

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000680-MR
AND
NO. 2015-CA-000672-MR

BRIAN K. DAMRELL

APPELLANT

v. APPEAL FROM ROCKCASTLE CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 10-CR-00131

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: COMBS, STUMBO, AND VANMETER, JUDGES.

VANMETER, JUDGE: Brian K. Damrell appeals, *pro se*, the order of the Rockcastle Circuit Court denying his motion for relief made pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42, wherein he claimed ineffective assistance of trial counsel. Additionally, he appeals the trial court's denial of his

motion for leave to supplement his RCr 11.42 motion. For the following reasons, we affirm.

On August 23, 2010, Trooper Scotty Pennington observed a subject he knew to be Damrell operating a four wheel ATV on a public roadway. When Trooper Pennington attempted to pull the ATV over, Damrell exited the roadway and eventually escaped on a nearby railroad track. However, during Trooper Pennington's pursuit of Damrell through residential yards, he observed several items fall from Damrell's ATV. Upon closer inspection, Trooper Pennington identified the items as supplies used to make methamphetamine and a mason jar containing an active methamphetamine lab. Damrell was eventually apprehended.

Following a jury trial, Damrell was convicted of operating an ATV on a public roadway and fleeing or evading police. In a bifurcated proceeding, the jury also convicted Damrell of manufacturing methamphetamine, second or subsequent offense. He was sentenced to twenty years' imprisonment. Damrell appealed his conviction as a matter of right to the Supreme Court of Kentucky which, on September 20, 2012, affirmed the conviction. *Damrell v. Commonwealth*, No. 2011-SC-00627-MR, 2012 WL 4327800 (Ky. 2012).

Thereafter, Damrell, *pro se*, filed a motion pursuant to RCr 11.42 requesting that the circuit court vacate his sentence due to ineffective assistance of trial counsel. In substance, Damrell claimed that his counsel was ineffective for failing to communicate a plea offer and for failing to impeach Trooper Pennington. On December 2, 2013, the circuit court entered an order denying Damrell's claim

regarding Trooper Pennington. However, the court appointed counsel and granted an evidentiary hearing on Damrell's claim respecting his plea offer.

One day before the scheduled evidentiary hearing, on January 23, 2014, Damrell filed a motion for leave to supplement his RCr 11.42 motion with four additional claims. After the evidentiary hearing was held on January 24, 2014, the circuit court, on March 24, 2014, rendered an order wherein it denied Damrell's claim that counsel failed to communicate a plea offer and also denied his motion for leave to supplement.

Damrell appealed to this Court the denial of his RCr 11.42 motion. However, while this appeal was pending, Damrell filed a motion in circuit court requesting that the court rule on the issues in his supplemental motion. The trial court summarily denied that motion and Damrell appealed. Damrell now appeals from the denial of his RCr 11.42 motion and the denial of his motion to review and rule.

In this consolidated appeal, Damrell contends that the circuit court erred when it denied his claims of ineffective assistance for: (1) failure to transmit a plea offer; and (2) failure to impeach Trooper Pennington. He further contends that the trial court erred when it denied his motion for leave to supplement his motion to vacate. We will address each argument in turn.

We first note that when a movant claims ineffective assistance of counsel, his claim is evaluated under the two-part test articulated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 688, 689, 104 S.Ct 2052,

2065, 80 L.Ed.2d 674 (1984); *Hollon v. Commonwealth*, 334 S.W.3d 431, 436 (Ky. 2010). Under *Strickland*, the movant must show: (1) that counsel's performance was deficient, and (2) that counsel's deficient performance prejudiced the defense. 466 U.S. at 687, 104 S.Ct. at 2064.

To establish deficient performance, the movant must show that counsel's representation "fell below an objective standard of reasonableness" such that "counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Commonwealth v. Tamme*, 83 S.W.3d 465, 469 (Ky. 2002). Establishing prejudice requires that the movant show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 687, 694, 104 S.Ct. at 2064, 2068. *Strickland* defines reasonable probability as "a probability sufficient to undermine confidence in the outcome[,]" thereby depriving "the defendant of a fair trial, a trial whose result is reliable." *Id.* While we will not disturb the trial court's factual findings if they are supported by substantial evidence, we review its conclusions of law *de novo*. *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky.2008). With these standards in mind, we now turn to Damrell's arguments.

Damrell first contends that his trial counsel provided ineffective assistance when he failed to inform Damrell of the Commonwealth's offer to serve four years' imprisonment. He insists that he first learned of the four-year offer in a letter he received from his trial attorney following his conviction. After an evidentiary hearing, at which both Damrell and his trial attorney testified, the

circuit court found that Damrell did not receive ineffective assistance. We agree with the circuit court.

Recently, the Supreme Court of the United States has recognized that defense counsel has a duty to “communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.”

Missouri v. Frye, 132 S.Ct 1399, 1408, 182 L.Ed. 2d 379 (2012). An attorney who fails to communicate a formal offer to his client has not rendered effective assistance. *Id.*

However, in a motion brought under RCr 11.42, “[t]he movant has the burden of establishing convincingly that he or she was deprived of some substantial right which would justify the extraordinary relief provided by [a] post-conviction proceeding A reviewing court must always defer to the determination of facts and witness credibility made by the circuit judge.” *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006), (overruled on other grounds by *Leonard v. Commonwealth*, 279 S.W.3d 151, 159 (Ky. 2009)). “Findings of fact, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” Kentucky Rules of Civil Procedure (CR) 52.01. Findings of fact are clearly erroneous when they are not supported by substantial evidence. *Stanford Health & Rehab. Ctr. v. Brock*, 334 S.W.3d 883, 884 (Ky. App. 2010). “Substantial evidence [is] that which, when taken alone or in light of all the evidence, has

sufficient probative value to induce conviction in the mind of a reasonable person.”

Id.

At Damrell’s evidentiary hearing, trial counsel testified that in the course of representing Damrell, he twice communicated a plea offer of four years’ imprisonment, which Damrell rejected. Counsel stated that the first offer was made one day prior to trial, via cell phone, while he and Damrell were in the recreation room at the detention center. He testified that he conveyed that offer to Damrell, who in rejecting the offer stated he “would not plead guilty to something that he did not do.” The second offer came while the jury was out deliberating. Counsel relayed the offer to Damrell, but Damrell believed the trial went favorably and wanted to see what the jury had decided.

Damrell’s account of the pretrial negotiations differed significantly from trial counsel’s version. Damrell testified that trial counsel communicated a ten-year offer, but that he had no idea about an offer of four years being extended. He stated that he rejected the ten-year offer, but would have accepted the four-year offer had he known about it. Curiously, Damrell’s RCr 11.42 motion to the trial court stated that trial counsel failed to communicate *any* plea offer.

The circuit court found that trial counsel’s account was replete with detail and thus more credible than Damrell’s account. It further found that Damrell made no showing why trial counsel would present false testimony to the court. Additionally, the court found that trial counsel’s account of the plea offer was corroborated by a trial witness who testified that he advised Damrell to take the

deal. Based on the testimony given at the evidentiary hearing, the circuit court concluded that Damrell failed to meet his burden of establishing that his trial counsel's performance was deficient.

After reviewing the record before us, we believe the trial court, which is in the best position to observe witnesses and determine credibility, reasonably found that trial counsel did not render ineffective assistance. The detail in trial counsel's account of the incident, as well as by the corroborating witness' testimony, supports the trial court's finding that trial counsel was the more credible witness. Additionally, Damrell's vacillating accounting of the events undermined his credibility. Clearly, the circuit court's finding that counsel's performance was not deficient, was supported by substantial evidence and not clearly erroneous. Regardless, this Court does not second-guess reasonable credibility determinations made by the trial court. *Commonwealth v. Bussell*, 226 S.W.3d 96, 101 (Ky. 2007). We therefore affirm the trial court's order as it pertains to this issue.

Damrell next argues that his trial counsel was ineffective for failing to investigate and impeach Commonwealth witness Trooper Pennington. Specifically, he claims counsel failed to investigate "a pattern of improper inducements and coercion by the arresting officer in this case, Trooper Scottie [sic] Pennington, in developing and producing key prosecution witnesses." He further claims trial counsel failed to investigate and impeach Trooper Pennington on his "longstanding obsession with, and pursuit of [Damrell's] girlfriend [.]" The trial

court found Damrell's claims refuted by evidence contained within the record. We agree.

“[C]ounsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigation unnecessary under all the circumstances and applying a heavy measure of deference to the judgment of counsel.” *Haight v. Commonwealth*, 41 S.W.3d 436, 446 (Ky. 2001) (*overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)). After a review of the record, we find that trial counsel conducted a reasonable investigation with respect to Trooper Pennington.

The record refutes Damrell's claim that his counsel did not explore witness coercion. First, counsel filed a Motion to Produce Exculpatory Evidence wherein he “specifically requested that the Commonwealth disclose any leniency or ‘deals’ offered to any witnesses in the case.” Second, counsel questioned Trooper Pennington on his interaction with witnesses and on whether he offered any leniency to witnesses. Counsel further asked several witnesses directly whether Trooper Pennington threatened or promised benefits to them in exchange for their testimony.

The record also reveals that trial counsel considered the issue of Trooper Pennington's possible interest in Damrell's girlfriend. At an evidentiary hearing before trial, the Commonwealth's attorney stated that Damrell's counsel had made the Commonwealth aware of this issue. Defense counsel, in response, stated that

he was not going to insinuate that Trooper Pennington had a romantic interest in the girlfriend, and that he did not need a “gimmick defense.”

We believe that the decision not to pursue the issue was reasonable in light of the circumstances. The only evidence of Trooper Pennington’s purported infatuation with the girlfriend was her own testimony. However, that evidence was impeached with evidence that Trooper Pennington had arrested her on at least two occasions. Further, the allegation was so tainted by self-interest that its validity was dubious at best. Given the lack of evidence to support Damrell’s claim, pursuing this issue would have done nothing to further Damrell’s case, and may have possibly offended the jury.

Based on the foregoing, we find Damrell’s allegation that his trial counsel was ineffective for failing to investigate and impeach Trooper Pennington contradicted by evidence in the record, and without merit. The record indicates that counsel investigated both of Damrell’s claims regarding Trooper Pennington, and made reasonable strategic decisions regarding each. Damrell has not presented evidence that his trial attorney’s performance was deficient in this respect. Therefore, we affirm the circuit court on this issue.

Damrell also claims error in the trial court’s denial of his motion to amend his RCr 11.42 motion filed January 23, 2014. He cites CR 15.01, which permits amendment once as a matter of course at any time before a responsive pleading is served. In Damrell’s supplemental motion, he argued four additional issues: 1) the Commonwealth’s “needless destruction of all confiscated items subsequent to lab

testing of the suspected methamphetamine”; 2) Pennington’s failure to collect fingerprint evidence; 3) the trial court’s failure to suppress certain evidence; and 4) trial counsel’s failure to “define and pursue the issue of the pattern of negligence in Trooper Pennington’s handling of this case.” The circuit court conducted Damrell’s evidentiary hearing on January 24, 2014, and in its March 24, 2014, order, stated that Damrell’s supplemental motion was barred as a successive RCr 11.42 motion. While denying Damrell’s claims for procedural reasons, the trial court noted that the additional issues were addressed at trial and rejected by the jury.

Damrell is correct that he is entitled to amend his pleading once as a matter of course at any time before a responsive pleading is served, even without court order. *Ky. Lake Vacation Land, Inc. v. State Prop. & Bldgs. Comm’n*, 333 S.W.2d 779, 781 (Ky. 1960). The Commonwealth had yet to file an answer when Damrell filed his supplemental motion; therefore, the court was without judicial discretion to reject it. *Whitney Transfer Co. v. McFarland*, 138 S.W.2d 972 (Ky. 1940). In response, the Commonwealth argues that RCr 11.42(3) specifically requires the original motion set forth all grounds of which appellant has knowledge. However, RCr 11.42(3) also states: “Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding.” Before Damrell submitted his supplemental motion, the trial court had only ruled on one of the two issues in Damrell’s original RCr 11.42 motion. The second issue was set for a hearing and had not yet been decided. Therefore, Damrell was not

precluded from supplementing his motion because final disposition of the motion had not been reached. Nonetheless, at the evidentiary hearing, the circuit court considered the issues in Damrell's supplemental motion and found that each was addressed at trial and rejected by the jury. We agree.

“The purpose of RCr 11.42 is not to permit a convicted defendant to retry issues which could and should have been raised in the trial court and upon an appeal considered by this court.” *Thacker v. Commonwealth*, 476 S.W.2d 838, 839 (Ky. 1972). Accordingly, the first three issues in Damrell's supplemental motion are procedurally barred because each was, or could have been, raised on direct appeal. The fourth issue in Damrell's supplemental claim is simply a restatement of his original claim regarding trial counsel's handling of Trooper Pennington. To the extent that Damrell argues his trial counsel failed to investigate and pursue issues with Trooper Pennington, we have resolved that claim, and no further discussion is warranted. Therefore, we hold that error occurred in the denial of Damrell's leave to supplement his motion, but the error was harmless.

For the foregoing reasons the orders of the Rockcastle Circuit Court are affirmed.

ALL CONCUR.

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