

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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001596-MR

MICHAEL DURHAM, JR.

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
INDICTMENT NO. 10-CR-00080

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: COMBS, JOHNSON, AND J. LAMBERT, JUDGES.

LAMBERT, J., JUDGE: Michael Durham, Jr., appeals from the Boyle Circuit Court order denying, without an evidentiary hearing or appointment of counsel, his motion for post-conviction relief brought under Kentucky Rule of Criminal Procedure (RCr) 11.42. We affirm.

In July 2010, Durham and a co-defendant were indicted for two counts of first-degree robbery and one count of first-degree burglary for incidents that had occurred the previous May. Durham, who had fled to Virginia to escape prosecution, was captured and incarcerated there (for burglary and theft charges committed in that state) at the time the indictment was returned in Kentucky. He was arraigned upon his return to Kentucky¹ (initiated by his motion pursuant to Article III(a) of the Interstate Agreement on Detainers (IAD)) in February 2011. Because his co-defendant was already represented by the area Public Advocate, Durham was appointed conflict counsel to represent him. Durham later retained private counsel in May 2011; private counsel represented Durham until August of that year, successfully moving to withdraw because of an inability to agree on undisclosed matters. Conflict counsel was reappointed, and Durham appeared with his new attorney on September 6, 2011.

On that date, counsel requested and was granted a competency evaluation for Durham. The Boyle Circuit Court held a hearing on the issue in January 2012 after which it found Durham to be competent to stand trial. After a status hearing scheduled the following month, the case was scheduled for a pretrial

¹ By Wise County (Virginia) Circuit Court order entered November 10, 2010, Durham was sentenced to sixty years, with all but five of those years suspended on the condition that Durham make restitution to his victims and all costs associated with his criminal charges in Virginia. The order further stated that the Virginia sentences would run concurrently with Durham's Kentucky charges.

conference on March 6, 2012. At the conference, a trial date was set for three days the following June. On April 18, 2012, Durham was indicted for the status offense of Persistent Felony Offender in the Second Degree (PFO II).

On May 1, 2012, Durham appeared with counsel and moved that counsel be relieved, which was denied by the circuit court. It was then that Durham filed his motion to dismiss for failure to hold trial within 180 days. The circuit court held a hearing ten days later and denied the motion for two reasons, namely, that Durham's notice to the prosecution was insufficient and that, by accepting a trial date outside the 180-day limit, Durham had waived his right to a speedy trial.

In June 2012, Durham's counsel notified the circuit court that there would be a change of plea, and the scheduled trial was canceled. Durham thereafter entered a guilty plea to the amended charges of second-degree robbery and burglary. Durham later moved to withdraw his guilty plea, voicing dissatisfaction with services provided to him by his attorney. A hearing was held on the motion on July 19, 2012. The Boyle Circuit Court denied the motion, finding that Durham's plea was voluntary and citing in support the cases of *Williams v. Com.*, 229 S.W.3d 49, 53 (Ky. 2007); and *Rigdon v. Com.*, 144 S.W.3d 283, 285 (Ky. App. 2004). Durham was sentenced to eleven years' imprisonment per the three amended counts, all of which were ordered to run concurrently with

each other. He and his co-defendant were held jointly liable for restitution to their victims. The PFO II charges (three separate counts) were dismissed against Durham as part of the plea bargain. Durham returned to Virginia to complete his sentence there and was brought back to Kentucky in 2014.

On June 20, 2016, Durham filed his *pro se* motion pursuant to RCr 11.42. Durham raised the following allegations of ineffective assistance of counsel in the motion: Failure to meet with Durham and discuss various defenses; failure to do “basic legal research”; misrepresentation of facts and withholding of evidence; undue pressure to plead guilty; failure to investigate the prosecution’s case; threatening to withdraw as counsel if Durham wished to testify in his own defense; and failure to investigate the IAD defense regarding his right to trial within 180 days. In separate motions filed the same date, Durham requested an evidentiary hearing, to proceed *in forma pauperis*, and for appointment of counsel.

The circuit court, on August 18, 2016, denied Durham’s RCr 11.42 motion, without an evidentiary hearing or appointment of counsel, ruling that the matter could be determined by reviewing the record, and that the record refuted all of Durham’s claims. Durham filed this appeal thereafter.

Before focusing on Durham’s arguments, we shall address the Commonwealth’s assertion that Durham’s motion for post-conviction relief was untimely filed. RCr 11.42(10) states:

Any motion under this rule shall be filed **within three years after the judgment becomes final**, unless the motion alleges and the movant proves either:

(a) that the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence; or

(b) that the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

If the judgment becomes final before the effective date of this rule, the time for filing the motion shall commence upon the effective date of this rule. If the motion qualifies under one of the foregoing exceptions to the three year time limit, the motion shall be filed within three years after the event establishing the exception occurred. Nothing in this section shall preclude the Commonwealth from relying upon the defense of laches to bar a motion upon the ground of unreasonable delay in filing when the delay has prejudiced the Commonwealth's opportunity to present relevant evidence to contradict or impeach the movant's evidence.

(Emphasis added.) *And see, e.g., Clark v. Com.*, 476 S.W.3d 895 (Ky. App. 2015), (citing *Com. v. Carneal*, 274 S.W.3d 420 (Ky. 2008)); and *Bush v. Com.*, 236 S.W.3d 621, 623 (Ky. App. 2007).

But Durham argues that his absence from Kentucky between September 2012 until December 2014 (when he was housed in a Virginia correctional facility) effectively tolled the time limitation. "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he

has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.” *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 1814, 161 L. Ed. 2d 669 (2005). We agree with Durham that his incarceration in Virginia (leaving him without meaningful access to his records or Kentucky law), coupled with his efforts to revive his post-conviction action as soon as he returned to Kentucky, was sufficient to toll the statute. His *pro se* motions alleged these circumstances; and neither the Commonwealth in its response nor the circuit court in its ruling considered the issue of timeliness. We thus decline the Commonwealth’s invitation to dismiss Durham’s appeal as taken from an untimely motion.

We next address the merits of Durham’s appeal. We begin by reciting our standard of review, namely:

The applicable standard of review in RCr 11.42 post-conviction actions is well-settled in the Commonwealth. Generally, in order to establish a claim for ineffective assistance of counsel, a movant must meet the requirements of a two-prong test by proving that: 1) counsel’s performance was deficient and 2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985), *cert. denied*, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). In *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001) (citations omitted), the Supreme Court stated, “[a]fter the answer is filed, the trial judge shall determine whether the allegations in the motion can be resolved on the face of the record, in which event an evidentiary hearing is not

required. A hearing is required if there is a material issue of fact that cannot be conclusively resolved, i.e., conclusively proved or disproved, by an examination of the record.”

Clark, 476 S.W.3d at 897-98.

When a criminal defendant enters a guilty plea, “in order to satisfy the ‘prejudice’ requirement, the defendant must show that there is 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 Padilla v. Kentucky*, 559 U.S. 356, 373, 130 S. Ct. 1473, 1486, 176 L. Ed. 2d 284 (2010).

Durham insists that trial counsel was ineffective for advising him to plead guilty. His arguments on appeal focus on two aspects which he maintains render his guilty plea infirm, specifically, that counsel failed to preserve Durham’s right to a speedy trial under the IAD, and that counsel failed to inform Durham that his guilty plea could have been conditional, allowing him to appeal the issue of the IAD.²

The circuit court found no merit in Durham’s argument that trial counsel was ineffective for failing to litigate the IAD 180-day claim. The circuit

² RCr 8.09 allows for a conditional guilty plea. The Rule states: “With the approval of the court a defendant may enter a conditional plea of guilty, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified trial or pretrial motion. A defendant shall be allowed to withdraw such plea upon prevailing on appeal.”

court based its decision on two grounds: lack of proof of proper compliance with the IAD's requirement of notification to the Commonwealth, and Durham's willing acceptance of a trial date beyond the 180-day period. Even were we to agree with Durham's claim that he had properly notified the prosecution, we disagree that the circuit court erred in its assessment that Durham had waived the 180-day timeframe. The record is replete with instances of Durham's acquiescence in the various delays: He had hired private counsel (who later withdrew), agreed to a competency evaluation, and agreed to a trial date beyond the 180-day period.

“Although a defendant has the right to be brought to trial within 180 days of providing notice of his imprisonment in another state, defense counsel may waive this right on behalf of the defendant.” *Roskie v. Com.*, 296 S.W.3d 436, 437 (Ky. App. 2009) (citing *New York v. Hill*, 528 U.S. 110, 115, 120 S. Ct. 659, 664, 145 L. Ed. 2d 560 (2000)). Durham, “through his counsel, waived his right to trial within 180 days by agreeing to the [June] trial date.” *Roskie*, 296 S.W.3d at 437. Durham waived this argument.

This finding thus makes the second allegation of ineffective assistance of counsel (i.e., that counsel should have advised Durham to enter a plea conditional on appealing the IAD issue) moot. We need not address it separately. *Hill v. Lockhart*, 474 U.S. at 59.

Durham lastly contends that the circuit court erred in failing to hold an evidentiary hearing on his RCr 11.42 motion and urges this Court to remand for same. We have reviewed the record in its entirety, including the numerous videotaped proceedings, and agree with the circuit court that a hearing on Durham's allegations was not required because all issues of fact were "conclusively resolved . . . by an examination of the record." *Clark, supra* at 898.

The order of the Boyle Circuit Court is affirmed.

ALL CONCUR.

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