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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001448-MR

ALEXANDER L. RUFF

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HON. MITCH PERRY, JUDGE
NO. 08-CR-003686

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * ** * ** *

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

TAYLOR, JUDGE: Alexander L. Ruff brings this *pro se* appeal from an order of the Jefferson Circuit Court entered August 15, 2014, denying Ruff's motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. After a careful review of the record, we vacate and remand for the circuit court to conduct an evidentiary hearing and further proceedings, if necessary.

In September 2011, Ruff was convicted of wanton murder and first-degree robbery after a jury trial in the Jefferson Circuit Court. Ruff was sentenced to life imprisonment without the benefit of parole or probation for twenty-five years. The Kentucky Supreme Court affirmed Ruff's conviction by opinion rendered April 25, 2013.

BACKGROUND

The relevant underlying facts have been set out in the Kentucky Supreme Court's Opinion affirming Ruff's conviction in his direct appeal which are as follows:

On November 24, 2008, Alexander Ruff entered the New York Fashions clothing store in Louisville, Kentucky, with the intent to rob the store and its customers. Ruff was accompanied that day by John Benton and Kendrick Robinson. With tee-shirts tied around their faces and armed with handguns, Ruff and Benton entered the store while Robinson waited in a nearby vehicle. Ruff fired a single shot into the ceiling and ordered the people inside to get on the ground and surrender their wallets and cash. Ruff fired the gun again, this time striking store owner Mohamed Abderlrahman in the abdomen. Ruff and Benton then collected the customers' wallets and fled in Robinson's car. Abderlrahman died as a result of internal bleeding caused by his injury.

Four days later, Louisville Metro Police Department ("LMPD") Officers Christopher Sheehan and Benjamin Lunte, while on narcotics patrol, stopped a vehicle driven by Ruff's girlfriend, Chesica White, for an unreadable temporary tag. Ruff happened to be seated in the passenger seat when the officers approached the vehicle. After White and Ruff exited the vehicle, Ruff suddenly fainted and fell to the street. The officers testified that, suspecting that Ruff had swallowed narcotics, they obtained consent from White to search the vehicle.

White disputed that she gave consent. Officer Sheehan found a 45–caliber handgun and a garbage bag full of clothing under the passenger seat of the car. Ruff admitted ownership of the gun and clothing. He was then arrested on unrelated charges and transported to an LMPD substation for questioning.

That evening, Ruff was questioned and placed in jail on the unrelated charges. Five days later on December 3, Ruff was transported to the LMPD homicide office for further questioning. He once again returned for questioning on December 5. Over the course of his interviews with LMPD detectives, Ruff admitted to being involved in the New York Fashions robbery, and implicated Benton and Robinson as co-conspirators.

Ruff was indicted by a Jefferson County Grand Jury on one count of murder and three counts of robbery. His motions to suppress evidence found and statements made during the vehicle stop and subsequent statements at the LMPD office were denied. At trial, Ruff took the stand in his own defense. He confessed to his involvement in the robbery and shooting, including taking customers' wallets and firing his weapon in Mohamad Abdelrahman's direction. The jury convicted Ruff of wanton murder and first-degree robbery. Finding an aggravating factor of first-degree robbery, the jury returned a sentence of life without the benefit of parole or probation for twenty-five years. The trial court sentenced in accord with the jury's recommendation

Ruff v. Commonwealth, 2013 WL 1789861 at *5 (2011-SC-000640-MR) (Ky. Apr. 25, 2013).

On July 16, 2014, Ruff filed a *pro se* motion and supporting memorandum to vacate conviction and sentence pursuant to RCr 11.42 with the Jefferson Circuit Court. The following day, Ruff filed additional *pro se* motions related to his RCr 11.42 motion: for leave to proceed *in forma pauperis*, for

findings of fact and conclusions of law, for an evidentiary hearing, and for appointment of counsel. The circuit court denied the RCr 11.42 motion in an order entered August 15, 2014. The circuit court gave no analysis or reasoning for its order and did not conduct an evidentiary hearing. The court summarily wrote “motion denied” on the last page of Ruff’s RCr 11.42 motion. Presumably, the court found that all of Ruff’s allegations were refuted on the face of the record below. Ruff’s motions for appointment of counsel and evidentiary hearing were denied via a written order entered on September 2, 2014. This appeal follows.

STANDARD OF REVIEW

In Kentucky, ineffective assistance of counsel claims are reviewed under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), recognized by the Kentucky Supreme Court as controlling precedent in *Gall v. Com.*, 702 S.W.2d 37 (Ky. 1985). To prevail upon an RCr 11.42 motion, a movant must demonstrate: (1) trial counsel’s performance was deficient, and (2) the deficiency was prejudicial and deprived defendant of a fair trial. *Strickland*, 466 U.S. 668. An appellant bears a heavy burden of identifying the specific acts or omissions that constitute counsel’s deficient performance. *Id.*; *Com. v. Pelfrey*, 998 S.W.2d 460 (Ky. 1999).

Additionally, when reviewing an RCr 11.42 motion, the circuit court must conduct an evidentiary hearing only when there is “a material issue of fact that cannot be determined on the face of the record” RCr 11.42(5). An evidentiary hearing is not required in cases where the record refutes the claim of

error, or “where the allegations, even if true, would not be sufficient to invalidate the conviction.” *Harper v. Com.*, 978 S.W.2d 311, 314 (Ky. 1998) (citing *Brewster v. Com.*, 723 S.W.2d 863 (Ky. App. 1986)).

ANALYSIS

Ruff raises four issues on appeal from the denial of his RCr 11.42 motion, the first of which asserts that counsel rendered ineffective assistance regarding the issue of Ruff’s competency to stand trial. Because we vacate and remand for an evidentiary hearing on the competency issue, we need not consider Ruff’s other arguments at this time.

Based upon our review of the record on appeal, we reluctantly must conclude that Ruff’s claim of ineffective assistance of counsel regarding his competency to stand trial cannot be conclusively resolved by an examination of the record. Defense counsel moved for a competency evaluation of Ruff prior to trial on March 9, 2011. The circuit court ordered Ruff to be transported to Kentucky Correctional Psychiatric Center (KCPC) for evaluation on March 16, 2011. Ruff was admitted to KCPC on May 2, 2011. In a “memo to the file” dated June 15, 2011, the circuit court stated, *inter alia*, that a “Competency Hearing for Alexander L. Ruff” was scheduled for July 13, 2011. In open court on July 13, 2011, the circuit court raised the competency issue. Defense counsel then stipulated to the contents of the KCPC report without making any reference to what the report actually contained. The circuit court responded with “we’ll enter an order to that effect.” Based on our review, no such order appears in the record, and of course,

the circuit court did not reference it in the court's "calendar order" denying Ruff's RCr 11.42 motion. The KCPC report was likewise not included in the circuit court's record on appeal. Ruff attempted to amend his brief in this Court to append the KCPC report which was denied since it was not part of the record below. He was instructed per court order entered May 12, 2016, that he could only supplement the record by filing a motion in the Jefferson Circuit Court. An examination of the record indicates that Ruff failed to do this. An appellant is responsible to complete the record below for our review and matters not in the record may not be considered on appeal. *Hatfield v. Com.*, 250 S.W.3d 590 (Ky. 2008).

While the KCPC report cited by Ruff does not exist for purposes of this review, neither was there an explicit determination in the record that Ruff was competent to stand trial, despite the fact that Ruff was ordered to undergo a competency evaluation – it is a question left hanging and never formally resolved. The Commonwealth concedes this in its brief on page 5 thereof, stating “[u]ndersigned counsel cannot find in either the trial or video record another mention or discussion of the results of the competency evaluation or the results of a competency hearing.”

Notwithstanding, the Commonwealth citing to *Commonwealth v. Thompson*, 697 S.W.2d 143 (Ky. 1985), argues that “[i]t has long been held that, when the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court.” *Id.* at 145.

Because the circuit court permitted the trial to go forward, the Commonwealth urges us to find that the circuit court made an “implicit decision finding Appellant competent to stand trial.” Commonwealth’s Brief at 8.

However, in RCr 11.42 proceedings, we are limited to review the record on appeal. Without having any insight or explanation as to why the circuit court summarily denied Ruff’s RCr 11.42 motion, we cannot speculate on matters considered below that are not in the record. Thus, the controlling precedent is set forth in *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001). In *Fraser*, the court held: “[a] hearing is required if there is a material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record. The trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them.” *Id.*, at 452-53 (citations omitted). This Court may not unilaterally declare that Ruff was competent to stand trial and we otherwise are duty bound to maintain a scrupulous regard for due process in criminal cases. Thus, in ruling on the side of caution, we conclude that *Fraser* mandates that an evidentiary hearing is necessary in this case.

Based on *Fraser* and the fact that the competency issue cannot be resolved by an examination of the record, we hold that the circuit court’s denial of Ruff’s RCr 11.42 motion must be vacated and remanded for an evidentiary hearing on ineffective assistance of counsel as relates to Ruff’s competency at the time of his trial. Because an evidentiary hearing is required in this case, counsel should be appointed to represent Ruff. RCr 11.42(5). The circuit court should also address

any other issues raised in Ruff's RCr 11.42 motion and thereafter ensure that findings of fact and conclusions of law are entered into the record to permit appropriate appellate review. RCr 11.42(6).

CONCLUSION

For the foregoing reasons, we vacate the Jefferson Circuit Court's order entered August 15, 2014, denying Ruff's RCr 11.42 motion and the September 2, 2014, orders denying Ruff's motions for an evidentiary hearing and appointment of counsel, and remand for further proceedings consistent with this opinion.

ALL CONCUR.

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