RENDERED: SEPTEMBER 23, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000216-MR

BRANDON FRENCH — APPELLANT

v.

APPEAL FROM HENRY CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 12-CR-00002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; D. LAMBERT AND STUMBO, JUDGES.

D. LAMBERT, JUDGE: This matter is before the Court on appeal from an order entered by the Henry Circuit Court which summarily denied the motion of the Appellant, Brandon French, who is proceeding *pro se*, seeking post-conviction relief pursuant to Rule 11.42 of the Rules of Criminal Procedure ("RCr"). The sole issue before us is whether the trial court erred in denying the motion without first conducting an evidentiary hearing. We find that it did not and therefore affirm.

I. FACTUAL AND PROCEDURAL HISTORY

French was in custody in Shelby County on suspicion of having committed a pharmacy robbery in Shelby County. He gave a videotaped confession during which he also volunteered a confession relating to another, similar, robbery which took place in Henry County. He later gave a confession to a Henry County law enforcement officer.

According to French, he was intoxicated at the time he gave these confessions. He offered proof which he contends supports this contention. He produced medical records which indicate that he reported having ingested four dosage units of a narcotic controlled substance. Though this form also revealed that he did not appear to a medical professional to be under the influence of or withdrawing from any controlled substances at the time of his medical examination, this medical form was dated the day after he gave his confessions.

The Henry County Grand Jury indicted French on the following offenses: robbery in the 1st degree, possession of a handgun by a convicted felon, theft of a controlled substance, and being a persistent felony offender ("PFO") in the 1st degree. As a result of successful plea negotiations, French accepted an offer and entered a guilty plea to the robbery charge only. He waived a separate sentencing date and was sentenced the same day to a fifteen-year term of incarceration. Under the terms of the agreement, said sentence was to be served concurrently with an identical sentence in the Shelby County case.

He later filed a motion for post-conviction relief pursuant to RCr 11.42, alleging that his plea was rendered involuntary by his trial counsel's ineffective assistance. Specifically, French contends that his trial counsel was ineffective by failing to move for suppression of his confession. The basis for the suppression motion, he contends, would have been his intoxication at the time he gave his confessions.

Relying heavily on the plea colloquy, the trial court summarily denied the motion. French then filed the instant appeal.

II. ANALYSIS

A. STANDARD OF REVIEW

French argues that his counsel failed to meet the two-pronged effectiveness test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under that test, the Defendant must show that counsel's assistance was somehow deficient, and then must show that the deficient performance prejudiced the defense. *Id.,* at 687. However, a "strong presumption that counsel's performance was effective" underlies any analysis under RCr 11.42. *Hodge v. Commonwealth*, 68 S.W.3d 338, 344 (Ky. 2001).

As the instant case involves a guilty plea rather than a trial, courts employ a modified *Strickland* test set forth in subsequent U.S. Supreme Court cases, and adopted by the Courts of this Commonwealth in *Sparks v. Commonwealth*, 721 S.W.2d 726 (Ky.App. 1986). The test for analyzing effectiveness of counsel in a guilty plea situation is: "that counsel made errors so

serious that counsel's performance fell outside the wide range of professionally competent assistance" and that "the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, the defendant would not have pleaded guilty, but would have insisted on going to trial." *Id.*, at 727-28 (internal citations omitted).

Appellate courts have also consistently cautioned against "second-guessing counsel's trial strategy" when reviewing RCr 11.42 motions. *Parrish v. Commonwealth*, 272 S.W.3d 161, 170 (Ky. 2008). The strong presumption of effectiveness includes a presumption that a "challenged action might be considered sound trial strategy." *Commonwealth v. Pelfrey*, 998 S.W.2d 460, 463 (Ky. 1999).

A hearing on the motion is not required where the allegations contained therein do not create "an issue of fact that cannot be determined on the face of the record." *Stanford v. Commonwealth*, 854 S.W.2d, 742, 743 (Ky. 1993). The Kentucky Supreme Court held in *Brewster v. Commonwealth*, 723 S.W.2d 863 (Ky. 1986), that a hearing is also unnecessary in situations where the record adequately shows the prejudice element cannot be satisfied.

B. THE TRIAL COURT ACTED PROPERLY IN DENYING FRENCH'S MOTION FOR RELIEF WITHOUT A HEARING

French alleged in his motion, and again on appeal, that his trial counsel was ineffective in failing to move for the suppression of his confession. French offered scarcely more than allegations that he was intoxicated at the time he gave it. He filed exhibits with his motion consisting of medical records indicating

he self-reported having taken controlled substances on the day he gave his confession. Those same medical records note that the medical professional to whom French made these disclosures did not opine that French was either under the influence or withdrawing from any controlled substances

To find in French's favor would require an assumption that he would have been successful in his suppression motion. There are two circumstances where a confession might be suppressed for lack of voluntariness related to intoxication. The first is the situation where an accused's intoxication renders him more pliable and a "lesser quantum of coercion" is necessary to convince him to incriminate himself. *Hill v. Anderson*, 300 F.3d 679, 682 (6th Cir. 2002). The second is a situation where the accused is intoxicated "to the degree of mania, or of being unable to understand the meaning of his statements." *Halvorsen v. Commonwealth*, 730 S.W.2d 921, 927 (Ky. 1986). French did not specify which of these theories his trial counsel might have pursued, nor does he point to any evidence that he was either coerced or extraordinarily intoxicated as contemplated in *Hill* and *Halvorsen*, respectively. For that reason, this Court cannot assume the merits of either theory here.

French also states in his brief that he had made his trial counsel aware of his state of intoxication, even going so far as to have "implored trial counsel seek suppression of his confession." This indicates to this Court that his trial counsel's decision to forego the filing a suppression motion was an intentional decision; that is, a strategic one. French thus asks this Court to ignore the

presumption espoused in *Pelfrey* when he contends that "the record reveals no tactical or strategic advantage gained by counsel's failure to seek suppression of French's confession."

French's statements to the trial court during his plea colloquy certainly do not indicate he was entering into an involuntary plea. French did not display any degree of distress inherent in entering a plea involuntarily. He engaged the trial court in idle chatter regarding jail food, and indicated that he was prepared to enter the identical guilty plea in Shelby County at a previous court appearance, but refrained from doing so until issues in his Henry County case were resolved. When the trial court asked him if it was his desire to plead guilty only to the robbery count, French responded that "[i]t's better than the options," indicating a deliberate decision from among an array of choices, including proceeding to trial. French also intimated to the trial court that he would "rather not take the chance on losing and taking a lot more years" and that the decision to enter the plea was in his best interest, which again reflects a deliberate, tactical decision. French answered in the negative when the trial court asked if he had been pressured into taking the plea deal, and in the affirmative when the trial court asked if he was doing so voluntarily. These responses directly refute the allegations he made in his RCr 11.42 motion that he was deprived of any real choice.

French is also unable to show prejudice in his trial counsel's performance. As the result of accepting the offer and pleading guilty, he received a sentence which was less than the minimum sentence he could have received had

he elected to proceed to trial on the indictment. Had he rejected the deal, the offense of first degree robbery, as enhanced by French's first degree PFO charge, carries a minimum sentence of 20 years to serve. *See* KRS 515.020; KRS 532.020; KRS 532.080.

III. CONCLUSION

Having reviewed the record, this Court finds that the record refutes French's arguments both that trial counsel was ineffective and that he was prejudiced by the allegedly ineffective performance. The decision of the Henry Circuit Court is therefore AFFIRMED.

ALL CONCUR.

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