

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000925-MR

MICHAEL H. THOMAS

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 11-CR-00302

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, J. LAMBERT, AND NICKELL, JUDGES.

LAMBERT, J., JUDGE: Michael Thomas appeals from the Christian Circuit Court's order denying his motion for post-conviction relief under Kentucky Rules of Criminal Procedure (RCr) 11.42. After careful review, we affirm.

Thomas was indicted in July 2011 for three counts of burglary in the third degree, three counts of attempted burglary, criminal mischief in the first degree, criminal mischief in the second degree, and criminal mischief in the third

degree. Ultimately, Thomas entered a guilty plea to all of the charges on November 7, 2012. The Commonwealth recommended five-year sentences on each of the three counts of burglary in the third degree and a five-year sentence on the criminal mischief in the first degree charge. The sentences were to run concurrently, for a total of five years' imprisonment. Under the agreement, Thomas was to pay restitution to the victims of his crimes. In order to work to make money to pay the restitution, Thomas was permitted to remain out of custody until final sentencing. The plea agreement contained a hammer clause, which stated, "Failure to appear at final sentencing shall result in the Commonwealth moving the Court to modify the sentence to the maximum sentence for each offense, run consecutively or otherwise to the maximum aggregate sentence permitted by law."

Thomas expressed to the trial court that he was entering his plea knowingly and voluntarily, and the trial court emphasized the consequences if he failed to appear at his sentencing hearing or failed to pay the restitution as ordered by the court, in particular the fact that such would trigger the hammer clause of the plea agreement. Thomas stated that he understood and was voluntarily pleading guilty.

A final sentencing hearing was scheduled for May 14, 2013, but Thomas failed to appear. Thomas made some restitution payments prior to disappearing, but he was later found in Tennessee in jail on other burglary charges.

Thomas was extradited to Kentucky, and on October 28, 2013, the Commonwealth filed a motion to invoke the hammer clause of Thomas's plea agreement.

The trial court held a final sentencing hearing on December 10, 2013. The record of the hearing reflects that Thomas's counsel advised the court that Thomas's failure to appear at the previous sentencing hearing was due to his drug and alcohol substance abuse issues. His counsel also stated that Thomas's mother was there to testify on his behalf and that she had enrolled Thomas in substance abuse counseling. Thomas himself spoke at the hearing, stating that he had worked for a time and made two restitution payments totaling \$800.00, but that he eventually lost his job. He also stated that he had an ongoing substance abuse problem and asked the court to grant him another chance. The testimony reflected that, at the time of the missed sentencing hearing, Thomas had not yet been incarcerated in Tennessee, but he was incarcerated shortly thereafter.

The trial court stated that it had considered Thomas's presentence investigation report (PSI), the nature of his crimes, and the circumstances surrounding Thomas's failure to appear at the sentencing hearing as required by his plea agreement. The court stated that given the seriousness of Thomas's crimes, it was denying probation and imposing the twenty-year sentence under the hammer clause. In response to Thomas's claim that he was under the influence of drugs and alcohol at the time he made the plea agreement, the trial court stated that Thomas had specifically testified that he was not under the influence and was freely and voluntarily pleading guilty. In accordance with its oral ruling, the trial

court entered a final judgment sentencing Thomas to an aggregate sentence of twenty years.

In August 2014, Thomas filed a *pro se* motion to vacate his conviction under RCr 11.42, alleging ineffective assistance of counsel as well as the substantive error by the trial court in imposing the hammer clause. On March 17, 2015, the trial court denied Thomas's motion without an evidentiary hearing, holding that the record refuted his claims of ineffective assistance and that his substantive claims were not properly raised in a collateral attack. An appeal from that order now follows.

In order to establish ineffective assistance of counsel, Thomas must demonstrate that his counsel's performance was deficient and that the deficiency prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668 (1984) (adopted by the Kentucky Supreme Court in *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985)). Furthermore, Thomas must overcome the presumption that his counsel provided adequate assistance and exercised reasonable professional judgment. *See Strickland* at 689. As the Court in *Strickland* explained, trial counsel's performance must have so prejudiced the defendant's defense that it deprived him of a fair trial. *Id.* at 697. When a defendant pleads guilty, as Thomas did here, the movant must show that but for counsel's errors, they would have insisted on going to trial. *Commonwealth v. Pridham*, 394 S.W.3d 867, 876 (Ky. 2012).

In his brief to this Court, Thomas makes three central arguments. First, he argues that he should have been afforded an evidentiary hearing with

regard to his RCr 11.42 claims. Next, he argues that he received ineffective assistance when his counsel failed to object to the imposition of the hammer clause. Finally, he argues that the court's imposition of the hammer clause constituted substantive error.

For purposes of this opinion, we will combine Thomas's first two arguments. Thomas argues in his brief to this Court that his counsel failed to object in any way to the trial court's imposition of the hammer clause at the final sentencing hearing and failed to advise him to withdraw his plea. Thomas further alleges that he was not afforded an evidentiary hearing during which he could flesh out these claims.

The record clearly contradicts Thomas's claims. At the hearing, Thomas's counsel urged the court not to impose the hammer clause and to instead grant Thomas leniency because of his substance abuse problems. Counsel also advised the court that Thomas's mother was present to testify and had enrolled Thomas in rehabilitation. Trial counsel also advised that Thomas's mother could not care for herself and required Thomas's help in her care. Thus, Thomas's claim that his counsel failed in some way to advocate on his behalf at the final sentencing hearing is completely without merit. Counsel urged the court to impose the minimum sentence of five years, advocated for his client, and urged the court not to impose the hammer clause or impose the maximum sentence. We find no error by trial counsel, and as the record clearly refuted Thomas's claims, no evidentiary hearing was warranted.

Next Thomas argues that the trial court erred when it imposed the hammer clause without consideration of other circumstances. The Commonwealth argues that this claim is not properly brought in a collateral attack and instead should have been raised in a direct appeal, citing *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983) (“The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete. That structure is set out in the rules related to direct appeals, in RCr 11.42, and thereafter in CR 60.02.”).

While we agree with the Commonwealth that Thomas raises a substantive argument that the trial court improperly imposed the hammer clause without using its discretion in consideration of the circumstances of Thomas’s case, the fact that he entered a guilty plea muddies the waters a bit as to how he should have properly raised this argument. Nonetheless, a review of the hearing refutes Thomas’s allegations in this regard. The trial court considered the string of burglaries committed by Thomas, his continued crimes in another state, his failure to appear at the sentencing hearing, and the fact that he advised the court that he was entering a voluntary plea of guilty during the plea colloquy. Thus, Thomas’s argument that the trial court did not consider the circumstances before invoking the hammer clause is without merit.

Finding no ineffective assistance of counsel and no other errors, we affirm the Christian Circuit Court’s March 12, 2015, order denying Thomas’s motion for RCr 11.42 relief.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael H. Thomas, *Pro Se*
Sandy Hook, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Ken W. Riggs
Assistant Attorney General
Frankfort, Kentucky