

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000169-MR

JOSHUA HAMMONS

APPELLANT

v. APPEAL FROM BRECKINRIDGE CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 13-CR-00111

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: J. LAMBERT, STUMBO, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Joshua Hammons brings this appeal from the Breckinridge Circuit Court's denial of his motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. He argues he is entitled to an evidentiary hearing on the issue of whether his attorney had a conflict of interest at the time he pleaded guilty. Because Hammons failed to raise this issue in his RCr 11.42 motion before the trial court, we affirm.

In May of 2013, the mother of S.H., a child under sixteen (16) years of age, complained to the Breckinridge County Sheriff's Department that Hammons had been involved in sexual activity with her daughter in 2012. Sheriff's Deputy Christopher Woosley met with S.H. and subsequently contacted the Kentucky State Police (KSP) and the Cabinet for Health and Family Services. Following an investigation by the state police, Hammons was indicted by the Breckinridge County Grand Jury for first-degree unlawful transaction with a minor.¹

In September of 2013, Woosley resigned from his position with the Breckinridge County Sheriff's Office after being implicated in an unrelated case involving sexual contact with a minor. The allegations in this unrelated case also involved a former KSP trooper and a former Brandenburg city police officer, both of whom were indicted in the case. There is nothing in the record that indicates Woosley was charged with any crime regarding the incident, which again was unrelated to Hammons' case. Hammons alleges that Woosley sought counsel from his defense attorney before Hammons pleaded guilty in March of 2014. Hammons pleaded guilty to an amended charge of third-degree rape,² whereupon he was sentenced to four-years' imprisonment.

¹ Kentucky Revised Statute (KRS) 530.064(2)(b), a Class B felony.

² KRS 510.060, a Class D felony.

In October of 2015, Hammons filed a motion to vacate his sentence pursuant to RCr 11.42, as well as a memorandum in support and supplement to that motion. He alleged the following: (1) his counsel was ineffective when he failed to investigate whether Woosley's involvement in his case was affected by his alleged sexual misconduct with a minor; (2) his counsel was ineffective for failing to advise him of the consequences of his plea, including his sentencing; (3) S.H.'s statement was contradicted by other evidence in the record; (4) his counsel misadvised him regarding his guilty plea; and (5) S.H.'s mother coached S.H. into providing a statement to Woosley. The court denied Hammons' motion without an evidentiary hearing, noting that he had pleaded guilty and received a detailed plea colloquy. On appeal, Hammons requests an evidentiary hearing, arguing that his counsel was under a conflict of interest at the time of his guilty plea in 2014 because he was simultaneously representing Deputy Woosley when the plea was entered.

To prevail on his motion, Hammons must demonstrate that trial counsel's performance was deficient and that such deficiency was prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Gall v. Com.*, 702 S.W.2d 37 (Ky. 1985). Hammons must show "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985). Because Hammons pleaded

guilty, he must establish the following to succeed on an ineffective assistance of counsel claim based on a conflict of interest: (1) that there was an actual conflict of interest in his attorney's representation; and (2) that the conflict adversely affected the voluntary nature of his guilty plea. *Mitchell v. Com.*, 323 S.W.3d 755 (Ky. App. 2010). An evidentiary hearing is only required if Hammons' allegations cannot be resolved upon the face of the record. *Fraser v. Com.*, 59 S.W.3d 448, 452 (Ky. 2001).

The Commonwealth argues that Hammons failed to adequately raise the conflict of interest issue in his *pro se* RCr 11.42 motion. Under RCr 11.42(2), the movant "shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds." The failure to do so warrants summary dismissal of the motion. We note that more liberal pleading standards apply to *pro se* movants under RCr 11.42. *Brooks v. Com.*, 447 S.W.2d 614 (Ky. 1969). However, even *pro se* litigants must plead a minimum of factual basis to avoid summary dismissal. *Stanford v. Com.*, 854 S.W.2d 742 (Ky. 1993). Where an appellant fails to raise an issue before the circuit court, he may not present it for the first time on appeal. *Jones v. Com.*, 239 S.W.3d 575 (Ky. App. 2007). This rule is applicable to RCr 11.42 proceedings.

Shelton v. Com., 928 S.W.2d 817 (Ky. App. 1996).³

³ There is an exception to this rule found under Kentucky Rules of Criminal Procedure (RCr) 10.26, but Hammons has not requested palpable error review. "Absent extreme circumstances amounting to a substantial miscarriage of justice, an appellate court will not engage in palpable error review pursuant to RCr 10.26 unless such a request is made and briefed by the appellant." *Shepherd v. Com.*, 251 S.W.3d 309, 316 (Ky. 2008).

Hammons argues that, because he raised his counsel's failure to investigate Woosley's sexual misconduct and its potential impact on the evidence in his case, he has preserved the conflict of interest issue for appeal. We disagree. Hammons' argument set forth in his RCr 11.42 motion is entirely distinct from the one he presents in this appeal. Further, his allegation that his attorney failed to investigate Woosley did not provide the circuit court with the opportunity to address whether his attorney was under a conflict of interest at the time of his representation of Hammons in this case. Nowhere in the body of Hammons' RCr 11.42 motion does he allege that Woosley retained or consulted Hammons' attorney. Rather, his allegations below look to whether Woosley's involvement in Hammons' case somehow tainted the case due to Woosley's sexual impropriety with an unrelated minor and his attorney's failure to investigate the same. There being no allegations raised below of his attorney's alleged conflict of interest, and there being no substantive evidence of record to support such an allegation, we will not consider this issue for the first time on appeal.

Finally, we note that Hammons argues he has sufficiently preserved this conflict issue below because he attached a bar complaint to his RCr 11.42 memorandum, in which he alleged that his attorney was working on Woosley's case while he represented Hammons. Again, we find this argument unpersuasive. Woosley filed his bar complaint prior to the time he filed his RCr 11.42 motion in

the circuit court. Therefore, Woosley knew about the purported conflict of interest issue prior to filing his RCr 11.42 motion, but presented a different argument to the circuit court. It is not the circuit court's responsibility to read through a *pro se* movant's attachments and infer potential arguments that were not raised in the text of his motion. More importantly, Hammons' argument fails to establish the conflict given that the purported claims against Woosley involved in a different minor, as aptly noted by the circuit court. There exists no causal or factual relationship between the facts of Hammons' case, where he pleaded guilty, to the allegations as stated against Woosley.

Therefore, the order of the Breckinridge Circuit Court denying Hammons relief pursuant to RCr 11.42 is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Meredith Krause
Assistant Public Advocate
Ashland, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky
Frankfort, Kentucky

David B. Abner
Assistant Attorney General
Frankfort, Kentucky