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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000425-MR

JOSHUA MCDOWELL — APPELLANT

v.

APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 13-CR-00063

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

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

LAMBERT, D., JUDGE: Joshua McDowell seeks our review of orders entered by the Grayson Circuit Court which summarily denied his motion for post-conviction relief pursuant to RCr[1] 11.42. Having reviewed the record, and finding no error, we accordingly affirm the trial court's ruling.

[1] Rule of Criminal Procedure.

I. FACTUAL AND PROCEDURAL HISTORY

McDowell was serving a sentence in the Grayson County Detention Center for third-degree burglary when, on June 29, 2012, he climbed the fence of the jail's recreation yard and escaped. From the jail, McDowell ran as far as a fast food restaurant in the Leitchfield area, where he encountered eighteen-year-old Timothy Hayes in his vehicle waiting in the restaurant's drive-through lane. Using a concocted story about a broken-down vehicle, McDowell persuaded Hayes to give him a ride.

Once Hayes had driven McDowell to the city limits of Clarkson, McDowell informed Hayes that he had just escaped from the jail, and coerced Hayes with threats into driving him to Lexington. Upon reaching Lexington, McDowell made Hayes stop at a Speedway station to buy him cigarettes. After making another stop where McDowell stole an airsoft pistol, he allowed Hayes to return home. Hayes immediately called his father and law enforcement, who took a detailed statement from him.

McDowell contends that Hayes willingly drove him to Lexington, even after learning that McDowell had escaped from custody.

McDowell was eventually captured in Richmond on July 19, 2012. A grand jury in Grayson County later indicted him for kidnapping, escape in the second degree, theft by unlawful taking, and being a first-degree persistent felony offender ("PFO"). The Commonwealth provided discovery, from which the facts noted herein are derived.

After his arraignment, McDowell's trial counsel began working on a plea agreement. McDowell's trial counsel reached a deal with the Commonwealth that initially seemed satisfactory to him. According to its terms, McDowell would plead guilty to kidnapping, escape in the second degree, theft by unlawful taking, and the PFO count would be reduced to a second-degree charge. The Commonwealth would recommend concurrent sentencing on all of the pending charges for a total term of twenty years to serve, based on the enhanced kidnapping sentence. However, after agreeing to the offer, McDowell returned to jail, where he apparently sought legal advice from a fellow inmate, who informed him of the various alleged deficiencies in his trial counsel's performance.

McDowell's next court appearance occurred on September 3, 2013. During this appearance, he began—but did not complete—the entry of his guilty plea. After witnessing McDowell and his counsel in vehement disagreement, the trial court continued the pre-trial conference until September 17, 2013, at which time McDowell did complete the entry of his plea. McDowell also requested immediate sentencing, so that he could return to Hopkins County to finish a drug treatment program. The trial court denied this request and set his sentencing date for October 15, 2013.

At that point McDowell alleges that he requested his attorney move to withdraw the guilty plea, which counsel refused. The record indicates that McDowell was sentenced on October 15, 2013, as agreed. Pursuant to KRS

532.110(3), the trial court ordered the sentence imposed in this action be served consecutively to that imposed in his prior burglary conviction.

Approximately ten months later, McDowell filed a *pro se* motion for post-conviction relief pursuant to RCr 11.42. In it, he alleged several instances of ineffective assistance of counsel. The allegations include: 1) McDowell's factual innocence of the kidnapping charge; 2) a failure to consult with him at length; 3) trial counsel pushing him to plead guilty because his story lacked credibility; 4) a failure to independently investigate; 5) failure to advise McDowell of all of the elements of the offense of kidnapping; and 6) failure to assist him in moving to withdraw his guilty plea.

Appointed post-conviction counsel later supplemented the motion: 1) trial counsel failed to advise McDowell of the elements necessary to prove kidnapping; 2) trial counsel's failure to advise McDowell as to how the Commonwealth could establish he used Hayes as a shield or hostage; 3) trial counsel failed to move to dismiss, or for a Bill of Particulars relating to the kidnapping charge; 4) trial counsel's refusal to assist McDowell with a motion to withdraw his plea amounted to a denial of counsel at a critical stage of the proceedings; and 5) trial counsel insisted McDowell would receive a life sentence if he did not plead out.

The trial court, relying almost entirely on the plea colloquy, summarily denied the motion in a written order on November 19, 2015. McDowell's post-conviction counsel then moved to reconsider and/or for specific

findings of fact. The trial court issued those findings in a second written order summarily denying McDowell's motion on February 15, 2016. McDowell appeals from these orders.

II. ANALYSIS

A. STANDARD OF REVIEW

The critical case concerning claims of ineffective assistance of counsel is *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* set the standard of review in such cases which the Courts of this Commonwealth later adopted in *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). This test begins with a strong presumption that counsel rendered effective assistance. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, at 689. The test requires a two-pronged analysis, with the first prong being whether counsel's assistance "fell below an objective standard of reasonableness." *Strickland*, at 687-88. The second prong being that the defendant must affirmatively prove that he was prejudiced, or that there was a reasonable probability that but for counsel's deficient performance the result of the proceeding would have been different. *Id.* at 693-94.

The terms of RCr 11.42 itself also contain very strict requirements. The allegations must be stated with specificity, providing the grounds upon which the sentence is being challenged and the facts on which the movant relies to

support those allegations. The rule is not to be used to relitigate appellate issues or to assert trial errors not attributable to the performance of trial counsel.

Additionally, because the instant case involves a guilty plea rather than a trial, courts employ a modified *Strickland* test set forth in subsequent U.S. Supreme Court cases, and adopted by the Courts of this Commonwealth in *Sparks v. Commonwealth*, 721 S.W.2d 726 (Ky. App. 1986). The test for analyzing effectiveness of counsel in a guilty plea situation is: "that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance" and that "the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, the defendant would not have pleaded guilty, but would have insisted on going to trial." *Id.* at 727-28 (internal citations omitted). *See also Bronk v. Commonwealth*, 58 S.W.3d 482 (Ky. 2001); *Osborne v. Commonwealth*, 992 S.W.2d 860 (Ky. App. 1998). To show prejudice, a defendant "must convince the court that a decision to reject a plea bargain would have been rational under the circumstances." *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010).

When a movant's allegations are procedurally sufficient to raise a legitimate question regarding entitlement to relief, the movant is entitled to a hearing. *Barnes v. Commonwealth*, 454 S.W.2d 352, 354 (Ky. 1970). Conversely, a hearing on the motion is not required where the allegations contained therein fail to create "an issue of fact that cannot be determined on the face of the record." *Stanford v. Commonwealth*, 854 S.W.2d, 742, 743 (Ky. 1993). "The trial judge

may not simply disbelieve factual allegations in the absence of evidence in the record refuting them." *Fraser v. Commonwealth*, 59 S.W.3d 448, 452-453 (Ky. 2001) (citing *Drake v. U.S.*, 439 F.2d 1319 (6th Cir. 1971). The Supreme Court held in *Brewster v. Commonwealth*, 723 S.W.2d 863 (Ky. 1986), that a hearing is unnecessary in situations where the record adequately shows the prejudice element cannot be satisfied.

B. MCDOWELL'S ALLEGATIONS THAT A FAILURE TO INVESTIGATE AMOUNTED TO INEFFECTIVE ASSISTANCE

McDowell argues that his trial counsel failed to conduct an independent investigation into the allegations in the indictment, which amounted to a departure from prevailing professional norms.

When challenging trial counsel's failure to investigate and speak with witnesses, a movant must provide sufficiently specific information regarding those witnesses and what their testimony might have been had they been called to testify. Indeed, prior courts have denied RCr 11.42 relief for lack of specificity alone. *Brooks v. Commonwealth*, 447 S.W.2d 614, 619 (Ky. 1969) (The Court denied a motion for 11.42 relief on similar grounds because "[w]hat preparation for what defense is not hinted [in the motion].").

Here, in regards to Hayes, McDowell simply alleges, without noting any basis whatsoever for his belief, that had his trial counsel spoken to Hayes, he would have deviated from the statement he gave to police. This position fails for lack of specificity, particularly when considering the fact that McDowell offers

nothing to prove Hayes' story might have changed beyond his own self-serving insistence that Hayes had lied to police in his original statement.

McDowell also asserts that his trial counsel rendered ineffective assistance in failing to obtain the surveillance video from the Speedway gas station. He alleged in his *pro se* motion that this video would show Hayes' lack of truthfulness in his statement to law enforcement. McDowell, however, does not offer proof that the recording still existed, given that more than a year had passed between its creation and the appointment of his trial counsel. Such information would be necessary in order for the motion to be sufficiently specific.

The trial court appropriately denied this aspect of the motion, and we affirm, as the allegations fail for lack of specificity.

C. MCDOWELL'S ALLEGATIONS THAT FAILURE TO ADVISE HIM OF THE ELEMENTS OF PROOF NECESSARY TO CONVICT HIM OF KIDNAPPING AMOUNTED TO INEFFECTIVE ASSISTANCE

McDowell contends that he was not aware of the elements of the offense of kidnapping when his trial counsel encouraged him to plead guilty, thereby rendering his plea involuntary. He alleges that he actually became aware of the nuances of the statute when he spoke to another inmate only after having agreed to accept the offer.[2]

[2] The Court would emphasize that at the point in time at which McDowell alleges he learned this information, he had not yet entered the guilty plea. He had merely agreed with his counsel to accept it.

As the Commonwealth notes, this allegation is refuted by the record. As it relates to the kidnapping charge, the indictment against McDowell reads as follows:

> [O]n or about June 29, 2012, in Grayson County, Kentucky, the Defendant, Joshua L. McDowell, committed the offense of Kidnapping when he unlawfully restrained Timothy Hayes with the intent to advance the commission of a felony and/or use him as a shield or hostage[.]

The relevant statutory elements of the offense are spelled out within this quoted language. McDowell acknowledged under oath on two occasions, both occurring after the jailhouse conference with his fellow inmate, that his trial counsel had explained—and that he understood—the content of his indictment, specifically, the nature of the charges, the penalties they carried, and the possibility of defending against them. McDowell even acknowledges such discussions with counsel when he alleges in his *pro se* motion that his trial counsel offered her opinion that he would likely receive a life sentence because his version of the facts lacked credibility. That McDowell retroactively asserts in his *pro se* motion that he "does'nt [*sic*] remember being explained or read to by counsel" does not change his sworn statements in the record, or the self-defeating facts he asserted in the very same pleading.

This court finds no error in the trial court's findings that McDowell's allegation is refuted in the record.

D. MCDOWELL'S ALLEGATION THAT A FAILURE TO MOVE FOR DISMISSAL OR FOR A BILL OF PARTICULARS AMOUNTED TO INEFFECTIVE ASSISTANCE

McDowell also argues that the indictment lacked essential information regarding what other felony he advanced while perpetrating the kidnapping of Hayes.

The indictment also charged him with escape in the second degree. Contrary to McDowell's assertions, "[A]n indictment is not insufficient because of its failure to detail the formerly 'essential' factual elements of the offense so long as it informs the accused of the specific offense with which he is charged and does not mislead him." *Salinas v. Commonwealth*, 84 S.W.3d 913, 916 (Ky. 2002) (citing *Thomas v. Commonwealth*, 931 S.W.2d 446 (Ky. 1996)). McDowell's claim that he lacked notice of an element of the offense thus fails.

Moreover, RCr 6.22, which governs the situations in which a court may direct the filing of a Bill of Particulars, states that trial courts have discretion in when to order them, and that such Bills may only be issued after arraignment "for cause." Indeed, in *Brown v. Commonwealth*, 555 S.W.2d 252, 258 (Ky. 1977), the Supreme Court noted that even where an indictment is defective, a Bill of Particulars is unnecessary when the defense was "fully aware of what the prosecution intended to prove," and in *White v. Commonwealth*, 394 S.W.2d 770, 772 (Ky. 1965), the Court noted that even though RCr 6.22 allows for liberal issuance of such Bills, where no cause is stated, trial courts may rightly deny such

motions. In addition to the indictment, and police report provided to McDowell in discovery clearly stated that the commission of his criminal escape was advanced by the kidnapping. An instance where defense counsel already has actual awareness of the information sought from the prosecution by way of a Bill of Particulars, lacks cause to issue that Bill.

The trial court's findings are unclear on this point, and it appears to be misinterpreting KRS 509.050 to mean that no proof of specific intent is required to support a charge of kidnapping when the underlying offense is criminal escape. This is not the law.

The "kidnapping exemption" codified in KRS 509.050 is "designed to prevent the misuse of the kidnapping statute to secure greater punitive sanctions for rape, robbery, and other offenses when the crime itself inherently involves restraint done to accomplish the crime[.]" *Stinnett v. Commonwealth*, 364 S.W.3d 70, 76 (Ky. 2011). In other words, the exemption precludes charging a defendant with kidnapping when the victim's liberty is restrained by force as an inherent part of another charged offense. The final sentence of KRS 509.050 simply allows a defendant charged with criminal escape to also be charged with kidnapping, it does nothing to change the proof necessary for the Commonwealth to obtain conviction.

The trial court's conclusion that any failure by trial counsel's to advise McDowell on the intent element of kidnapping was unnecessary and the advice was entirely proper, was erroneous. However, in light of McDowell's own sworn statements made even after he acquired his newfound understanding of the

elements of kidnapping, we cannot conclude that the trial court's ultimate ruling was made in error. The record does contain evidence clearly refuting McDowell's claims.

E. MCDOWELL'S ALLEGATION THAT A FAILURE TO MOVE TO WITHDRAW HIS GUILTY PLEA WAS INEFFECTIVE ASSISTANCE

McDowell predicates his argument on this issue on the assumption that the circuit court erred in concluding that the alleged failure to advise him properly on the elements of kidnapping amounted to ineffective assistance. He cites to *Tigue v. Commonwealth*, 459 S.W.3d 372 (Ky. 2015), to stand for the proposition that the time for filing of a motion to withdraw a guilty plea is a critical stage of the proceedings and that prejudice may be presumed when there has been a complete denial of counsel at such a critical stage. He characterizes his trial counsel's refusal to file the motion to withdraw a guilty plea as a complete denial of counsel.

McDowell's argument only addressed the fact that his trial counsel refused to file the motion. To determine why, this Court again gleans its facts from McDowell's *pro se* motion. McDowell describes a conversation with his trial counsel wherein she states that the trial judge has never granted a motion to withdraw a guilty plea, and filing such motion would serve only to antagonize the court. Such belief is not without support in the law, as Kentucky appellate courts have repeatedly held that following the entry of a guilty plea deemed voluntary, the decision whether a defendant is allowed to withdraw it is entirely within the trial

court's discretion. *Greene v. Commonwealth*, 475 S.W.3d 626 (Ky. 2015); *Pridham v. Commonwealth*, 394 S.W.3d 867 (Ky. 2012); *Williams v. Commonwealth*, 189 S.W.3d 558 (Ky. 2006); *Commonwealth v. Lopez*, 267 S.W.3d 685 (Ky. App. 2008). The trial court, based on McDowell's own words, found the plea to have been entered voluntarily. In other words, McDowell's trial counsel had a strategic reason, based on her experience, for refraining from filing a motion she believed to be futile.

The purpose of analysis under RCr 11.42 is not to "usurp or second guess counsel's trial strategy" using the benefit of hindsight. *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 advice, based on her assessment of the relative strength of the defense case, after having reviewed the indictment and the information provided in discovery with McDowell, was to avoid the possibility of the maximum penalty by entering a guilty plea with a lesser PFO charge. McDowell's entry of a guilty plea was consistent with that advice.

Moreover, as the trial court noted, McDowell swore, on both occasions on which he was given a plea colloquy, that his trial counsel had done everything he had asked her to do, and also that he was satisfied with her performance. McDowell insists that this Court should not rely on the plea colloquy in this instance, where the plea agreement may have been the result of ineffective assistance. The record refutes his allegation that trial counsel provided

inadequate advice as it related to the kidnapping charge, and because that allegation underlies the allegation that the refusal to assist in filing a futile motion to withdraw the plea was ineffective assistance, that argument fails as well.

III. CONCLUSION

This Court, having reviewed the record and finding no error, hereby affirms the ruling of the Grayson Circuit Court.

ALL CONCUR.

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