

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001589-MR

JAMES R. NORVELL

APPELLANT

v. APPEAL FROM CARLISLE CIRCUIT COURT
HONORABLE TIMOTHY A. LANGFORD, JUDGE
ACTION NO. 12-CR-00008

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KRAMER, CHIEF JUDGE; CLAYTON AND THOMPSON,
JUDGES.

KRAMER, CHIEF JUDGE: James Norvell appeals the Carlisle Circuit Court's order denying his RCr¹ 11.42 motion to vacate his sentence. After a careful review of the record, we affirm because the circuit court properly denied Norvell's motion without holding an evidentiary hearing.

¹ Kentucky Rule of Criminal Procedure.

I. FACTUAL AND PROCEDURAL BACKGROUND

Norvell was indicted on four counts of first-degree rape and four counts of incest. The Commonwealth provided him an offer in which the Commonwealth offered to dismiss the four counts of rape and one of the counts of incest, as well as to amend the charges on the remaining three counts of incest to non-forcible incest, if Norvell would enter guilty pleas to the amended charges. The Commonwealth also offered to recommend a sentence of five years of imprisonment on each count of non-forcible incest. Norvell moved to enter a guilty plea in accord with the Commonwealth's offer. The circuit court accepted his guilty plea to the three amended charges of non-forcible incest and dismissed the remaining counts, per the plea agreement. The court sentenced Norvell to five years of imprisonment on each count, to be served consecutively for a total of fifteen years of imprisonment.

Norvell moved for relief from the judgment, pursuant to CR² 60.02. In his motion, Norvell claimed that the victim had recanted her allegations against him. The circuit court denied Norvell's motion, reasoning that he had admitted committing the offenses at least four times.

Norvell filed a second CR 60.02 motion, alleging his actual innocence and claiming that the circuit court had not taken his first CR 60.02 motion seriously. The circuit court denied the motion.

² Kentucky Rule of Civil Procedure.

Norvell then moved to vacate his sentence pursuant to RCr 11.42, claiming that he had received the ineffective assistance of counsel when counsel: (a) failed to consider Norvell's actual innocence defense, as shown via the victim's letters of recantation; (b) failed to pursue the actual innocence defense when counsel failed to investigate the alleged victim's statements and the victim's allegations to the police; (c) refused to investigate, pursue, and assert the issue of Norvell's mental stability and competency, based upon his having received treatment at a hospital for an attempted overdose and having been released from the hospital the day before he entered his guilty plea; (d) failed to investigate and interview witnesses concerning Norvell's allegation that he was under the influence of various drugs and alcohol at the time he was questioned by law enforcement; (e) had a conflict of interest in representing him; (f) failed to investigate and request a suppression hearing to suppress Norvell's statement to law enforcement; and (g) failed to adequately represent him because Norvell refused to ask his sisters-in-law to recant their allegations against one of counsel's other clients. Additionally, Norvell alleged that the circuit court failed to inquire if he was under the influence of medication at the time he entered his guilty plea and, because he was under such influence, his guilty plea was invalid. Norvell also requested an evidentiary hearing concerning his RCr 11.42 motion.

The circuit court denied Norvell's RCr 11.42 motion without holding an evidentiary hearing. Norvell now appeals, contending that the circuit court should have held an evidentiary hearing regarding his claims.

II. ANALYSIS

In a motion brought under RCr 11.42, “[t]he movant has the burden of establishing convincingly that he or she was deprived of some substantial right which would justify the extraordinary relief provided by [a] post-conviction proceeding. A reviewing court must always defer to the determination of facts and witness credibility made by the circuit judge.” *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151, 159 (Ky. 2009) (citation omitted). An RCr 11.42 motion is “limited to issues that were not and could not be raised on direct appeal.” *Id.* Pursuant to RCr 11.42(5), if there is “a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing. . . .” Where the trial court fails to hold an evidentiary hearing on an RCr 11.42 claim, appellate 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). In other words, absent an evidentiary hearing, we will only affirm if the record is adequate to decide the claim.

Most of Norvell’s RCr 11.42 claims were ineffective assistance of counsel allegations.

A showing that counsel’s assistance was ineffective in enabling a defendant to intelligently weigh his legal alternatives in deciding to plead guilty has two components: (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.

Bronk v. Commonwealth, 58 S.W.3d 482, 486-87 (Ky. 2001) (quotation marks omitted).

In his first two RCr 11.42 claims, Norvell alleged that counsel failed to consider his actual innocence defense, which he contends could be proven via the victim's letters of recantation, and he contended that counsel failed to pursue the actual innocence defense by neglecting to investigate the alleged victim's statements to the police. Regarding these claims, the circuit court held that any alleged recantation by the victim occurred after Norvell had entered his guilty plea, which the court held rendered "the recantation suspect at best." Because Norvell confessed to the crimes on the record at his plea hearing and at sentencing, there was no need for the circuit court to hold an evidentiary hearing before denying relief based upon this claim. Further, as the court correctly noted, the alleged recantation letters were "suspect at best."

Norvell also claimed that counsel rendered ineffective assistance when she refused to investigate, pursue, and assert the issue of his mental stability and competency. Norvell alleged that this issue should have been based upon his having received treatment at a hospital for an attempted overdose and having been released from the hospital the day before he entered his guilty plea. Regarding this

claim, the circuit court held that upon review of the plea hearing and the sentencing hearing, Norvell

clearly stated to the Court that he knew the consequences of entering the plea, that he was satisfied with his counsel and did not need to communicate with her any further, and, importantly, [admitted] to his crimes with no hesitation. [Norvell] was calm, alert, properly responsive to questioning by the Court – there is simply no evidence from the record that Defendant did not understand his actions in pleading guilty.

Based upon our review of the plea colloquy and sentencing hearing, we agree with the circuit court. Norvell properly interacted with the court and with his counsel during the hearings, and admitted to his crimes. There was no indication that he did not understand what he was doing at those hearings. Therefore, the circuit court properly denied Norvell's request for an evidentiary hearing before it denied relief concerning this claim.

Norvell next asserted in his RCr 11.42 motion that counsel failed to investigate and interview witnesses concerning his allegation that he was under the influence of various drugs and alcohol at the time he was questioned by law enforcement. We note that Norvell did not specify which witnesses counsel should have interviewed. Regardless, even assuming *arguendo* that counsel had interviewed witnesses and such witnesses informed counsel that Norvell was under the influence of drugs and alcohol when he was questioned by law enforcement, this still does not prove that Norvell would not have pled guilty but for this allegedly deficient performance. Norvell's daughter was the victim in this case

and she also told police about the incest, so the evidence against him was strong. Further, in exchange for his guilty plea, the Commonwealth dismissed four rape charges and one charge of incest against Norvell. Therefore, Norvell cannot show that he was prejudiced by counsel's allegedly deficient performance concerning this issue. Consequently, this ineffective assistance of counsel claim lacks merit and the circuit court did not err in failing to hold an evidentiary hearing before denying relief based upon this claim.

Norvell also contended that counsel rendered ineffective assistance because counsel had a conflict of interest in representing him. He further alleged in a separate claim that counsel failed to adequately represent him because Norvell refused to ask his sisters-in-law to recant their allegations against Chris Barbee, whom counsel had also represented. Because these two claims essentially involve the same factual premise, we will consider them together as one claim as the circuit court did. The circuit court noted the fact that defense counsel had "previously represented Chris Barbee, who had sexually abused two of [Norvell's sisters-in-law], is immaterial." The court reasoned that

[a] review of Mr. Barbee's CourtNet record reveals that defense counsel had last represented Mr. Barbee some five years prior to the Defendant being charged and convicted in this case. There was no proof from the Defendant that counsel had any involvement with Chris Barbee or his victims during the prosecution of the Defendant, or that Chris Barbee even had a criminal case pending anywhere. Defendant is attempting to create an issue out of whole cloth.

As previously noted, Norvell entered a guilty plea.

[I]n order to successfully assert a claim of ineffective counsel based on a conflict of interest, a defendant who entered a guilty plea must establish: (1) that there was an actual conflict of interest; and (2) that the conflict adversely affected the voluntary nature of the guilty plea entered by the defendant.

Mitchell v. Commonwealth, 323 S.W.3d 755, 760 (Ky. App. 2010) (internal quotation marks and citation omitted). The circuit court noted that it had been five years since defense counsel had last represented Mr. Barbee, and Norvell does not challenge this finding on appeal. Therefore, defense counsel did not have an actual conflict of interest, and the circuit court did not err in failing to hold an evidentiary hearing before denying relief based upon this claim.

Norvell alleged in his RCr 11.42 motion that counsel rendered ineffective assistance when counsel failed to investigate and request a suppression hearing concerning Norvell's statement to law enforcement. Norvell contended that counsel should have sought to get his statement suppressed because the confession was involuntarily and unknowingly given, considering that he was under the influence of drugs and alcohol at the time he made the statement. The circuit court held that this claim lacked merit. The court reasoned that "[a] review of the audio recorded interview clearly indicates that the Defendant had his faculties about him, that he was properly *Mirandized* prior to giving his statement, and that there is nothing apparent in the recording that would indicate the Defendant was laboring un[der] intoxication or any other infirmity."

Unfortunately, we were unable to find the audio recorded interview during which

Norvell gave his statement to law enforcement in the record before us. “If evidence is missing from the record, we must assume that the trial court’s decision is supported by the record.” *King v. Commonwealth*, 384 S.W.3d 193, 194 (Ky. App. 2012) (citations omitted). Consequently, because we were unable to find the recording in the appellate record, we assume that the circuit court’s decision regarding this issue is supported by the record. Therefore, this claim lacks merit.

Finally, Norvell alleged that the circuit court failed to inquire if he was under the influence of medication at the time he entered his guilty plea, and because he was under such influence, his guilty plea was invalid. However, the circuit court specifically asked Norvell during his plea colloquy if he was under the influence of drugs at that time, to which Norvell responded in the negative. Therefore, the circuit court did not err in failing to hold an evidentiary hearing before denying relief based on this claim.

Accordingly, the order of the Carlisle Circuit Court is affirmed.

ALL CONCUR.

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