RENDERED: AUGUST 17, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000038-MR

DANIEL DRAGOO APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 11-CR-003053

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; SMALLWOOD AND TAYLOR, JUDGES.

CLAYTON, CHIEF JUDGE: Daniel Dragoo appeals from the Jefferson Circuit Court's order entered April 18, 2016, denying his motion to vacate judgment under Kentucky Rule of Criminal Procedure (RCr) 11.42. We affirm the circuit court's order.

The facts of this case relate to a bank robbery on October 5, 2011, in Jefferson County, Kentucky. Daniel Dragoo entered a local branch of PNC Bank

and approached the teller, Kathy Hilton. Dragoo gave Hilton a note which read, "Just give me the money & don't hit the panic button and no one will be hurt." Dragoo took the note away from Hilton and waited as she began to pull money from her drawer, including a roll of twenty-dollar bills containing a hidden Global Positioning System (GPS) tracking device. Hilton placed the money on the counter and asked Dragoo if he wanted an envelope for the cash, but he declined. Dragoo grabbed the money and placed it under his shirt before leaving the bank. A witness saw Dragoo flee in a black Mercury Sable. Using the description of the vehicle and the GPS tracking data, police apprehended Dragoo shortly thereafter. Dragoo gave a recorded confession to police admitting to the deed.

In her statement to the police, Hilton asserted Dragoo kept reaching into the front waistband of his pants, toward what appeared to be the top of a semi-automatic handgun. She was not completely certain the object was a gun, but she told police that she "use[d] to shoot a lot and that was kind of what it looked like to her." When Dragoo was apprehended, however, no gun was found on his person or in his vehicle. Furthermore, he denied using a gun both during his apprehension and in his recorded confession.

Dragoo had a recent criminal history before entering PNC Bank on October 5, 2011. In 2009, Dragoo had entered a three-year diversion program for a burglary charge. In 2010, while on diversion, he was charged with second-degree

escape. Revocation proceedings were pending at the time Dragoo walked into PNC Bank. Dragoo's diversion was revoked in February 2012, and he was sentenced to a total of five years' incarceration on the burglary and escape charges.

The Jefferson County grand jury indicted Dragoo on one count of first-degree robbery[1] and one count of being a first-degree persistent felony offender[2] (PFO 1st). On August 20, 2012, Dragoo entered a negotiated *Alford*[3] guilty plea in open court to first-degree robbery. Pursuant to Dragoo's plea agreement, the Commonwealth agreed to dismiss the PFO 1st charge and to recommend a sentence of ten years' imprisonment. The trial court conducted a thorough plea colloquy with Dragoo before accepting his guilty plea. First, the Commonwealth recited the version of the facts it would have presented to the jury. The court then asked Dragoo, *inter alia*, if he understood the constitutional rights he would be giving up, whether his counsel had explained the elements of the offense, and whether the attorney had explained possible lesser-included offenses. Dragoo answered these questions affirmatively. The trial court then asked counsel

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[1] Kentucky Revised Statute (KRS) 515.020, a Class B felony.

[2] KRS 532.080(3).

[3] *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). An *Alford* plea "permits a conviction without requiring an admission of guilt and while permitting a protestation of innocence." *Wilfong v. Commonwealth*, 175 S.W.3d 84, 103 (Ky. App. 2004). "The entry of a guilty plea under the *Alford* doctrine carries the same consequences as a standard plea of guilty." *Id*. at 102 (internal quotation marks omitted).

and Dragoo whether the guilty plea was signed knowingly, intelligently, and voluntarily. Both replied affirmatively. The trial court accepted Dragoo's guilty plea. As requested by the defense, the circuit court immediately entered final judgment and sentence in accordance with the plea agreement, sentencing Dragoo to ten years' imprisonment.

On July 28, 2014, Dragoo filed several related motions under RCr 11.42, asking the trial court to vacate and set aside his judgment and sentence as well as to grant an evidentiary hearing on claims of ineffective assistance of counsel. The trial court denied his motions in an order entered April 18, 2016. This appeal followed.

A successful petition for relief under RCr 11.42 for ineffective assistance of counsel must survive the twin prongs of "performance" and "prejudice" provided in *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). "A deficient performance contains errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Commonwealth v. McGorman*, 489 S.W.3d 731, 736 (Ky. 2016) (quoting *Strickland*, 466 U.S. at 687, 104 S. Ct. 2052). "[A] defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render and rendering reasonably effective assistance." *Commonwealth v. Rank*,

494 S.W.3d 476, 488 (Ky. 2016) (citation and internal quotation marks omitted). When a defendant pleads guilty, the "prejudice" prong of *Strickland* requires the defendant to show "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). "In making that determination, the trial court must indulge the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance." *Rank*, 494 S.W.3d at 481 (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. 2052).

Dragoo presents two issues on appeal supporting his argument that trial counsel was ineffective in permitting him to enter his guilty plea: (1) trial counsel advised him to plead guilty to first-degree robbery, when the facts only supported a conviction for second-degree robbery;[4] and (2) trial counsel failed to challenge the PFO 1st charge when he only qualified as a second-degree persistent felony offender[5] (PFO 2nd). He also presents a third issue, asserting trial counsel should have granted an evidentiary hearing on his RCr 11.42 motion. Dragoo argues that, had his trial counsel not misadvised him on these two issues, he would have faced a maximum of ten to twenty years in prison, based on a presumed conviction for second-degree robbery enhanced by a PFO 2nd conviction. He

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[4] KRS 515.030, a Class C felony.

[5] KRS 532.080(2).

contends this would have been a better choice than his negotiated plea because it would have allowed him to seek parole in four years, as second-degree robbery is not considered a violent offense. *See* KRS 439.3401(1). As it stands, Dragoo's conviction for first-degree robbery, a violent offense listed under KRS 439.3401(1), means he may not go before the parole board until he has served eighty-five percent of his sentence, or eight and one-half years. KRS 439.3401(3)(a). Furthermore, Dragoo contends he only agreed to the plea agreement because a PFO 1st conviction would have required him to serve a minimum of ten years before seeking parole. KRS 532.080(7). A defendant with a PFO 2nd conviction, however, does not fall under this minimum ten-year sentence prior to parole eligibility.

Dragoo bases his argument regarding first-degree versus second-degree robbery on the question of whether he was armed with a handgun during the course of the offense. KRS 515.030, the second-degree robbery statute, states in relevant part as follows: "A person is guilty of robbery in the second degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft." In contrast,

> KRS 515.020 (the first-degree robbery statute), incorporates all the elements of second-degree robbery, but also requires one of three aggravating

> circumstances, which are listed in KRS 515.020(1)(a), (b), and (c):
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> (a) Causes physical injury to any person who is not a participant in the crime; or
>
> (b) Is armed with a deadly weapon; or
>
> (c) Uses or threatens the immediate use of a dangerous instrument upon any person who is not a participant in the crime.

Gamble v. Commonwealth, 319 S.W.3d 375, 377 (Ky. 2010) (footnote omitted). Here, the evidence pointed to the second aggravator, KRS 515.020(b), because Hilton told police she saw the top of a handgun in Dragoo's waistband during the robbery, though she admitted to some uncertainty on the question. A handgun indisputably qualifies as a "deadly weapon" under KRS 500.080(4)(b), which defines a "deadly weapon" as "[a]ny weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged[.]"

Dragoo unequivocally denies possession of a gun during the incident and denies Hilton could have seen one on his person. Therefore, Dragoo contends a jury could only have convicted him for second-degree robbery based on *Lawless v. Commonwealth*, 323 S.W.3d 676 (Ky. 2010), which he argues stands for the proposition that a defendant may not be convicted of first-degree robbery when "no gun was seen or referred to by the perpetrator but the victims perceived that he may have had a gun." *Id*. at 679.

We find no merit to Dragoo's argument because he presumes the evidence could *only* have led to a jury finding there was no gun, and thus the jury could *only* have convicted him for second-degree robbery. This is not accurate. In *Lawless*, the Kentucky Supreme Court commented on the evidence in that case as follows: "No one saw a gun, however, *a part of a gun*, or any other deadly weapon as delineated in *Wilburn* [*v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010)] and required by KRS 515.020(b)." *Id*. at 680 (emphasis added). In Hilton's interview, however, she explicitly told police she indeed saw what she believed was "a part of a gun." Assuming Hilton would have provided testimony consistent with her police interview, the issue of whether Dragoo actually had a weapon on his person during the robbery would have been an open question which the jury would have been required to resolve.

> [I]n circumstances where the alleged "weapon" is never recovered and its authenticity cannot be readily established . . . [t]he victim's description of the item would ordinarily provide sufficient evidence to permit the jury to decide whether it was among the sort of items declared by the legislature to be a "deadly weapon."

Wilburn, 312 S.W.3d at 329.

Furthermore, Dragoo's bare assertion of what the evidence showed in his case amounts to a challenge to the sufficiency of the evidence, which is not appropriate in an RCr 11.42 motion. "Kentucky courts have long held that a guilty plea precludes a post-judgment challenge to the sufficiency of the evidence."

Johnson v. Commonwealth, 103 S.W.3d 687, 696 (Ky. 2003) (citation omitted). "Because he entered a guilty plea as if the trial never took place, [the defendant] is precluded from challenging the evidence at trial and the associated jury instructions." *Bishop v. Commonwealth*, 357 S.W.3d 549, 553 (Ky. App. 2011). Accordingly, Dragoo cannot argue he was assured at trial of a conviction no greater than that of second-degree robbery.

Because a jury may have convicted Dragoo of first-degree robbery, Dragoo's second argument, asserting a lesser degree of PFO he would have encountered at trial, becomes an academic exercise at best. Assessing ineffective assistance of counsel in the context of a plea agreement relies on determining whether taking the plea was a rational decision. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985). "The test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Robbins v. Commonwealth*, 365 S.W.3d 211, 214 (Ky. App. 2012) (citation omitted). "A conclusory allegation to the effect that absent the error the movant would have insisted upon a trial is not enough." *Stiger v. Commonwealth*, 381 S.W.3d 230, 237 (Ky. 2012).

In essence, the issue becomes how we ought to weigh potential benefits versus potential risks in assessing whether the plea agreement was a

rational decision. Dragoo's arguments regarding the distinction between a PFO 1st and a PFO 2nd conviction rely on the difference in the time required to serve before seeking parole. He argues he may have only been required to serve twenty percent of a ten- to twenty-year sentence, or between two and four years, versus his negotiated plea, whereby he will need to serve eight and one-half years. However, Dragoo's contentions rely upon stacked best-case scenarios – a conviction for second-degree robbery which was only enhanced by a PFO 2nd. Such an outcome was by no means guaranteed. Despite his claim otherwise, Dragoo could very well have been convicted of first-degree robbery, a Class B felony. Enhancement of first-degree robbery by a PFO of *either* degree would have resulted in a significantly greater sentence than his negotiated plea. Under KRS 515.020(2), first-degree robbery is a Class B felony, punishable by ten to twenty years *before* PFO enhancement. "A person who is found to be a persistent felony offender in the second degree shall be sentenced to an indeterminate term of imprisonment pursuant to the sentencing provisions of KRS 532.060(2) for the next highest degree than the offense for which convicted." KRS 532.080(5).

Even if Dragoo were only convicted of a PFO 2nd at trial, he risked a first-degree robbery conviction being elevated to a Class A felony, punishable by a sentence of "not less than twenty (20) years nor more than fifty (50) years, or life imprisonment[.]" KRS 532.060(2)(a). In addition, this hypothetically-enhanced

first-degree robbery conviction would have been a violent offense, as discussed *supra*, thus requiring Dragoo to serve eighty-five percent of the sentence before parole eligibility. KRS 439.3401(3)(a). At best, therefore, a first-degree robbery conviction enhanced by *either* PFO would have resulted in Dragoo not seeing the Parole Board before serving at least seventeen years—far worse than Dragoo's negotiated plea.

"'Prejudice' requires more than a simple self-serving statement by the movant." *Stiger*, 381 S.W.3d at 237 n.3. In determining whether the guilty plea was "a voluntary and intelligent choice," we must consider the potential risks the appellant would have faced had he been convicted at trial. If the appellant

> had little, if any chance of improving his outcome at trial, but could easily have fared far worse, we are not persuaded that, had he been correctly advised about the . . . consequences of his plea, there is a reasonable probability that he would have rejected the plea bargain and insisted upon a trial. It simply would not have been a "rational" choice under the circumstances.

Id. at 238. Under the facts of this case, we cannot conclude it would have been rational for Dragoo to reject his guilty plea, with its ten-year sentence, in favor of a trial in which he faced the possibility of twenty to fifty years, or life imprisonment. The risks of trial were substantial. The potential benefit of going to trial in no way compared to the risk of an enhanced first-degree robbery conviction. Even assuming Dragoo would have received correct advice about receiving a PFO 2nd

conviction instead of a PFO 1st conviction, Dragoo's negotiated plea was a rational choice under *Hill v. Lockhart*, and thus he cannot demonstrate prejudice due to alleged ineffective assistance of counsel.

Dragoo's last issue turns on whether the trial court erred by not granting an evidentiary hearing on his issues. "[W]here the defendant fails to plead facts showing the decision to go to trial would have been rational under the circumstances, the prosecution's evidence is strong and the defendant received the minimum sentence for the charged offense an evidentiary hearing may be unnecessary." *Commonwealth v. Pridham*, 394 S.W.3d 867, 880 n.9 (Ky. 2012). As previously considered, Dragoo's decision to avoid trial was rational. In addition, the Commonwealth's case was a strong one, which included eyewitness accounts, photographs from bank security cameras, and a full recorded confession. Finally, Dragoo's sentence of ten years was at the low end of what he potentially faced, had he been convicted of first-degree robbery. The trial court did not err in its denial of Dragoo's motion for an evidentiary hearing.

Conclusion

For the foregoing reasons, we affirm the order of the Jefferson Circuit Court entered April 18, 2016.

ALL CONCUR.

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