

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000768-MR

JOSEPH SALES

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 12-CR-01233

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, CHIEF JUDGE; KRAMER AND NICKELL, JUDGES.

KRAMER, JUDGE: Joseph Sales, proceeding *pro se*, appeals the Fayette Circuit Court's order denying his RCr¹ 11.42 motion to vacate his sentence. After a careful review of the record, we affirm because Sales's ineffective assistance of counsel claims lack merit.

¹ Kentucky Rule of Criminal Procedure.

Sales was indicted with co-defendants, Kirby Bryan Ruano and Juan Manuel Chavarria, Jr., on charges of capital murder and first-degree robbery in the murder of Saul Ruiz. The Commonwealth filed a notice of intent to seek the death penalty against the defendants. All the defendants were offered the same plea deal. Sales moved to enter his guilty plea to the charges of murder and complicity to robbery in the first degree. The circuit court accepted his guilty plea to these charges.² Sales was sentenced to thirty years of imprisonment for the murder conviction and ten years of imprisonment for the complicity to robbery conviction. The sentences were ordered to run concurrently with each other for a total of thirty years of imprisonment.

Sales moved to vacate his sentence pursuant to RCr 11.42 and he requested an evidentiary hearing regarding his motion. Postconviction counsel was appointed to represent him, and counsel filed a supplement to Sales's RCr 11.42 motion. An evidentiary hearing was held, during which Sales testified, as well as the two attorneys who represented him in the trial court, Aaron Currin and Greg Coulson. Following the hearing, the circuit court denied Sales's motion. He now appeals.

Sales first claims that one of his trial attorneys, Mr. Currin, was operating under a conflict of interest and that the advice he provided was improper,

² Sales's co-defendants entered guilty pleas to the same charges to which Sales pleaded guilty.

resulting in Sales's guilty plea being unintelligently and involuntarily entered. Sales alleges that Mr. Currin had a conflict of interest because JoAnn Lynch (from the Department of Public Advocacy's (DPA's) Capital Trials Western Division in LaGrange) who was the trial attorney for co-defendant Kirby Ruano, used space in the DPA Eastern Division's Lexington office while in Lexington representing Ruano. Sales argues that Mr. Currin had multiple conversations with her during that time. However, these allegations were contradicted by Mr. Currin who testified that he only spoke with the attorneys for the other co-defendants in court. He saw Ms. Lynch at court appearances, but he did not speak with her about anything privileged, confidential, or factual about the case. As examined below, the circuit court found Mr. Currin's testimony credible.

Because this claim of the ineffective assistance of counsel is based on a conflict of interest, "a different standard is used than the general standard applicable to a typical ineffectiveness claim." *Mitchell v. Commonwealth*, 323 S.W.3d 755, 759 (Ky. App. 2010).

[I]n order to successfully assert a claim of ineffective counsel based on a conflict of interest, a defendant who entered a guilty plea must establish: (1) that there was an actual conflict of interest; and (2) that the conflict adversely affected the voluntary nature of the guilty plea entered by the defendant.

Id. at 760 (internal quotation marks and citation omitted) (alteration in original).

The circuit court in this case found as follows:

Testimony was presented that no confidential information was shared by the attorneys for the defendant and the attorneys for the other co-defendants. Furthermore, the Commonwealth made the exact same offer to all three co-defendants: 30 years on murder and 10 years on the robbery. The Court finds no conflict nor prejudice to the Defendant as a result of representation by his public defenders.

Upon reviewing the video of the RCr 11.42 evidentiary hearing, we discern no error in the circuit court's decision regarding this claim because Sales has not presented any evidence that the co-defendants asserted antagonistic defenses. Further, contrary to Sales's contention, the evidence presented during the hearing showed that the attorneys representing the various defendants in this case worked in offices in different cities. Therefore, Sales presented no evidence to show that there was an actual conflict of interest in this case, and this claim lacks merit.

Sales next contends that the circuit court erred in finding that he had not asked to withdraw his plea.³ The circuit court entered the following findings concerning Sales's allegation that he wanted to withdraw his guilty plea:

The Defendant's counsel was present when the Defendant signed his guilty plea form, contrary to what is

³ Sales also asserts that the court should have identified which standard it used in rendering its ruling on this claim. However, Sales's argument is misplaced. As discussed *infra*, we defer to the circuit court on determinations of facts and witness credibility. *See Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151, 159 (Ky. 2009) (citations omitted). Because the circuit court made the factual finding that Sales did not ask his attorneys to withdraw his guilty plea, the court did not need to analyze this claim further.

alleged in Defendant's RCr 11.42 motion. Counsel confirmed this at the time Defendant entered his guilty plea. Furthermore, both of the Defendant's attorneys testified at the RCr 11.42 hearing that they always have their clients sign guilty plea forms in their presence. Despite the Defendant's recent claim of an agreement to enter an *Alford*^[4] plea, that was never the understanding between the Defendant, his counsel and the prosecutor. The Defendant never requested his trial attorneys to withdraw his plea of guilty. Therefore, counsel not filing a motion to withdraw the plea cannot be argued as a failure of counsel's representation.

Defendant's trial attorneys devoted an extraordinary amount of time in preparing this case. They retained the services of an investigator, crime scene reconstruction expert, and a mitigation specialist. They visited with their client at least twice a month and explained proceedings and the discovery to the Defendant with great detail. Though Defendant's attorneys were prepared for trial, they felt that the proof against the Defendant was substantial and his co-defendants had already plead guilty and thus could be witnesses against the Defendant. Trial counsel appropriately recommended the offer of 30 years and 10 years (to be served concurrently) as opposed to facing a jury on a brutal and violent crime and the possible penalty of death.

Upon our review of the video of the evidentiary hearing, the circuit court's factual findings were proper. Further, on appeal from an RCr 11.42 proceeding, "[a] reviewing court must always defer to the determination of facts and witness credibility made by the circuit judge." *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006), *overruled on other grounds by Leonard v.*

⁴ *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

Commonwealth, 279 S.W.3d 151, 159 (Ky. 2009) (citations omitted). In the present case, the circuit court found Sales's trial attorneys were present when he signed the plea agreement, and the court found the attorneys credible when they testified that Sales never asked them to withdraw his guilty plea. We defer to the circuit court regarding these findings. Consequently, Sales's claim lacks merit.

Finally, Sales alleges that he received ineffective assistance of counsel when the attorney who represented him during his RCr 11.42 proceedings failed to adequately develop the record during the evidentiary hearing. However, the Supreme Court of Kentucky held in *Sanders v. Commonwealth*, 339 S.W.3d 427, 435 (Ky. 2011), that ineffective assistance of RCr 11.42 counsel claims are not cognizable in Kentucky. Consequently, this claim lacks merit.

Accordingly, the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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