

RENDERED: OCTOBER 27, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001122-MR

AARON LEWIS

APPELLANT

v. APPEAL FROM CLARK CIRCUIT COURT
HONORABLE WILLIAM G. CLOUSE JR., JUDGE
ACTION NO. 11-CR-00064

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, D. LAMBERT AND NICKELL, JUDGES.

LAMBERT, D., JUDGE: Aaron Lewis, acting *pro se*, appeals the Clark Circuit Court's denial of his motion for post-conviction relief pursuant to Rule 11.42 of the Kentucky Rules of Criminal Procedure ("RCr"). Lewis contends that he is entitled to relief from his convictions for complicity to commit murder and conspiracy to commit burglary because he did not knowingly and voluntarily enter

the plea due to ineffective assistance of counsel. After reviewing the record, we affirm the order of the circuit court.

I. FACTUAL AND PROCEDURAL HISTORY

On May 23, 2011, police received a report of gunshots fired at a residence in Winchester, Kentucky. Responding officers found the resident and another individual, later identified as Demontez Cowherd, lying on the bedroom floor, both with gunshot wounds. The resident, Phillip Howard, told police that Cowherd had broken into his home and that they had shot each other. Cowherd had died by the time police arrived, and Howard later died from his injuries. A witness saw another individual, armed with an assault rifle, flee from the residence with a gunshot wound in the back. Another witness saw a Dodge Magnum flee the scene at high speed.

Approximately twenty minutes after the incident at the Howard residence, Lewis arrived at St. Joseph East Hospital in Lexington seeking treatment for a gunshot wound to the back. Lewis gave a statement during a police interview that he had been visiting a woman in the Tates Creek area of Lexington when unknown assailants shot him. However, Lewis could not give police the woman's last name, address, or phone number. Lewis also claimed not to know the name of the person who gave him a ride to the hospital. Lewis denied being in Winchester or even knowing anyone in Winchester. He specifically denied knowing Cowherd.

Surveillance video from the emergency room entrance showed someone driving a Dodge Magnum dropping Lewis off at the hospital. A

subsequent search of Lewis's cell phone records revealed that his phone had used two cell towers in Winchester only minutes before Howard's murder, and that he had called Cowherd twice on the previous day.

Police arrested Lewis upon his release from the hospital. The eventual indictment charged him with murder, first-degree burglary, and being a first-degree persistent felony offender ("PFO"). The Commonwealth later gave notice that it intended to seek the death penalty.

Pursuant to a negotiated agreement, Lewis entered an unconditional guilty plea. In exchange for Lewis's plea of guilty, the Commonwealth dismissed the PFO charge and amended his charges down to complicity to commit murder and conspiracy to commit burglary. The offer came with a recommendation that Lewis receive a twenty-seven-year prison sentence. On August 8, 2013, the circuit court sentenced Lewis accordingly.

On October 16, 2015, Lewis filed his motion to vacate, set aside, or correct judgment, pursuant to RCr 11.42. In his motion, Lewis claimed: (1) that his plea was not knowing and voluntary because he was actually innocent, and he "did not possess an understanding of the law in relation to the facts;" (2) that he was denied effective assistance of counsel when his counsel failed to move to dismiss his murder and burglary charges due to insufficient evidence; and (3) that he was denied effective assistance when his counsel advised him to plead guilty despite insufficient evidence of his guilt. The circuit court summarily denied Lewis' motion as untimely. Subsequently appointed counsel aided Lewis in filing

his request for findings of fact and conclusions of law. On July 16, 2016, the circuit court ruled that findings of fact and conclusions of law were unnecessary because the motion had been denied on procedural grounds. The circuit court also found the motion failed to state grounds for which relief could be granted. This appeal follows.

II. ANALYSIS

A. STANDARD OF REVIEW

The test for determining the validity of a guilty plea is whether it represents a voluntary and intelligent choice among alternative courses of action open to a defendant. *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). This determination is to be made from a consideration of the totality of the circumstances surrounding the entry of the plea. *Kotas v. Commonwealth*, 565 S.W.2d 445, 447 (Ky. 1978).

To determine whether a criminal defendant received ineffective assistance of counsel in the context of a guilty plea, we apply the standard from *Strickland v. Washington*, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under *Strickland*, a defendant must show that “counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 688, 104 S.Ct. at 2052. A defendant must also demonstrate “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); *See also Sparks v. Commonwealth*, 721 S.W.2d 726, 727-28 (Ky. App. 1986).

The standard of review on appeal in an RCr 11.42 case where the trial court has denied the request for post-conviction relief without an evidentiary hearing is “whether the [RCr 11.42] motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction.” *Baze v. Commonwealth*, 23 S.W.3d 619, 622 (Ky. 2000) (quoting *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967)), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

B. LEWIS’ MOTION WAS IMPROPERLY DENIED AS UNTIMELY

As a threshold matter, we first note that the circuit court incorrectly determined that Lewis’ motion was untimely. RCr 11.42(10) states that a motion brought under the rule shall be filed within three years of the judgment becoming final. Here, Lewis’ judgment became final ten days after its entry on August 8, 2013. *See, e.g., Commonwealth v. Marcum*, 873 S.W.2d 207, 211 (Ky. 1994) (“[J]udgment became final once ten days had elapsed with no action taken to alter, amend or vacate it[.]”). Lewis therefore needed to file his motion on or before August 18, 2016. Lewis filed his RCr 11.42 motion on October 16, 2015, clearly in a timely manner, as approximately ten months remained until the deadline.

C. LEWIS’ CLAIMS THAT HE LACKED UNDERSTANDING OF THE ELEMENTS OF THE OFFENSES ARE REFUTED BY THE RECORD

Lewis first claims that his plea was not voluntary because he was actually innocent and was unaware of “the law in relation to the facts.” Lewis claims that had he been aware of the elements of the crimes, he would not have

pleaded guilty because the Commonwealth lacked sufficient evidence to prove each element. This claim is conclusively refuted by the record.

During the plea colloquy, the trial court afforded Lewis the opportunity to dispute the factual basis of his plea, which he declined to do. The circuit court then explained to Lewis his constitutional rights on the record and confirmed that Lewis understood that he waived those rights by pleading guilty. Lewis further confirmed that his attorneys had informed him of the nature of his charges and that he understood the penalties and possible defenses. Lewis stated that he was satisfied with his attorneys and that he participated in, and was pleased with, his defense. He admitted that the plea was in his best interest and stated that he had not been threatened or coerced into entering the plea. He stated he was pleading guilty to avoid a possible death sentence. Lewis thereafter signed a Waiver of Further Proceedings and a Petition to Enter a Plea of Guilty which contained, as paragraph 11, the following statement:

My attorney has explained to me and I understand what facts the Commonwealth would have to prove beyond a reasonable doubt in order to convict me of the crimes of Complicity to Murder, Burglary in the First Degree, PFO 1.

While it is true that the validity of a guilty plea is not determined by reference to some magic incantation recited at the time the plea is taken, but by the totality of the circumstances surrounding the plea (*Kotas* at 447), “solemn declarations in open court carry a strong presumption of verity.” *Blackledge v. Allison*, 431 U.S. 63, 74, 97 S.Ct. 1621, 1629, 52 L.Ed.2d 136 (1977). Here, a

review of the totality of the circumstances surrounding Lewis' plea belies his assertion that he lacked understanding of the elements of the offenses for which he stood charged. To rebut the strong presumption of the truthfulness of his open court statements, Lewis needs more than just his bare assertions.

Additionally, even if this Court were to assume his trial counsel rendered ineffective assistance, Lewis cannot show any prejudice caused by any error. In his brief, Lewis proclaims his innocence of the crimes for which he was convicted; however, the record indicates otherwise. In addition to the circumstantial evidence supporting Lewis's guilt, Lewis established the necessary factual basis for his convictions for both complicity to commit murder and conspiracy to commit burglary at the time he entered his plea. Lewis stated that he and his friend formed a plan to rob a house, and while executing that plan, individuals were killed. Even were we to accept that Lewis was not told of the elements of each of the crimes, the Commonwealth's evidence and Lewis' own words established a factual basis for a conviction on both of the charges. Based on the all of the evidence establishing Lewis' guilt, we do not believe that absent the alleged error Lewis would have rejected the plea offer and proceeded to trial.

**D. LEWIS' CLAIM THAT IT WAS INEFFECTIVE ASSISTANCE TO
FAIL TO MOVE TO DISMISS THE INDICTMENT IS OUTSIDE THE
SCOPE OF RCR 11.42**

Lewis next claims his trial counsel rendered ineffective assistance by failing to move to dismiss the indictments based on the sufficiency of the evidence.

This claim is procedurally barred. A guilty plea forfeits any post-conviction challenge to the sufficiency of the evidence. *Johnson v. Commonwealth*, 103 S.W.3d 687, 696 (Ky. 2003); *Bishop v. Commonwealth*, 357 S.W.3d 549, 552 (Ky. App. 2011). Following a guilty plea, a defendant “may only attack the voluntary and intelligent character of the guilty plea[.]” *Jackson v. Commonwealth*, 363 S.W.3d 11, 15 (Ky. 2012) (citations and internal quotations omitted). Lewis voluntarily entered his guilty plea to the charges; therefore he cannot raise sufficiency of the evidence in an RCr 11.42 motion.

Moreover, Lewis cannot show any allegedly ineffective assistance prejudiced him. The Kentucky Supreme Court has consistently held that “a trial judge has no authority to weigh the sufficiency of the evidence prior to trial or to summarily dismiss indictments in criminal cases.” *Commonwealth v. Bishop*, 245 S.W.3d 733, 735 (Ky. 2008) (citations omitted). An attorney’s failure to move a trial court to grant relief beyond its authority to grant cannot constitute ineffective assistance. *Williams v. Commonwealth*, 336 S.W.3d 42, 47 (Ky. 2011) (holding that an attorney’s failure to make a meritless motion is not ineffective assistance).

**E. LEWIS’ CLAIM THAT THE ADVICE TO ENTER A GUILTY PLEA
TO AMENDED CHARGES WAS INEFFECTIVE ASSISTANCE IS
REFUTED BY THE RECORD**

Lewis next claims that he received ineffective assistance of counsel when his trial counsel advised him to plead guilty despite insufficient evidence of guilt. As demonstrated above, this claim is refuted by the record in that the

evidence was sufficient for a jury to find beyond a reasonable doubt that Lewis committed the offenses.

Additionally, Lewis faced a possible death sentence if the case had proceeded to trial on his original charges. Based on the Commonwealth's evidence, it was reasonable for Lewis's trial counsel to believe that a jury might find him guilty of murder and recommend death. By accepting the plea agreement, Lewis avoided the murder charge and thus also the possibility of a death sentence, instead receiving twenty-two years for the amended complicity to commit murder charge. The same can be said for the five-year sentence on the amended charge of conspiracy to commit burglary. Lewis' decision to plead guilty clearly represented a "meaningful choice between the probable outcome at trial and the more certain outcome offered by the plea agreement." *Vaughn v. Commonwealth*, 258 S.W.3d 435, 439 (Ky. App. 2008).

Further, "[j]udicial review of the performance of defense counsel must be very deferential to counsel. . . . There is always a strong presumption that the conduct of counsel falls within the wide range of reasonable professional assistance[.]" *Id.* at 440 (quoting *Hodge v. Commonwealth*, 116 S.W.3d 463, 469 (Ky. 2003)); *See also Strickland* at 669 ("A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."). Lewis cannot overcome the strong presumption of effective assistance with only his assertion that trial counsel advised him to accept a reasonable plea offer.

F. THE TRIAL COURT CORRECTLY DENIED THE MOTION

WITHOUT A HEARING

Finally, as all of Lewis's claims were either meritless or refuted by the evidence in the record, an evidentiary hearing on his motion was unnecessary. *Sparks* at 727. Therefore, the circuit court properly denied Lewis's motion without holding an evidentiary hearing.

III. CONCLUSION

Having reviewed the record, we conclude that though the order of the Clark Circuit Court summarily denied the motion based on a non-existent procedural defect, we nonetheless affirm the denial after reviewing its merits.

ALL CONCUR.

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