflict counsel was unprepared. Purvis also alleges that conflict counsel's representation was intentionally deficient because she wanted to protect Douglas, her colleague in the DPA. Purvis claims that this bias is evidenced by conflict counsel's leading and non-adversarial direction examination of Douglas.

The trial court rejected Purvis's claim that conflict counsel refused to adequately pursue the allegations against trial counsel. Our review of the record supports the trial court's findings, indicating that conflict counsel was prepared for the hearing and asked appropriate, probative questions. Conflict counsel demonstrated that she had a grasp of the case history, and asked questions regarding the plea negotiations, competency evaluation, witness interviews, and other relevant issues. Conflict counsel also questioned Douglas regarding whether Purvis went back and forth on the decision to accept a plea deal and asked whether a mock cross-examination conducted was used to convince Purvis to accept a plea deal. These questions demonstrate that conflict counsel properly probed whether Douglas pressured Purvis to accept a plea deal. Therefore, we find no merit to Purvis's claim that conflict counsel's representation was intentionally deficient because she wanted to protect her colleague.

Purvis also claims conflict counsel's representation was ineffective because her lack of preparation prevented him from calling other witnesses at the trial. The only such witness identified by Purvis on appeal is his father, Terry Purvis. Purvis alleges that his father would have testified that trial counsel coerced him to take a plea agreement. Purvis provided an affidavit to the trial court from his father, who indicated that he believed Douglas forced and scared Purvis into taking a plea deal. Finding the evidence insufficient to justify relief, the trial court determined that his father's testimony is so tainted by self-interest that the validity of the statement is dubious at best. We agree, and hold that Purvis cannot demonstrate that he was prejudiced by his inability to call his father as a witness.

Next, Purvis claims that he received ineffective assistance from his trial counsel because she failed to advise him of the possibility of acquittal or conviction on a lesser-included offense. Purvis attributes this failure to his trial counsel's lack of knowledge of relevant law. Citing *Wilburn v. Commonwealth*, 312 S.W.3d 321, 329 (Ky. 2010), Purvis claims that a jury could have found him guilty of second-degree robbery under the theory that he used a toy gun rather than a real gun. He also claims his trial counsel could have called into question the type of knife he used in committing the second robbery. Purvis claims that his trial counsel failed to advise him that he was entitled to a second-degree robbery instruction.

In rejecting Purvis's argument, the trial court held that Purvis failed to allege the specifics of what his trial counsel did tell him. The trial court found that

Purvis's counsel testified that she informed him that she believed an acquittal to be possible in one of the cases, but a conviction with a significant sentence was likely in the other. The trial court found she demonstrated an awareness of the state of the law, and conveyed the information to Purvis. We agree, and hold that Purvis's allegation regarding information his counsel failed to tell him is unsubstantiated speculation. Moreover, Purvis's claim is refuted by his solemn declaration in open court during the plea colloquy, admitting that he threatened the use of physical force while armed with a firearm in one robbery, and was armed with a knife in the other. "Solemn declarations in open court carry a strong presumption of verity. 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." *Edmonds v. Commonwealth*, 189 S.W.3d 558, 569 (Ky. 2006) (*quoting Blackledge v. Allison,* 431 U.S. 63, 74, 97 S.Ct. 1621, 1629, 52 L.Ed.2d 136 (1977)). As discussed above, the "law of the case" provides that Purvis's plea colloquy was entered into knowingly, voluntarily, and intelligently.

Lastly, Purvis claims that he was entitled to an evidentiary hearing on his RCr 11.42 motion. A movant is not automatically entitled to an evidentiary hearing on an RCr 11 .42 motion; there must be an issue of fact which cannot be determined on the face of the record. *Stanford v. Commonwealth,* 854 S.W.2d 742, 743 (Ky. 1993). "Where the movant's allegations are refuted on the face of the record as a whole, no evidentiary hearing is required." *Sparks v. Commonwealth,* 721 S.W.2d 726, 727 (Ky. App. 1986) (*citing Hopewell v. Commonwealth,* 687

S.W.2d 153, 154 (Ky. App. 1985)). As discussed above, our review indicates all of Purvis's allegations are refuted on the face of the record, and thus, the trial court did not err in refusing to hold an evidentiary hearing.

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

ALL CONCUR.

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