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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000260-MR

DOMINIQUE SANFORD — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 10-CR-00735-002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, COMBS, AND STUMBO, JUDGES.

COMBS JUDGE: Dominique Sanford appeals from the Fayette Circuit Court's denial of his RCr[1] 11.42 motion without an evidentiary hearing. After our review of the parties' arguments, the record, and the applicable law, we affirm.

[1] Kentucky Rules of Criminal Procedure.

FACTS AND PROCEDURAL HISTORY

On June 15, 2010, Sanford was charged with nine counts of first-degree robbery, four counts of first-degree wanton endangerment, and one count of first-degree fleeing and evading police. Sanford's charges resulted from his actions in the early morning hours of April 23, 2010, when he and his cousin, Jettadia Johnson, committed five armed robberies involving nine victims. When police attempted to stop Sanford and Johnson in their vehicle, they fled. In the process of crashing their vehicle, Sanford and Johnson hit several other occupied vehicles. Sanford and Johnson then fled on foot. When Johnson was later apprehended, he named Sanford as his accomplice. At least one of the victims also identified Sanford as the second gunman.

Pursuant to a plea agreement, Sanford entered a plea of guilty on December 17, 2010, to one count of robbery in the first degree and one count of robbery in the second degree. According to the terms of the agreement, the Commonwealth agreed to recommend that Sanford be sentenced to twelve years for robbery in the first degree and to eight years for robbery in the second degree -with the sentences to run consecutively for a total of twenty years.

Before accepting Sanford's guilty plea, the trial judge engaged in a lengthy colloquy with Sanford in order to insure that he was fully informed of the constitutional rights that he was waiving by pleading guilty and that he was satisfied with his trial counsel's representation. Sanford expressed satisfaction with counsel, acknowledged that he understood the rights he was waiving, and

executed waiver documents in open court. The court further inquired whether Sanford had been pressured into pleading guilty. Sanford assured the court that no threats or promises were made to induce him to accept the plea offer. Defense counsel acknowledged that Sanford was reluctant to accept the plea agreement, but they both agreed that it was in his best interest. The trial judge ultimately accepted Sanford's plea as being knowing and voluntary. He postponed sentencing for a later date.

At Sanford's sentencing hearing on February 11, 2011, defense counsel asked the court not to sentence Sanford as violent felony offender due to his age (21) at the time of the crimes. Counsel argued that the trial court should hold the violent felony offender statute unconstitutional because it failed to harmonize with the persistent felony offender laws. Trial counsel was alluding to KRS[2] 532.080. For persistent felony offender purposes, that statute excludes prior felonies that were committed before the defendant attained twenty-one years of age. Counsel also argued for concurrent sentencing.

Before the court handed down its sentence, Sanford was given the opportunity to address the court. He pleaded with the court for a concurrent sentence. He admitted that the activities in which he was involved on the night in question were unacceptable. He said that a lot of drugs were involved and that his thought processes were blurred. He stated that he should have "acted like the older cousin that he is and said no, but things went another route." After listening

[2] Kentucky Revised Statutes.

to Sanford, his attorney, and the Commonwealth, the trial court ultimately followed the Commonwealth's recommendation and ordered that Sanford's sentences should run consecutively for a total of twenty years to serve.

On June 3, 2011, pursuant to RCr 10.06, Sanford, *pro se,* filed a motion to vacate his conviction based on an affidavit in which his cousin, co-defendant Johnson, recanted his statement to the police implicating Sanford as a participant in the robberies. The trial court summarily denied the motion on July 11, 2011, and Sanford did not appeal.

On direct appeal to the Supreme Court of Kentucky,[3] Sanford argued that his twenty-year sentence is disproportionate to the charges to which he pled guilty because of his age and prior criminal history; therefore, he contends that the sentence amounts to cruel and unusual punishment under the Eighth Amendment of the United States Constitution and Section Seventeen of the Kentucky Constitution. However, the Court disagreed and affirmed Sanford's conviction and sentence. *Sanford v. Commonwealth,* 2011 WL 6826405, 2011-SC-00143-MR (December 22, 2011).

On July 1, 2014, Sanford, *pro se*, filed an RCr 11.42 motion alleging numerous instances of ineffective assistance of trial counsel. The Department of Public Advocacy was appointed and supplemented Sanford's motion on October

[3] Sanford entered an unconditional guilty plea. However, the Supreme Court allowed Sanford's appeal because he filed motions at the conclusion of the plea seeking deviation from the plea agreement. The Commonwealth responded without asserting that the motions were improper; and the trial court ruled on them at the sentencing hearing and included language that it was a final judgment. Additionally, the Commonwealth did not assert a claim of lack of preservation on appeal.

28, 2014. On February 2, 2015, the trial court denied Sanford's motion without conducting an evidentiary hearing. It is from the order denying his RCr 11.42 motion that Sanford now appeals.

STANDARD OF REVIEW

In order to challenge a guilty plea based on ineffective assistant of counsel, a movant must meet the requirements of a two-pronged test by proving that: (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness as measured against prevailing professional norms; 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 pled 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*); Gail v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985); *Sparks v. Commonwealth*, 721 S.W.2d 726, 727-28 (Ky. App. 1986).

On review, we must defer to the trial court's findings of fact and may set aside those findings only if they are clearly erroneous. *Logan v. Commonwealth*, 446 S.W.3d 655, 658-59 (Ky. App. 2014). A finding of fact is not clearly erroneous if it is supported by substantial evidence. *Brown v. Commonwealth,* 253 S.W.3d 490, 500 (Ky. 2008). Counsel's performance and any alleged deficiency are reviewed *de novo*. *Id*. However, we must "indulge a strong presumption that [ ] 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). 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.

ANALYSIS

Sanford first argues that his attorney was ineffective for failing to interview his co-defendant, Johnson. Johnson was jointly indicted for the same crimes as Stanford. Prior to Sanford's guilty plea, Johnson negotiated a plea agreement with the Commonwealth that resulted in his receiving a sentence of twenty-three years' imprisonment on September 10, 2010. On February 28, 2011—seventeen days after Sanford was sentenced—Johnson executed an affidavit in which he swore that Sanford had not been involved in the crimes. Stanford claims that if his attorney had interviewed Johnson before Sanford pleaded guilty, she would have discovered that Johnson was willing to recant his statement to police implicating Sanford in the crimes. Instead, Sanford was forced to accept responsibility for something he did not do. He asserts that if his attorney had discovered that Johnson was willing to recant, he would have not pled guilty and would have insisted on going to trial. We disagree.

"A reasonable investigation is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and recourses, but also with the benefit of hindsight, would conduct." *Haight v. Commonwealth*,

41 S.W.3d 436, 446 (Ky. 2001) (*overruled on other ground in Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). "While the duty investigate is not absolute, a less-than-complete investigation may be supported only by a reasoned and deliberate determination that further investigation is not warranted." *Commonwealth v. Tigue*, 459 S.W.3d 372, 394 (Ky. 2015).

On review, "[t]he focus of the inquiry must be on whether trial counsel's decision not to pursue evidence or defenses was objectively reasonable under all the circumstances. Matters involving trial strategy, such as the decision to call a witness or not, generally will not be second-guessed by hindsight." *Robbins v. Commonwealth*, 365 S.W.3d 211 (Ky. 2012) (Internal citations omitted).

> [W]here the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, ... whether the error ... caused him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea[.] ... [T]his assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial[.]

Commonwealth v. Tigue, 459 S.W.3d at 392. (Internal citations and quotations omitted).

In the case before us, even if trial counsel had been aware that Johnson was willing to recant his prior statement implicating Sanford, we are not persuaded that counsel would have changed her recommendation as to the plea. Nor do we believe that the evidence would likely have changed the outcome at trial. The record indicates that Johnson had refused to testify at Sanford's trial. Therefore,

Johnson's statement implicating Sanford was likely not admissible. *See Bruton v. United States*, 391 U.S. 123, 135-37, 88 S.Ct. 1620, 1627-28, 20 L.Ed. 476 (1968) (holding that a defendant's right to confront witnesses against him under the Sixth Amendment is violated when a non-testifying co-defendant's statements inculpating defendant are admitted at trial); see also *Terry v. Commonwealth*, 153 S.W.3d 794, 801 (Ky. 2005) (holding that *Bruton* applies when the co-defendants are not tried jointly). Trial counsel was aware that Johnson's statement to the police **would not be** used as evidence. Yet she recommended that Sanford take the plea deal based on the strength of the Commonwealth's case. If counsel had discovered that Johnson was willing to recant his statement, it is nonetheless unlikely that she would have recommended that Sanford proceed to trial. Any testimony that Johnson could have offered at trial that was inconsistent with his prior statement would have allowed the prior statement to become admissible -- not only to impeach Johnson, but as substantive evidence with respect to the matter asserted. *See Manning v. Commonwealth*, 23 S.W.3d 610, 613 (Ky. 2000) ("Prior inconsistent statement can be used not only to attack the credibility of the declarant, but also as substantive evidence"). Thus, presenting Johnson as an exculpatory witness at trial arguably could have made the Commonwealth's case against Sanford even stronger, and it is unlikely that the outcome of a trial would have changed as a result of his putative testimony.

It is well known that recantations are often viewed with skepticism and suspicion. They are perceived to be unreliable and untrustworthy. *See Thacker v.*

Commonwealth, 453 S.W.2d 566, 568 (Ky. 1970) ("The general rules are that recanting testimony is viewed with suspicion[.]"). This perception is especially true when the recantation comes from an accomplice who is a relative of the defendant. It is possible that a jury would have believed Johnson's initial version of the events and would have dismissed his recantation as an attempt to protect a family member.

We conclude that trial counsel's advice to take the plea deal was reasonable under the circumstances. Eyewitnesses identified Sanford as one of the robbers, and Sanford faced up to seventy years in prison if he had been found guilty. It is unlikely that trial counsel would have changed her recommendation as to the plea upon discovering that Johnson was willing to recant his initial identification. Additionally, proffering Johnson as a witness to a jury is unlikely to have changed the outcome of a trial. Thus, we find that the record directly refutes Sanford's claim of error. Accordingly, we affirm the trial court on this issue.

Sanford next claims that his trial attorney refused to file a motion to withdraw his guilty plea after he requested her to do so. That claim, however, is directly refuted by the record.

In his motion to the trial court, Sanford relies on *Commonwealth v. Tigue, supra,* in support of his claim. In *Tigue*, soon after the appellant pleaded guilty, he called his attorneys and requested their assistance in withdrawing his plea. Defense counsel, however, refused Tigue's requests, and no written motion to withdraw was filed on Tigue's behalf. At his sentencing hearing, Tigue orally

requested that the trial judge withdraw his plea due to its involuntary nature. Tigue's trial counsel refused to join in the motion. The judge summarily denied Tigue's request because Tigue's motion, entered *pro se*, did not give him sufficient grounds to allow withdrawal. Our Supreme Court held that a motion to withdraw a guilty plea made before entry of the final judgment and sentence is a critical stage of the criminal proceedings to which the constitutional right to counsel attaches. Thus, the Court held that Tigue's right to counsel was violated when counsel refused to help him seek withdrawal of his plea.

Sanford claims that he, too, was denied counsel at a critical stage. He contends that before the sentencing hearing, he related to his attorney that he wished to withdraw his plea because he was actually innocent. In his motion to the trial court, he stated as follows:

> Movant, after accepting the plea and realizing that he made mistake, immediately tried to contact his attorney to request that she withdraw his plea. Movant eventually met with his attorney and made his request that she file a motion to withdraw his guilty plea and she refused to do so. Movant informed his attorney that he could not do the time for crimes which he did not commit and her response was that she would not file a motion to withdraw his plea but would ask that an Alford plea be used instead of a regular plea.

As distinguished from *Tigue*, the credibility of Sanford's claim that he wanted to withdraw his plea due to actual innocence is contradicted by his actions at the sentencing hearing. At the hearing, Sanford admitted his involvement, and he pleaded for the court to run his sentences concurrently. Sanford was given the

opportunity to address the court at his final sentencing hearing, and at no time did he express a wish to withdraw his plea; nor did he endeavor to profess his innocence. On the contrary, Sanford pleaded for concurrent sentencing; admitted that he was on a lot of drugs on the night of the crime; admitted that his actions were unacceptable; and stated to the court that he should have known better.

An evidentiary hearing "is only required when the motion raises an issue of fact that cannot be determined on the face of the record. To do this, the court must examin[e] whether the record refuted the allegations raised." *Parrish v. Commonwealth,* 272 S.W.3d 161, 166 (Ky. 2008). Sanford's actions and statements at his sentencing hearing were completely inconsistent with his claim that he asked his counsel to withdraw his plea because of his actual innocence. Therefore, we are not persuaded by Sanford's claim with regard to this issue.

We affirm the order of the Fayette Circuit Court.

ALL CONCUR.

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