

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000581-MR

RANDY SCOTT OSTRIHON

APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 08-CR-01058

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: ACREE, J. LAMBERT, AND THOMPSON, JUDGES.

J. LAMBERT, JUDGE: Randy Ostrihon brings this appeal *pro se* from a Warren Circuit Court order denying his motion to vacate judgment and sentence pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 following an evidentiary hearing. Ostrihon argues that his guilty plea was involuntary due to ineffective

assistance of counsel. After carefully reviewing the record, we affirm the trial court's order denying relief.

Ostrihon was indicted for murder, assault in the first degree, and driving under the influence of intoxicants after his car struck a motorcycle at an intersection. According to witness statements in the police report, the motorcycle was stopped at a red light when Ostrihon's vehicle struck it from the rear. The witnesses stated that Ostrihon did not appear to slow down or to apply his brakes before striking the motorcycle. The driver of the motorcycle was seriously injured and his passenger was killed. One of the police officers at the scene observed that Ostrihon's eyes were watery and bloodshot, that his speech was slurred, and that he smelled of alcoholic beverages. Ostrihon failed all field sobriety tests administered by the police, and subsequent breath and blood tests indicated that his blood alcohol level was approximately double the legal limit.

According to Ostrihon, he had consumed four beers approximately six hours prior to the accident. He claims that he was unable to see the motorcycle because the sun was in his eyes as he approached the intersection. When he realized he was approaching an intersection and saw cross traffic, he applied his brakes, deploying the airbag which pinned him in his seat.

Ostrihon ultimately entered a plea of guilty to all three charges pursuant to an agreement with the Commonwealth. He received a total sentence of twenty years in accordance with the Commonwealth's recommendation, which also

specified that he would not be eligible for parole until he had served seventeen years, less credit for time served.

Ostrihon thereafter filed a *pro se* motion to vacate judgment under RCr 11.42, arguing that his trial counsel had been ineffective during the guilty plea proceedings. After conducting an evidentiary hearing, at which Ostrihon and his counsel testified, the trial court entered an order denying the motion. This appeal by Ostrihon followed.

In order to prove ineffective assistance of counsel, a defendant must show: (1) that counsel's representation was deficient in that it fell below an objective standard of reasonableness, measured against prevailing professional norms; and (2) that he was prejudiced by counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

When the defendant argues that his guilty plea was rendered involuntary due to ineffective assistance of counsel, the trial court is required

to "consider the totality of the circumstances surrounding the guilty plea and juxtapose the presumption of voluntariness inherent in a proper plea colloquy with a *Strickland v. Washington* [466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)] inquiry into the performance of counsel." To support a defendant's assertion that he was unable to intelligently weigh his legal alternatives in deciding to plead guilty because of ineffective assistance of counsel, he must demonstrate the following:

(1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; 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 pleaded guilty, but would have insisted on going to trial.

Rigdon v. Commonwealth, 144 S.W.3d 283, 288 (Ky. App. 2004) (internal citations omitted).

Ostrihon argues that his trial counsel failed to conduct an adequate independent investigation of the facts of the case before advising him to plead guilty. He contends that his trial counsel erred in relying solely on the information provided to him by the Commonwealth during the discovery process and that he should have personally interviewed the witnesses to the accident and investigated the history of other traffic accidents at the intersection.

“A reasonable investigation is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources, but also with the benefit of hindsight, would conduct. The investigation must be reasonable under all the circumstances.” *Haight v. Commonwealth*, 41 S.W.3d 436, 446 (Ky. 2001) (internal citations omitted), overruled on other grounds by *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

Trial counsel testified at the RCr 11.42 evidentiary hearing that he did employ an expert to investigate Ostrihon’s case, hoping to uncover mitigating evidence to support a finding of manslaughter rather than murder. The expert was unable, however, to uncover anything advantageous to Ostrihon’s defense. He drove out to the intersection on the one-year anniversary of the accident, but was unable to substantiate Ostrihon’s claim that he could not see the red light because

the sun was in his eyes. Trial counsel further testified that a man and his teenage son who witnessed the accident stated that the intersection light was red at the time and that Ostrihon did not brake. The investigation uncovered no evidence, such as skid marks on the road, to indicate that Ostrihon had braked.

In light of this testimony and evidence, Ostrihon has simply failed to show that trial counsel's investigation was deficient in any way. Ostrihon's contention on appeal that a witness "could exonerate" him if the witness stated he did not notice the light until a minute or two after the accident occurred is purely speculative and unsupported by any evidence. "If general allegations . . . were sufficient, RCr 11.42 would easily be turned into a discovery device, a result which . . . is contrary to the rule's purpose." *Roach v. Commonwealth*, 384 S.W.3d 131, 140 (Ky. 2012). RCr 11.42(2) provides for summary dismissal of the motion for failure to "state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds." We agree with the trial court that Ostrihon failed to cite with any specificity what defensive benefit any further investigations could have yielded nor did he present any proof at the evidentiary hearing regarding how such investigations would have changed the ultimate outcome of his decision to plead guilty.

Ostrihon's next argument concerns a motion filed by his attorney, seeking in part to suppress evidence of his prior conviction in Georgia for being a Habitual Impaired Violator. Ostrihon contends that his attorney failed to discover that although the prosecution could have asked at trial if he had ever been convicted of

a felony, it was not permitted to delve into the specifics of the convictions, and that therefore the jury would not have learned that Ostrihon's prior offenses involved driving while impaired. But evidence of the nature of his prior convictions would have been admissible during the penalty phase of the trial under Kentucky Revised Statutes (KRS) 532.055(2)(a).

In any event, the record shows that trial counsel filed a motion to prohibit evidence concerning his prior felony conviction under Kentucky Rules of Evidence (KRE) 609(b), which provides that a prior felony may be admissible for impeachment purposes if the felony is less than ten years old. Ostrihon's prior felony conviction occurred on June 25, 1998, eleven years before. His attorney argued that it was over eleven years old and furthermore that its admission during the sentencing phase would be unduly prejudicial. The Commonwealth's response argued that the time limit in the rule is applied at the discretion of the court and that in Ostrihon's case the probative nature of the conviction was not outweighed by its potential prejudicial impact. Ostrihon has failed to demonstrate that it was deficient performance on the part of his attorney to seek to suppress admission of the prior conviction, particularly because the offense related so closely to the charges in the instant case.

Next, Ostrihon argues that his counsel coerced him into pleading guilty shortly before trial, after spending months preparing for the trial, and assuring him that the charges against him would be amended to manslaughter and assault in the second degree. Ostrihon claims that after his attorney received the

Commonwealth's responses to his motion to amend the charges as well as the motion to prohibit evidence of his prior felony convictions, his attorney made an "about-face" turn and began urging him to accept the guilty plea offer from the Commonwealth. He claims trial counsel showed him the Commonwealth's response to his motions and implied that it had the same weight as a judge's order. He then told Ostrihon that his only hope was to enter a plea of guilty to all the charges and that there was "no chance" of getting them reduced, and he warned Ostrihon that if he did not accept the offer, he would receive a life sentence. He also told him that if he persisted in seeking a ruling on the motion to amend the charges, the plea would be nullified and the judge would not consider amending the charges.

At the evidentiary hearing, trial counsel explained that he changed his tactics and decided to recommend acceptance of the guilty plea after his investigator discovered no evidence that Ostrihon would have had the sun in his eyes at the time of the accident, and after attending the depositions of the physicians at Vanderbilt Medical Center who treated the victims, from whom he learned that the passenger who survived the accident suffered a serious injury causing paralysis. Breathalyzer and blood tests administered within two hours after the collision showed Ostrihon's blood alcohol levels as .155 and .170, well above the statutory limit. Based on these factors, trial counsel believed that there was little chance of getting the charges against Ostrihon amended. Trial counsel summarized the evidence as a whole as "challenging" in terms of going to trial. He further testified

that he did not coerce or pressure Ostrihon to plead guilty, but he did advise him as to what a jury might do. Generally, trial counsel's strategy will not be second guessed in an RCr 11.42 proceeding. *Baze v. Commonwealth*, 23 S.W.3d 619, 624 (Ky. 2000), overruled on other grounds by *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). Trial counsel's reasoning and his tactics are fully supported by the evidence and do not constitute deficient performance. As the trial court pointed out in its order, had he gone to trial, Ostrihon would have faced a potential maximum sentence of seventy years or life with the possibility of parole after service of twenty years.

Ostrihon also argues that his attorney was ineffective due to a conflict of interest because trial counsel had close ties to the victim's family and the community. The trial court found that trial counsel shared the same last name as a member of one of the victim's families, but there was no evidence in the record establishing any actual familial relationship. Ostrihon had ample opportunity to question trial counsel about this issue at the evidentiary hearing but did not do so. Consequently, the trial court did not abuse its discretion in holding that Ostrihon had simply failed to indicate how his trial counsel had breached his duty of care or loyalty in any way.

At the evidentiary hearing, the trial court reviewed the entire video recording of the entry of Ostrihon's guilty plea, which fully met the requirements of *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d (1969). In the course of that colloquy, which was detailed and exhaustive, the trial court questioned Ostrihon at

great length about the voluntariness of his plea, and asked whether he had been informed of all the consequences of the plea and of the potential benefits of going to trial, including the possibility of being convicted of lesser-included offenses. Ostrihon replied in the affirmative. The trial court told Ostrihon about the potential sentences he might receive if he decided to go to trial and asked him if there was any question in his mind regarding the potential sentences and whether he believed it was in his best interest to accept the plea offer. The trial court also alluded to the physicians' depositions that had been taken only the day before and asked whether Ostrihon was aware that the surviving victim had suffered a serious physical injury. The trial court also reviewed the other evidence, including the reports indicating that Ostrihon was intoxicated at the time of the accident.

Ostrihon has presented no convincing evidence to refute the fact that he was fully informed both by his attorney and by the trial court of the implications and consequences of his guilty plea, or that his responses to the trial court's questions were anything but knowing and voluntary. "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) (citations omitted).

For the foregoing reasons, the order denying Ostrihon's RCr 11.42 motion is affirmed.

ALL CONCUR.

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