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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000090-MR

BLAIR RILEY — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE, V, JUDGE
ACTION NO. 14-CR-00854

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, D. LAMBERT, AND TAYLOR, JUDGES.

LAMBERT, D., JUDGE: Blair Riley (Riley) appeals the judgment of the Campbell Circuit Court. The circuit court denied his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to vacate his guilty plea and conviction and his request for an evidentiary hearing on the matter. Having reviewed the record and finding no reversible error, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

On August 20, 2014, while serving time in the Campbell County Detention Center (CCDC) for a previous conviction, Riley and three other inmates beat another inmate in order to steal his commissary.[1] As a result, the victim was hospitalized with serious physical injuries.

In October 2014, Riley was indicted on one count of first-degree robbery, one count of fourth-degree assault, one count of theft by unlawful taking under $500, and one count of being a second-degree persistent felony offender (PFO). Under the indicted charges Riley faced a potential sentence of twenty to fifty years, or life imprisonment.

The Commonwealth subsequently offered Riley a plea agreement wherein it agreed to amend the first-degree robbery charge to second-degree terroristic threatening. The Commonwealth also agreed to recommend five years on the second-degree terroristic threatening charge, one year for the fourth-degree assault and theft by unlawful taking charges, and that the sentences would run concurrently for one five-year term, which would be enhanced to ten years based on Riley's plea to the second-degree PFO charge. The agreement reduced his potential

[1] "Commissary" is a generic term used to describe items inmates can purchase from the commissary store within a correctional facility. For example, in this case, Riley indicated the items he stole were noodles, chips, shampoo, and toothpaste.

sentence from twenty to fifty years, or life, to a maximum of ten years' imprisonment.

On July 1, 2015, the circuit court held a plea hearing. Riley appeared with counsel. To begin the plea colloquy, the court established that Riley had plenty of time to consult with counsel, that his guilty plea was knowing and voluntary, and that he understood the constitutional and civil rights he was relinquishing by entering the plea.

Initially, Riley did not admit the facts alleged in the indictment. The court therefore inquired whether he had an agreement with the Commonwealth to enter an *Alford*[2] plea. Because there was no such agreement, the court told Riley he would have to admit the underlying facts or it would not accept his plea. The court gave Riley and his counsel a brief off-the-record recess to discuss how they wanted to proceed. Following the recess, Riley admitted all the underlying facts in the indictment. He also voluntarily admitted that he instigated the incident.

The court accepted Riley's guilty plea, finding it was freely and voluntarily entered, and that he was mentally competent. The court based these findings on its conversations with Riley, Riley's representations, and the

[2] An *Alford* plea allows a criminal defendant to plead guilty to an alleged crime without admitting the truth of the underlying facts: "An individual accused of crime may voluntarily, knowingly and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 167, 27 L. Ed. 2d 162 (1970).

representations of his counsel. The court sentenced Riley to ten years in accordance with the plea agreement.

Fourteen months after entering his plea, Riley filed a motion to vacate and set aside his conviction based on RCr 11.42[3]. Riley also requested an evidentiary hearing on this motion. The trial court denied both motions. This appeal followed.

II. ANALYSIS

Riley asserts two arguments on appeal: (1) the trial court erred by denying his RCr 11.42 motion to vacate and set aside his conviction; and (2) the trial court erred by denying his request for an evidentiary hearing on his RCr 11.42 motion. After a thorough review, we affirm.

A. STANDARD OF REVIEW

"We review [a] trial court's denial of an RCr 11.42 motion for an abuse of discretion." *Teague v. Commonwealth*, 428 S.W.3d 630, 633 (Ky. App. 2014), *as modified on denial of reh'g* (Apr. 4, 2014). "Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision."

[3] RCr 11.42: "(1) A prisoner in custody under sentence . . . who claims a right to be released on the ground that the sentence is subject to collateral attack may at any time proceed directly by motion in the court that imposed the sentence to vacate, set aside or correct it."

Kuprion v. Fitzgerald, 888 S.W.2d 679, 684 (Ky. 1994) (quoting *Kentucky Nat'l Park Comm'n v. Russell*, 301 Ky. 187, 191 S.W.2d 214, 217 (1945)).

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING RILEY DID NOT SHOW ENTITLEMENT TO RCR 11.42 RELIEF

"[A]n RCr 11.42 movant must allege with particularity specific facts which, if true, would render the plea involuntary under the Fourteenth Amendment's Due Process Clause, or would render the plea so tainted by counsel's ineffective assistance as to violate the Sixth Amendment[.]" *Stiger v. Commonwealth*, 381 S.W.3d 230, 234 (Ky. 2012) (citing *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001)). In this case, Riley asserts both that he received ineffective assistance of counsel and that his guilty plea was involuntary and unknowing.

1. RILEY'S *STRICKLAND* CLAIM MUST FAIL

Riley argues he was not provided adequate counsel at the time of his guilty plea. To assert a successful ineffective assistance of counsel claim a defendant must satisfy the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). First, the defendant must show that counsel's performance was so deficient that counsel "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466

U.S. at 687, 104 S. Ct. at 2064. Second, the defendant must show he was prejudiced by his counsel's insufficient performance. *Id.*

The two-part *Strickland* test applies to guilty plea challenges based on ineffective assistance of counsel. *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S. Ct. 366, 369-70, 88 L. Ed. 2d 203 (1985). In the guilty plea context, the first prong of the *Strickland* test remains the same Sixth Amendment standard for attorney competence. *Id.* at 58-59, 106 S. Ct. at 370. But to satisfy the second prong, a defendant must show that there was "a reasonable probability that, but for counsel's errors, he would not have [pled] guilty and would have insisted on going to trial." *Id.* at 59, 106 S. Ct. at 370.

To support his *Strickland* claim Riley first asserts that counsel did not properly advise him of the nature of the charges, and that he did not understand the full nature of the proceedings. The record directly refutes these claims. During the plea colloquy the following exchange occurred:

> COURT: Have you been able to talk . . . to your lawyers about this matter clear-headedly and arrive at this . . . important decision independently?
>
> RILEY: Yes sir.
>
> . . .
>
> COURT: Have you had all the time you need to talk to your lawyers about this?
>
> RILEY: Yes sir.

COURT: Is there anything you've asked [your lawyers] to do to prepare for today that they failed to do or have been unable to do?

RILEY: No sir.

COURT: Are you satisfied with what's happening here today and what [your lawyers] have done for you?

RILEY: Yes sir.

. . .

COURT: Alright this motion to enter a guilty plea, you've read this or had it read to you?

RILEY: Yes.

. . .

COURT: You understand everything in here?

RILEY: Yes.

. . .

COURT: This offer on a plea of guilty, you've read this or had it read to you?

. . .

RILEY: Yes.

COURT: You understand everything in here?

RILEY: Yes.

. . .

COURT: And finally, this waiver of pre-sentence report before sentencing. You've read this or had it read to you?

RILEY: Yes sir.

. . .

COURT: You understand everything in here?

RILEY: Yes.

. . .

COURT: Understanding all that, is this still what you wish to do today?

RILEY: Yes.

COURT: Do you also understand that by entering this plea of guilty you're giving up certain valuable constitutional rights? Such as the right to trial by jury, the right to remain silent, the right to present witnesses and other evidence on your own behalf, the right to confront and cross-examine witnesses called to testify against you by the Commonwealth, the right to appointment of counsel, and the right to appeal your conviction and sentence to a higher court?

RILEY: Yes sir.

COURT: You also understand you're giving up certain valuable civil rights such as the right to vote, the right [to hold] public office, the right to serve on a jury, the right to possess a firearm, maybe other civil rights I haven't mentioned?

RILEY: Yes.

> COURT: Understanding all those things, is this still what you wish to do today?
>
> RILEY: Yes sir.

It is clear from this exchange that Riley had consulted both of his privately retained attorneys prior to accepting the plea, that he understood all the documents he was required to sign, and that he understood he was forfeiting several civil and constitutional rights.

Riley's second assertion in support of his *Strickland* claim is that, had he fully understood the proceedings, he would not have pled guilty and would have insisted on going to trial.

> A conclusory allegation to the effect that absent the error the movant would have insisted upon a trial is not enough. The movant must allege facts that, if proven, would support a conclusion that the decision to reject the plea bargain and go to trial would have been rational, *e.g.*, valid defenses, a pending suppression motion that could undermine the prosecution's case, or the realistic potential for a lower sentence."

Stiger, 381 S.W.3d at 237 (citation and footnote omitted). Nothing in Riley's argument to this court indicates that he had any valid defenses, that he would have likely received a lower sentence at trial, or that any other grounds exist that would have made it reasonable to reject the Commonwealth's plea offer.

For the foregoing reasons, Riley's *Strickland* claim must fail.

2. RILEY'S GUILTY PLEA WAS VALID

Riley also argues that his guilty plea itself was not knowingly, voluntarily, and intelligently entered as required under *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). In *Kiser v. Commonwealth*, 829 S.W.2d 432 (Ky. App. 1992), this Court addressed an appeal from a criminal conviction wherein the defendant challenged the constitutionality of his guilty plea. *Id.* at 433. The defendant argued that neither his attorney nor the court explained to him what the prosecution would have to prove to convict him, and therefore his plea was not knowing, voluntary and intelligent. *Id.* This Court disagreed noting that the trial court individually questioned the defendant about the consequences of waiving his rights, that his attorney fully explained the allegations contained in his indictment and his rights to him, and that the defendant stated he was satisfied with his attorney's services. *Id.* at 433-34. Accordingly, this Court found that the requirements of *Boykin*, *supra*, were satisfied.

The court in this case specifically questioned Riley about his understanding of the ramifications of waiving his constitutional and civil rights. Riley stated that he understood and accepted those consequences. It was also established that Riley had discussed his case at length with his attorneys and their performance was satisfactory.

Notwithstanding, Riley claims that he entered the plea under duress. He alleges he was fearful for his safety at the CCDC and was advised that entering a guilty plea was his fastest way to get transferred to a different detention center. Again, the record refutes this claim. After Riley made his wish to be sent to a different institution known, the court said the following:

> COURT: Here's what I will do. I will recommend that you be sent to an institution, a penal institution, that offers mental health treatment. *The most I can do is recommend, I can't order. I don't have that control over the Department of Corrections.* But if I make recommendations based on certain factors, I know they'll listen to that and try to accommodate it which means it *may* help you get to another institution.
>
> . . .
>
> COURT: I'll recommend that you be sent to an institution that offers mental health evaluation and treatment, and I'll recommend to the jailer at the Campbell County detention center that he inform the Department of Corrections you might be better off at another institution. So that would be two *possible* avenues, if your problems are over here, to *maybe* let you go somewhere else.

(Emphasis added.) Therefore, it is evident the court did not tell Riley that accepting the plea deal would ensure he would be moved from the CCDC to another facility. Further, Riley being moved to another facility was not part of his plea agreement with the Commonwealth, and there is no evidence that either of his attorneys advised him that pleading guilty would get him transferred to a different facility.

Finally, Riley indicated he was entering the plea voluntarily and that no one had threatened or promised him anything when questioned by the court.

Riley further argues he has mental illnesses, and that those illnesses combined with fearing for his safety at the CCDC made his plea involuntary. Riley self-reports as having bipolar disorder and attention deficit hyperactive disorder. Following his indictment, the trial court, based upon notice by Riley's counsel, entered an order for examination. The order directed the Kentucky Correctional Psychiatric Center (KCPC) to prepare two separate reports: one regarding Riley's competency to stand trial, and the other his criminal responsibility for the incident.

During Riley's competency hearing, a licensed forensic psychologist that examined Riley ("Dr. Sparks"), testified about his findings and the findings of another psychiatrist at KCPC. Both diagnosed Riley with antisocial personality disorder with borderline intellectual functioning. Both found Riley's intellectual functioning to be above the range associated with intellectual disability, but below the low-average range. However, neither of them found any evidence of symptoms of mental illness or deficits. Further, Dr. Sparks found that Riley had a reasonable understanding of the nature of the charges against him and their consequences, the courtroom process, and that he had the capacity to participate rationally in his own defense. He even found that legal knowledge seemed to be an area of strength for Riley, who appeared to have the ability to adequately evaluate legal advice and

engage in reasoning in that regard. Based on these findings, Dr. Sparks determined Riley was competent to stand trial. The court agreed and entered an order finding Riley was competent to stand trial. Thus, for the foregoing reasons, we cannot agree that Riley's guilty plea was involuntary.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING RILEY'S REQUEST FOR AN EVIDENTIARY HEARING

It is a well-established rule that there is no right to an evidentiary hearing on a motion for postconviction relief. *Baze v Commonwealth*, 23 S.W.3d 619, 628 (Ky. 2000), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).[4] "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." *Fraser*, 59 S.W.3d at 452.

Riley argues that the material issues of fact which require an evidentiary hearing are the statements made to him by his counsel during the recess at his plea hearing. He contends that, because that conversation was not part of the record, he must be given an evidentiary hearing so that he can testify about what was discussed. We disagree.

An evidentiary hearing on a claim of error in an RCr 11.42 motion "is not required when the record refutes the claim of error or when the allegations, even

[4] *See also Harper v. Commonwealth*, 978 S.W.2d 311, 314 (Ky. 1998); *Stanford v. Commonwealth*, 854 S.W.2d 742, 743 (Ky. 1993); *and Skaggs v. Commonwealth*, 803 S.W.2d 573, 576 (Ky. 1990).

if true, would not be sufficient to invalidate the conviction." *Cawl v. Commonwealth*, 423 S.W.3d 214, 218 (Ky. 2014) (emphasis omitted) (citing *Brewster v. Commonwealth*, 723 S.W.2d 863, 865 (Ky. App. 1986)). As we have already discussed at length, the record clearly demonstrates that Riley's counsels' performance was sufficient, and that his guilty plea was valid. Riley has not specified what his counsel allegedly said that would invalidate his conviction, and we will not speculate. Accordingly, we find Riley has not alleged an error that cannot be conclusively resolved on the face of the record. He is therefore not entitled to an evidentiary hearing on his RCr 11.42 motion.

III. CONCLUSION

Having reviewed the record, we find that the trial court did not abuse its discretion by denying Riley's RCr 11.42 motion or by denying him an evidentiary hearing on that motion. Riley has not shown that his counsels' performance fell below the *Strickland* standard, that his guilty plea was invalid, or that there was a material issue of fact that cannot be resolved on the record as a whole. Accordingly, we affirm the ruling of the Campbell Circuit Court.

ALL CONCUR.

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