

RENDERED: NOVEMBER 9, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-000244-MR
AND
NO. 2016-CA-001179-MR

TERRANCE L. JOHNSON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 09-CR-001962

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, D. LAMBERT AND SMALLWOOD, JUDGES.

SMALLWOOD, JUDGE: In these associated appeals, Terrance L. Johnson argues that the Jefferson Circuit Court erred in denying his *pro se* Kentucky Rules of Criminal Procedure (RCr) 11.42 motion for relief from judgment alleging

ineffective assistance of counsel. Johnson also argues that the Court erred in denying his subsequent Kentucky Rules of Civil Procedure (CR) 60.02 motion. For the reasons stated below, we find no error and AFFIRM the orders on appeal.

On July 19, 2011, Johnson entered a plea of guilty in Jefferson Circuit Court on two counts of first-degree robbery, one count of first-degree burglary and one count of wanton endangerment. Pursuant to the Commonwealth's recommendation, the Jefferson Circuit Court sentenced Johnson to 15 years in prison and dismissed a charge of first-degree persistent felony offender.

On December 20, 2013, Johnson filed a *pro se* RCr 11.42 Motion to Vacate Judgment. In support of the motion, Johnson alleged that his trial counsel was ineffective in failing to withdraw from the case after a breakdown in communication between Johnson and counsel created a conflict of interest, and because counsel failed to notify the court during the plea colloquy that Johnson was on psychiatric medication. On February 13, 2014, the Jefferson Circuit Court rendered an order denying the motion.

On June 13, 2016, Johnson filed a CR 60.02(f) motion seeking to be relieved from the judgment based on a claim of extraordinary circumstances requiring relief. In support of the motion, Johnson asserted that his plea was not voluntarily made because he was taking a number of medications at the time of the plea which affected his ability to make informed decisions. On June 24, 2016, the

Circuit Court rendered an opinion and order denying the motion. This consolidated appeal followed.

Appeal 2015-CA-000244-MR

In appeal 2015-CA-000244-MR, Johnson, through appointed counsel, argues that the Jefferson Circuit Court erred in denying his December 20, 2013 *pro se* motion for RCr 11.42 relief. Johnson argues the court erred in failing to conclude that his trial counsel acted ineffectively and to Johnson's substantial prejudice when counsel 1) failed to file a motion to suppress evidence of prior bad acts under Kentucky Rules of Evidence (KRE) 404(b), and 2) failed to notify the court that Johnson was under the influence of medication. Johnson also argues that his due process rights were violated when the trial court did not inquire as to why Johnson wanted new counsel, and because the court did not conduct an evidentiary hearing on the RCr 11.42 motion. In sum, Johnson maintains that he received ineffective assistance of counsel and, as a direct result, his guilty plea was not voluntarily made.

To prevail on a claim of ineffective assistance of counsel, Appellant must show two things:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 80 L.Ed.2d 674 (1984). “[T]he proper standard for attorney performance is that of reasonably effective assistance.” *Id.*

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

Id. at 691-92, 104 S.Ct. at 2067 (internal citation omitted). “It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.” *Id.* at 693, 104 S.Ct at 2067. “The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694, 104 S.Ct at 2068.

We have closely studied the record and the law, and find no error in the denial of Johnson's RCr 11.42 motion. Johnson asserts that his counsel was ineffective in failing to respond to the Commonwealth's motion to introduce KRE

404(b) evidence of his prior convictions. We cannot conclude that counsel's purported error, if any, significantly affected Johnson's decision to plead guilty rather than to go to trial. Stated differently, Johnson has not shown that but for the alleged error, the outcome of the proceeding would have been different. The evidence against Johnson was substantial. Two elderly victims separately identified Johnson as the perpetrator, and a surveillance video was offered into proof. The Commonwealth's plea offer was less than the minimum Johnson would have received had he gone to trial and been convicted.

In considering an ineffective assistance of counsel claim, the reviewing court must consider the totality of evidence before the court and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir.1992). The critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that "defeat was snatched from the hands of probable victory." *Id.*

In considering the totality of the evidence against Johnson, we cannot conclude that counsel's decision not to challenge the Commonwealth's KRE 404(b) motion caused Johnson to lose what he probably would have won. *Id.* We base this conclusion in part on the scope and nature of the evidence against Johnson which would have been presented at trial irrespective of whether the Commonwealth's KRE 404(b) was successful. Accordingly we find no error on this issue.

Johnson goes on to argue that he was substantially prejudiced by counsel's ineffective performance when counsel failed to notify the court during the plea colloquy that Johnson was under the influence of medication. Johnson asserts that due process is not satisfied by the mere presence of counsel at a critical stage of the proceedings. Rather, he argues that counsel is required to comport with the prevailing standards and norms of the profession. To that end, Johnson maintains that his trial counsel was ineffective in merely being present at the plea colloquy while not offering information to the court regarding Johnson's medical history.

The appellant has the burden of demonstrating that his plea was not voluntarily made. *United States v. Boyer*, 931 F.2d 1201 (7th Cir. 1991). Johnson executed Administrative Office of the Courts (AOC) form 491 styled Motion to Enter Guilty Plea, and AOC form 491.1 entitled Commonwealth's Offer on a Plea

of Guilty. Johnson's signature on these forms evinces a knowing and intelligent plea. *Commonwealth v. Crawford*, 789 S.W.2d 779 (Ky. 1990). The Jefferson Circuit Court also noted its practice of inquiring as to whether each defendant is capable of making decisions at the time of his plea, and answered that question in the affirmative in regard to Johnson.¹ The court went on to find that Johnson "indicated that he understood the terms of the plea." *See* Footnote 1. We cannot conclude that Johnson met his burden of proof on this issue, and find no error.

Johnson next argues that his due process rights were violated when the Jefferson Circuit Court did not inquire as to why Johnson wanted new counsel, and because the court failed to give Johnson the opportunity to state on the record his reasons for wanting new counsel. At paragraph 8 of his *pro se* RCr 11.42 motion filed on December 20, 2013, Johnson asserted that his trial counsel was ineffective in failing to withdraw as counsel when Johnson asked the trial court for new counsel. Now on appeal, Johnson argues that *the court* erred in failing to inquire as to why Johnson wanted new counsel. Johnson has, in effect, changed horses in mid-stream by arguing before the trial court that counsel was ineffective, and now on appeal asserting that the court erred in failing to ask the right questions of Johnson. A party "will not be permitted to feed one can of worms to the trial judge and another to the appellate court." *Kennedy v. Commonwealth*, 544 S.W.2d

¹ Record on Appeal (ROA) at p. 135.

219, 222 (Ky. 1976), *overruled on other grounds by Wilburn v. Commonwealth*, 312 S.W.3d 321, 327 (Ky. 2010). Johnson is forwarding an unpreserved claim of error which cannot be raised via the collateral attack of RCr 11.42.

Commonwealth v. Basnight, 770 S.W.2d 231 (Ky. App. 1989). Johnson has not met his burden of demonstrating that his trial counsel failed to provide the effective assistance of counsel to which he was entitled, and accordingly we find no error on this issue.

Lastly, Johnson argues that he was improperly denied a hearing on his RCr 11.42 motion. “[A] hearing is required only if there is an issue of fact which cannot be determined on the face of the record.” *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993). As Johnson’s claims are refuted by reference to the record, we conclude that he was not entitled to a hearing.

Appeal 2016-CA-001179-MR

In appeal 2016-CA-001179-MR, Johnson, *pro se*, argues that the trial court abused its discretion by denying without a hearing his CR 60.02 motion for relief from judgment.² Johnson’s CR 60.02 motion asserted that his plea was not voluntary because at the time it was made he was on a number of medications

² Because Johnson’s *pro se* trial court filings were somewhat disjointed, the Commonwealth’s responsive brief in this appeal addressed the Jefferson Circuit Court’s denials of Johnson’s RCr 11.42 motion and his CR 60.02 motion. Johnson’s appeal in 2016-CA-001179-MR, however, only raises a claim of error arising from the denial of his CR 60.02 motion.

which affected his ability to make informed decisions. In his written argument now before us, Johnson briefly argues that the record supports a claim for CR 60.02 relief, but does not reveal with specificity why he should prevail on appeal. Rather, Johnson merely argues in general terms that there are “sufficient grounds in support of his claims,” and that the record “reflect [sic] the lack of candor by counsel to protect the Appellant’s due process rights”

On appeal, we review the trial court’s denial of a CR 60.02 motion for abuse of discretion. *Soileau v. Bowman*, 382 S.W.3d 888, 890 (Ky. App. 2012). An abuse of discretion is found if the trial court’s decision was “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Miller v. Eldridge*, 146 S.W.3d 909, 914 (Ky. 2004). We cannot conclude that the trial court abused its discretion in denying Johnson’s motion for CR 60.02 relief. Other than broadly asserting that his trial counsel had a lack of candor and that Johnson sought to terminate counsel’s representation of him, Johnson has offered nothing to support his claim of entitlement to CR 60.02 relief. We conclude that no hearing was required, *Stanford, supra*, and find no error on this issue.

For the foregoing reasons, we AFFIRM the orders of the Jefferson Circuit Court denying Johnson’s motions for RCr 11.42 and CR 60.02 relief.

ALL CONCUR.

BRIEF FOR APPELLANT:

Appeal No. 2016-CA-000244-MR:

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Department of Public Advocacy
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Appeal No. 2016-CA-001179-MR:

Terrance Johnson, *pro se*

BRIEF FOR APPELLEE:

Appeal Nos. 2016-CA-000244-MR
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