RENDERED: AUGUST 4, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2016-CA-000866-MR

JEFF SMITH — APPELLANT

v.

APPEAL FROM LYON CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL, III, JUDGE
ACTION NO. 12-CR-00004

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, STUMBO AND TAYLOR, JUDGES.

STUMBO, JUDGE: Jeff Smith, *pro se*, appeals the Lyon Circuit Court order denying his request for relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. We affirm.

Smith was charged with one count of first-degree assault in violation of Kentucky Revised Statutes (KRS) 508.010 for shooting Paul Gay once in the upper

chest with a .45 caliber pistol. Smith entered a guilty plea to the charge and received a sentence of eleven years' imprisonment. After confinement, Smith timely moved to vacate his conviction and sentence pursuant to RCr 11.42, alleging that his guilty plea was not entered voluntarily. The circuit court denied Smith's motion without an evidentiary hearing. This appeal followed.

On appeal, Smith claims that, due to ineffective assistance of trial counsel, his plea was not knowingly, voluntarily, or intelligently made. Specifically, he contends that his counsel was ineffective because he: (1) failed to advise Smith of possible lesser-included instructions; (2) failed to hire an expert to establish that Smith did not act with extreme indifference to human life; (3) failed to reasonably investigate and interview witnesses; and (4) failed to communicate the terms of the Commonwealth's offer. We disagree.

After a guilty plea has been entered, counsel's effectiveness is relevant only to the extent that it affected the voluntariness of the plea. *See Hill v. Lockhart*, 474 U.S. 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) (citing *North Carolina v. Alford,* 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)). When a defendant argues that his plea was rendered involuntary due to ineffective assistance of counsel, the trial court is required to "consider the totality of the circumstances surrounding the guilty plea and juxtapose the presumption of voluntariness inherent in a proper plea colloquy with a *Strickland v. Washington* [466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)] inquiry into the performance of counsel." *Rigdon v. Commonwealth*, 144 S.W.3d 283, 288 (Ky. App. 2004) (footnotes

omitted) (quoting *Bronk v. Commonwealth*, 58 S.W.3d 482, 486 (Ky. 2001)). To support a defendant's assertion that he was unable to intelligently weigh his legal alternatives in deciding to plead guilty because of ineffective assistance of counsel, he must demonstrate the following:

> (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.

*Id.* (footnote omitted).

The trial court's findings regarding alleged claims of ineffective assistance of counsel are mixed questions of law and fact. *McQueen v. Commonwealth,* 721 S.W.2d 694 (Ky. 1986). On appeal, deference must be given to the determination of facts and credibility made by the trial court, unless those findings are clearly erroneous. *Id.* at 698. However, a "reviewing court looks *de novo* at counsel's performance and any potential deficiency caused by counsel's performance." *Brown v. Commonwealth,* 253 S.W.3d 490, 500 (Ky. 2008) (citations omitted).

Where the issues presented may be fully considered by resorting to the record, no evidentiary hearing is required. *Baze v. Commonwealth*, 23 S.W.3d 619, 622 (Ky. 2000) *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). Where there is no hearing, the test is 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). A hearing is required if there is a material issue of fact that cannot be conclusively resolved by an examination of the record. *Id.*

Smith first argues that his plea was not voluntary because his trial counsel failed to investigate and interview witnesses. However, Smith does not identify who these witnesses are, nor does he tell the Court what these unnamed witnesses would have said if interviewed. The burden is upon Smith to establish convincingly that he is entitled to the extraordinary relief available under RCr 11.42. *Jordan v. Commonwealth*, 445 S.W.2d 878, 879 (Ky. 1969). Speculative allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of a discovery deposition. *Sanders v. Commonwealth*, 89 S.W.3d 380, 390 (Ky. 2002), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). Smith's lack of specificity is fatal to his claim of ineffective assistance of counsel regarding this issue. Accordingly, the circuit court did not err when it dismissed Smith's claim without an evidentiary hearing. *See Williams v. Commonwealth*, 336 S.W.3d 42 (Ky. 2011) (RCr 11.42 movant's failure to specify what evidence unsubpoenaed witnesses would have provided was fatal to his claim that counsel was ineffective in having failed to subpoena them.).

Smith next claims that trial counsel failed to advise him of the possibility of lesser-included instructions at trial. Specifically, Smith contends that he would have been entitled to an instruction on second-degree assault had he gone to trial.

Had his counsel so advised him, Smith claims he would have turned down the plea offer and gone to trial. We once again find that Smith fails to adhere to the specificity requirement of RCr 11.42(2).

At the conclusion of a criminal trial, the trial court is required to give every instruction supported to any extent by the testimony, including giving instructions for lesser-included offenses. *Taylor v. Commonwealth*, 995 S.W.2d 355, 360-62 (Ky. 1999). However, a defendant is only entitled to an instruction on a lesser-included offense if "a reasonable juror could entertain a reasonable doubt as to the defendant's guilt of the greater offense, but believe beyond a reasonable doubt that the defendant is guilty of the lesser offense." *Id.* at 362 (citations omitted). Here, Smith fails to allege any facts that would permit a jury to find that he was guilty of the lesser offense of second-degree assault.

Smith's indictment reads in part: "On or about October 2, 2011, in Lyon County, Kentucky, the above named Defendant did: intentionally cause serious physical injury to Paul Gay by means of a deadly weapon." Under KRS 508.010(1), a person is guilty of assault in the first degree when:

> (a) He *intentionally* causes *serious physical injury* to another person by means of a *deadly weapon* or a dangerous instrument; or
>
> (b) Under circumstances manifesting extreme indifference to the value of human life he wantonly engages in conduct which creates a grave risk of death to another and thereby causes *serious physical injury* to another person.

(Emphasis added). A person is guilty of second-degree assault under KRS 508.020(1) when:

> (a) He intentionally causes serious physical injury to another person; or
>
> (b) He intentionally causes physical injury to another person by means of a deadly weapon or a dangerous instrument; or
>
> (c) He wantonly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument.

Here, Smith does not allege that his behavior was not intentional. He does not allege that Gay's injuries were not serious. Nor does he allege that he inflicted Gay's injuries without the use of a deadly weapon. Smith's allegation that he was entitled to an instruction on second-degree assault thus has no basis in fact. Conclusory allegations that counsel was ineffective without a statement of the facts upon which those allegations are based do not meet the rule's specificity standard and so "warrant a summary dismissal of the motion." RCr 11.42(2). The circuit court thus correctly dismissed Smith's claim without an evidentiary hearing.

Smith also claims that his attorney was ineffective for failing to hire an expert to prove he did not act wantonly under circumstances manifesting extreme indifference to human life. We believe this claim is without merit. The record indicates that the Commonwealth charged and intended to prove that Smith's act was intentional, not wanton. The Commonwealth charged Smith with violating KRS 508.010(1)(a), which is an intentional act, not KRS 508.010(1)(b), which is a

wanton act. Proof that Smith did not act wantonly was therefore unnecessary. Accordingly, trial counsel was not ineffective for failing to hire experts to prove Smith's lack of wantonness.

Smith next argues that he was coerced into pleading guilty because he had less than a day to consider the Commonwealth's offer. The record belies his claim of coercion. In answers to questions directed to Smith by the circuit judge during his plea colloquy, Smith stated that he had some college education, that he had no mental illness or disease that affected his ability to think or to reason, and that he was not under the influence of any substance that affected his ability to reason. He further stated that his attorney had explained the charge to him and that he understood that it carried a sentencing range of ten to twenty years. He admitted that he had read over the Motion to Enter a Guilty Plea and the Commonwealth's Offer on a Plea of Guilty, that he understood them, and that he signed them freely and voluntarily. He acknowledged that no one had threatened him to plead guilty and that he was pleading because he was guilty and for no other reason.

In the signed Motion to Enter a Guilty Plea, Smith attested that he reviewed a copy of the indictment and that he told his attorney all the facts known to him concerning his charges; he believed he was fully informed about his case; *he and his attorney had discussed the charges and any possible defenses to them*; and that his plea was being made freely, knowingly, intelligently, and voluntarily. Smith's attorney signed a Certificate of Counsel attesting that to the best of his knowledge, Smith was fully informed and aware of the implications of his guilty plea.

Based on the totality of the circumstances in the record, we conclude that Smith's guilty plea was knowingly, voluntarily, and intelligently made. Smith has stated no facts that suggest otherwise.

For the foregoing reasons, the order of the Lyon Circuit Court is affirmed.

ALL CONCUR.

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