

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001104-MR

JOSE M. SABINO

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE GEORGE W. DAVIS, III, JUDGE
ACTION NOS. 12-CR-00214 AND 12-CR-00348

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, CHIEF JUDGE; JOHNSON¹ AND KRAMER, JUDGES.

KRAMER, JUDGE: Jose M. Sabino, proceeding *pro se*, appeals the Boyd Circuit Court's order denying his RCr² 11.42 motion to vacate his sentence. Sabino

¹ Judge Robert G. Johnson concurred in this opinion prior to the expiration of his term of office on November 20, 2018. Release of the opinion was delayed by administrative handling.

² Kentucky Rule of Criminal Procedure.

asserts that the circuit court violated his due process rights by denying him an evidentiary hearing to prove his claim of ineffective assistance of counsel. After a review of the record and applicable law, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Jose M. Sabino was arrested and indicted on: three counts of first-degree robbery; one count of operating a vehicle with a suspended or revoked operator's license; and one count of first-degree criminal possession of a forged instrument. Pursuant to the plea agreement, one of the charges of first-degree robbery was dismissed, and Sabino entered guilty pleas to the remaining charges. The circuit court sentenced him in accord with the plea agreement, which resulted in a ten-year sentence.

Sabino moved to vacate his sentences pursuant to RCr 11.42. This motion alleged that he received the ineffective assistance of trial counsel (the Hon. Jonathan Cochran) because counsel failed to investigate, prepare or present an intoxication defense on his behalf. Sabino claimed that he had informed Mr. Cochran that he had been a drug addict and an alcoholic when these crimes were committed. He contended that counsel refused to interview witnesses who would verify his intoxication during the events in question. Sabino also moved for an evidentiary hearing.

The circuit court denied Sabino's RCr 11.42 motion without holding an evidentiary hearing. The court reviewed the file and transcript and found that Sabino's guilty plea was entered knowingly and intelligently. The court also noted that "Mr. Cochran was not counsel for the Defendant at the time his plea was entered. Hon. Mark Hardy represented the Defendant at his plea." Consequently, the court found that the motion failed to state a valid basis for relief.

This appeal followed.

At the outset, we pause to note that it is unclear from the record why Sabino has asserted the claim of ineffective assistance of counsel only against Mr. Cochran and not Mr. Hardy. From our review of the record, it seems that both attorneys were involved throughout Sabino's case.³ However, it does appear that Mr. Cochran had more involvement in Sabino's representation than Mr. Hardy, with the exception that Mr. Hardy represented Sabino during his plea hearing. Nevertheless, we will review the claim of ineffective assistance of counsel regarding Mr. Cochran as he was specifically named in Sabino's brief.

³ The record indicates that Mr. Hardy's signature appears on the "Criminal Information and Waiver of Grand Jury Indictment Pursuant to RCr 6.04," which was filed June 14, 2012. However, the record also indicates that Mr. Cochran represented Sabino at all hearings, except for during his plea colloquy at which time Mr. Hardy represented him. Mr. Hardy's signature appears on the "Transcript of Proceedings," however, Mr. Cochran's signature appears on the "Commonwealth's Offer on a Plea of Guilty." Sabino made no ineffective assistance of counsel claim against Mr. Hardy.

STANDARD OF REVIEW

This Court has previously stated that,

[w]e review the trial court’s denial of an RCr 11.42 motion for an abuse of discretion. An RCr 11.42 motion is limited to the issues that were not and could not be raised on direct appeal. In order to prevail on an ineffective assistance of counsel claim, a movant must show that his counsel’s performance was deficient and that but for the deficiency, the outcome would have been different. Courts must also examine counsel’s conduct in light of professional norms based on a standard of reasonableness.

Teague v. Commonwealth, 428 S.W.3d 630, 633 (Ky. App. 2014) (internal citations omitted).

ANALYSIS

Sabino argues that the circuit court erred in denying his RCr 11.42 motion without holding an evidentiary hearing and allowing him to prove his claims of ineffective assistance of counsel.

We begin our analysis with determining whether Sabino’s guilty plea was voluntary. This Court has previously explained that, “[t]he 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. There must be an affirmative showing in the record that the plea was intelligently and voluntarily made.” *Sturgill v. Commonwealth*, 533 S.W.3d 204, 208 (Ky. App. 2017) (internal citation omitted). Sabino acknowledged during his

plea colloquy that: he understood he was waiving his right to a jury trial; he was satisfied with the advice of his counsel; and he had no further questions for his attorney before entering his guilty plea. The circuit court also noted in its order denying the RCr 11.42 motion that Sabino “made a knowing and intelligent waiver of his rights and pled guilty herein[.]” Also, Sabino signed the “Transcript of Proceedings,” as well as the “Motion to Enter Guilty Plea” acknowledging that he read and understood the questions asked during the plea colloquy. Nothing from the plea colloquy causes us to question the circuit court’s decision that Sabino’s plea was voluntarily and intelligently made.

Having found no indication from the record that Sabino’s plea was made involuntarily, we turn to counsel’s performance. The Supreme Court of Kentucky has previously stated that,

[i]n order to prove ineffective assistance of counsel where a guilty plea has been entered, the movant must establish:

(1) that counsel made errors so serious that counsel’s performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial.

[T]he trial court must evaluate whether errors by trial counsel significantly influenced the defendant’s decision

to plead guilty in a manner which gives the trial court reason to doubt the voluntariness and validity of the plea.

Commonwealth v. Elza, 284 S.W.3d 118, 120-21 (Ky. 2009) (internal quotation marks and citations omitted).

Sabino asserts that he informed Mr. Cochran he could not remember and was unaware of his actions when he committed the crimes because he was highly dependent on drugs and alcohol at the time. However, Sabino presents no evidence that he was prejudiced in any way by not presenting an intoxication defense. To the contrary, the record reflects that Sabino alleged in his voluntary statement to police that he committed these crimes under duress from a drug gang, not because he was intoxicated.

Further, the record shows no indication that a defense of intoxication would have succeeded in exonerating Sabino. Rather the record reflects that had Sabino not taken the plea agreement, he could have been facing substantially more years in prison. Therefore, Sabino has failed to make a showing that defense counsel's performance was deficient in any manner.

For the above-stated reasons, an evidentiary hearing was not required to be held. On appeal from the denial of an RCr 11.42 motion without an evidentiary hearing, "[o]ur review is confined to whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true,

would invalidate the conviction.” *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967).

Sabino knowingly entered a guilty plea in exchange for a lighter sentence and does not mention a defense of intoxication until he moved to vacate his sentence in the circuit court. He also does not cite to any facts supporting his assertion that had this defense been presented he would have received a lesser sentence, or possibly probation instead of a prison sentence. Consequently, the circuit court did not err in failing to hold an evidentiary hearing concerning Sabino’s claim.

CONCLUSION

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

ALL CONCUR.

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