

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-000599-MR

BOBBY FOREE, JR.

APPELLANT

v. APPEAL FROM TRIMBLE CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 04-CR-00002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: KRAMER, CHIEF JUDGE; JOHNSON AND NICKELL, JUDGES.

KRAMER, CHIEF JUDGE: Bobby Foree, Jr. brings this appeal from the Trimble Circuit Court's order denying his motion to vacate under RCr¹ 11.42. He argues his counsel was ineffective during his suppression hearing for not providing an expert to testify concerning police coercion. Foree also argues his counsel was

¹ Kentucky Rule of Criminal Procedure.

ineffective for not informing him of the elements of his offenses prior to the entry of his guilty plea. We affirm because we hold that Foree has failed to establish either deficient performance or prejudice regarding both of these issues.

M.M., a child under the age of twelve, made statements to the Kentucky State Police indicating Foree raped or sexually abused her. At the time, Foree was romantically involved with M.M.'s mother, K.M.

Detective Todd Harwood and Sergeant Detective Cary Duncan were assigned to Foree's case. Sergeant Duncan conducted Foree's questioning, during which Sergeant Duncan suggested that M.M. had attempted to seduce Foree. In Foree's first written statement, Foree asserted M.M. had repeatedly made advances upon him. He stated M.M. got naked, grabbed his hand, and attempted to put it on her vagina. After he told M.M. to get dressed and she refused, he took his finger and inserted "about 4 centimeters" into her vagina.

Following this statement, Sergeant Duncan met with K.M. He elicited information concerning her past sexual behavior with Foree in order to confront Foree under the ruse that it had been provided by M.M.

Sergeant Duncan falsely told Foree he had spoken with M.M. after he had left the room and related to Foree the information previously given by K.M. He told Foree he had discovered M.M. lied about an assertion she engaged in anal intercourse with Foree but said he believed she was telling the truth regarding her allegation of vaginal intercourse. He also stated he spoke with a fictional "Dr. Lewis," who informed him M.M. had engaged in intercourse within the past two

years. Sergeant Duncan said he needed to go check with M.M. to ensure she was telling the truth.

When Sergeant Duncan returned five minutes later, he again suggested M.M. might have seduced Foree. Foree admitted that he had put his penis in M.M.'s vagina "just a little." In Foree's second written statement, he stated he had been drinking all day and had engaged in intercourse with M.M. because he confused her with K.M. Following his second written statement, Foree signed a form stating that he had been read his *Miranda*² rights and that he made his statement freely and voluntarily.

After the trial court ordered Foree to have an intelligence test, he was determined to have an IQ of 78. Foree filed a motion to suppress his confessions in the Trimble Circuit Court, arguing the police intimidated him into giving a confession; the police coerced his confession; and that the police's tactics were unduly deceptive. Following a hearing, the trial court denied Foree's motion.

Foree was indicted on one count of first-degree rape,³ one count of first-degree sodomy,⁴ and one count of first-degree sexual abuse.⁵ He pled guilty to first-degree rape and first-degree sexual abuse and entered an *Alford*⁶ plea to first-

² *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

³ Kentucky Revised Statutes (KRS) 510.040, a Class A felony.

⁴ KRS 510.070, charged here as a Class A felony.

⁵ KRS 510.110, charged here as a Class D felony.

⁶ A defendant entering a plea of guilty under *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) refuses to admit guilt but acknowledges that the Commonwealth can present sufficient evidence to support a conviction.

degree sodomy. He was sentenced to twenty years' imprisonment on the rape conviction, twenty years' imprisonment on his sodomy conviction, and five years' imprisonment on the sexual abuse conviction, to be served concurrently for a total of twenty years' imprisonment.

Foree then filed an RCr 11.42 motion; the circuit court denied it without a hearing. On appeal, Foree requests an evidentiary hearing, arguing his counsel was ineffective for failing to procure an expert to testify concerning police coercion and for failing to discuss the elements of his offenses with him.

Generally, to establish a claim for ineffective assistance of counsel, a movant must meet the requirements of a two-prong test by proving: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). When a movant enters a guilty plea, the *Strickland* standard of review is slightly modified in that he must first show his counsel's performance was deficient and then show "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). RCr 11.42(5) requires an evidentiary hearing "[i]f the answer raises a material issue of fact that cannot be determined on the face of the record[.]" If the trial court denies an RCr 11.42 motion without first conducting an evidentiary hearing, our 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. App. 1967).

First, Foree alleges his counsel was ineffective for failing to call an expert witness at his suppression hearing to testify about the interrogation tactics employed by police. The record contains an email Foree’s trial attorney sent to Richard A. Leo, an expert in false confessions, requesting: (1) either to consult regarding Foree’s case; or (2) requesting Leo to recommend someone else to consult. Despite this, an expert witness did not testify at the suppression hearing. Foree’s counsel was therefore aware of the tactics used by the police in this case, investigated those tactics, and chose not present expert testimony on them. “[C]ounsel is strongly presumed to have . . . made all significant decisions in the exercise of reasonable professional judgment.” *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066, 80 L. Ed. 2d 674. “It is not the function of this Court to usurp or second guess counsel’s trial strategy.” *Commonwealth v. York*, 215 S.W.3d 44, 48 (Ky. 2007) (quoting *Baze v. Commonwealth*, 23 S.W.3d 619, 624 (Ky. 2000)), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151, 159 (Ky. 2009)). Foree’s counsel’s decision not to call an expert on interrogation tactics falls within the parameters of trial strategy. We cannot hold that his performance was deficient in this regard.

Furthermore, Foree has failed to demonstrate prejudice regarding this claim. “[W]hen a defendant claims his counsel is ineffective by not obtaining expert assistance, he must establish how he was prejudiced by the alleged failure of

counsel.” *Parrish v. Commonwealth*, 272 S.W.3d 161, 179 (Ky. 2008) (citation and internal quotation marks omitted). Here, the trial court held a lengthy suppression hearing concerning the interrogation tactics employed by police. The circuit court was aware of Foree’s limited intellectual functioning, and Foree’s counsel cross examined both Detective Harwood and Sergeant Duncan at length concerning the circumstances of Foree’s confession. Foree has not established how hiring an expert would have changed his mind about entering a guilty plea. Because Foree has not alleged how providing an expert on confession tactics would have changed the outcome of his suppression motion, he has failed to demonstrate prejudice.

Second, Foree claims that his trial counsel failed to inform him of the elements of his offenses. Foree’s motion to enter a guilty plea and his motion to enter an *Alford* plea both state, in relevant part:

I have reviewed a copy of the indictment and told my attorney all the facts known to me concerning my charges. I believe he/she is fully informed about my case. We have fully discussed, and I understand, the charges and any possible defenses to them.

...

I declare my plea of “GUILTY” is freely, knowingly, intelligently and voluntarily made; that I have been represented by counsel; that my attorney has fully explained my constitutional rights to me, as well as the charges against me and any defenses to them; and that I understand the nature of this proceeding and all matters contained in this document.

Foree's attorney also signed a "Certificate of Counsel" for both of Foree's motions, providing that all charges and possible defenses had been discussed with his client and that he appeared to have understood these matters. Therefore, Foree's contention that he was unaware of the elements of his offenses is refuted by the record. *See Commonwealth v. Crawford*, 789 S.W.2d 779, 780 (Ky. 1990).

Furthermore, Foree has also failed to establish prejudice because he has not explained how his knowledge of the elements of his convictions would have affected his decision to plead guilty. Foree has not alleged, for example, that he was unaware of any specific element of his convictions; he makes only general allegations that he would not have pled guilty had the elements of his crimes been explained to him. A motion under RCr 11.42(2) "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." Because Foree's allegation is refuted by the record and he has failed to identify any prejudice, this argument must fail.

We conclude that Foree was not entitled to an evidentiary hearing because his motion did not raise any material issues of fact that cannot be determined on the face of the record. RCr 11.42(5). Consequently, the order of the Trimble Circuit Court denying Foree relief pursuant to RCr 11.42 is affirmed.

ALL CONCUR.

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