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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001239-MR

WILLIAM J. MADDEN — APPELLANT

v.

APPEAL FROM ALLEN CIRCUIT COURT
HONORABLE JANET J. CROCKER, JUDGE
ACTION NO. 14-CR-00040

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

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

JONES, JUDGE: William J. Madden appeals the Allen Circuit Court's order denying his RCr[1] 11.42 motion without an evidentiary hearing. After careful review, we agree with the trial court that Madden's claim that he was prejudiced by trial counsel's allegedly inadequate pretrial investigation did not merit an evidentiary hearing. However, we conclude the record does not conclusively

[1] Kentucky Rules of Criminal Procedure.

disprove Madden's allegation that trial counsel did not inform him that his out-of-state conviction could be used to prove he was a first-degree persistent felony offender ("PFO"). Accordingly, we reverse and remand for an evidentiary hearing on this issue alone.

I. BACKGROUND

On or about March 14, 2014, Madden drove off in a truck belonging to Braddie Williams. Madden was arrested later that night, and credit cards belonging to Williams and Williams's son were discovered on his person. He was subsequently indicted for theft by unlawful taking, value over $10,000; theft by unlawful taking, value under $500; and for being a first-degree PFO. Prior to trial, the Commonwealth offered to dismiss the PFO charge and recommend a ten-year sentence in exchange for Madden pleading guilty to theft by unlawful taking, value over $10,000. Madden rejected the plea deal, and the case proceeded to trial.

At the subsequent jury trial, Williams testified that he purchased the truck in 2006 for $22,000 to $23,000. He described the truck as a 2004 full sized Chevrolet 2500 Duramax with a diesel engine. At the time of the theft, the truck had been driven approximately 120,000 miles and was in good condition with no motor or transmission problems. Williams testified he stayed informed on the truck's value by searching the internet and small sales papers, which he called "clip-its." Trial counsel objected to this testimony and stated the following during a bench conference:

> Just for the record, I just wanted to make my objection to him testifying about the value of the vehicle. The basis of my objection obviously is . . . it seems to me that he is basing this off of Clip-It magazines and there are so many different kinds of Chevrolets. There are some 2500s. I was looking on my phone just a few minutes ago during the break and I found some that were under $10,000 and that was Kelly Blue Book. I don't know what he is going to say the appraisal value is but I certainly don't feel comfortable with him giving appraisal value.

The Commonwealth responded that it was not seeking to elicit testimony regarding the appraised value of Williams's truck. Rather, it explained it was providing evidence that Williams was aware what similar trucks sold for. After the trial court overruled the objection, Williams testified that trucks with diesel engines depreciated at a slower rate than regular trucks. Williams concluded that, based on all the information he had, he would be willing to sell his truck for $17,000.

Trial counsel did not cross-examine Williams on the value of his truck, and the jury ultimately convicted Madden on both theft counts. Based on his prior felony conviction in King County, Washington, the jury also found Madden guilty of being a first-degree PFO. The trial court reduced the jury's recommended sentence of twenty years' imprisonment to twelve, and we affirmed his conviction on direct appeal. *Madden v. Commonwealth*, 2014-CA-002018-MR, 2015 WL 9264590 (Ky. App. Dec. 18, 2015).

Madden then moved to vacate his final judgment and sentence pursuant to RCr 11.42, raising several claims of ineffective assistance of counsel. Madden alleged, amongst other things, that his trial counsel failed to conduct an

adequate pretrial investigation concerning the value of Williams's truck. He also alleged trial counsel failed to inform him that his Washington felony conviction could be used to prove he was a first-degree PFO. In a thorough written order, the trial court addressed each claim and determined Madden's allegations either failed to state sufficient grounds for relief or were refuted by the record;[2] therefore, it denied the motion without an evidentiary hearing. This appeal followed.

On appeal, Madden argues his trial counsel's statements during the bench conference showed he failed to conduct an adequate pretrial investigation into the value of Williams's truck. Madden contends we must therefore reverse his conviction or, in the alternative, remand the matter for an evidentiary hearing to determine if trial counsel made a reasonable tactical decision not to independently investigate whether Williams's truck was worth less than $10,000. Madden also contends his allegation that trial counsel did not inform him that his out-of-state convictions could be used to prove he was a first-degree PFO was not refuted by the record and should be remanded for an evidentiary hearing.

II. STANDARD OF REVIEW

A motion to vacate pursuant to RCr 11.42 "shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds." An evidentiary hearing is required on the motion only if it "raises a material issue of fact that cannot be determined on

[2] Although Madden made several claims of ineffective assistance by trial and appellate counsel, only two claims were raised in his appellant brief. "As a general rule, assignments of error not argued in an appellant's brief are waived." *Cherry v. Augustus*, 245 S.W.3d 766, 780 (Ky. App. 2006).

the face of the record[.]" RCr 11.42(5). "Conclusionary allegations which are not supported with specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of discovery." *Hodge v. Commonwealth*, 116 S.W.3d 463, 468 (Ky. 2003), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

III. ANALYSIS

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). As explained in *Bowling v. Commonwealth*, 80 S.W.3d 405, 411-12 (Ky. 2002):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed.2d 674, 693 (1984). To show prejudice, the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is the probability sufficient to undermine the confidence in the outcome. *Id.* at 694, 104 S. Ct. at 2068, 80 L. Ed.2d at 695.

Appellate review of counsel's performance and any potential prejudice caused by counsel's performance is *de novo*. *Commonwealth v. McGorman*, 489 S.W.3d 731, 736 (Ky. 2016).

Defense counsel has a duty to make a reasonable pretrial investigation or to make a reasonable decision that a particular investigation is unnecessary. *Haight v. Commonwealth*, 41 S.W.3d 436, 446 (Ky. 2001), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). "A reasonable investigation is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources, but also with the benefit of hindsight, would conduct." *Id.* The investigation need only be reasonable under all the circumstances. *Id.* (citations omitted).

We do not doubt that trial counsel in this case had a duty to conduct a reasonable investigation concerning the value of Williams's truck or, at the very least, make a reasonable decision that an investigation was unnecessary under the circumstances. Proof that Williams's truck was worth less than $10,000 would have reduced the theft by unlawful taking charge from a Class C felony to a Class D felony. KRS 514.030(2)(d)-(e). However, when determining whether trial counsel fulfilled the duty to investigate, "it must be determined whether a reasonable investigation should have uncovered such mitigating evidence." *Hodge v. Commonwealth*, 68 S.W.3d 338, 344 (Ky. 2001) (quoting *Porter v. Singletary*, 14. F.3d 554, 557 (11th Cir. 1994)).

In this case, trial counsel possessed information that other Chevrolet

2500s were worth less than $10,000. However, this is not evidence that *Williams's* truck was worth less than $10,000. Madden has not alleged the existence of evidence that could have contravened Williams's testimony or proven that Williams's truck depreciated to less than $10,000. Instead, Madden merely speculates that because trial counsel possessed information that some Chevrolet 2500s were worth less than $10,000, a more thorough investigation would have produced evidence that Williams's truck was worth less than $10,000. "But . . . speculation falls short of the showing of prejudice required by *Strickland.*" *Commonwealth v. McKee*, 486 S.W.3d 861, 869 (Ky. 2016). Thus, Madden's allegation he was prejudiced by trial counsel's allegedly inadequate pretrial investigation was not supported by specific facts that would have entitled him to relief under RCr 11.42. The trial court did not err by denying this claim without an evidentiary hearing.

However, we conclude an evidentiary hearing is required on Madden's allegation that trial counsel failed to inform him that his out-of-state conviction could be used to prove he was a first-degree PFO. The Commonwealth does not dispute that this allegation, if true, is sufficient to demonstrate deficient performance and prejudice. *See Padilla v. Kentucky*, 559 U.S. 356, 370, 130 S. Ct. 1473, 1484, 176 L. Ed. 2d 284 (2010); *Lafler v. Cooper*, 566 U.S. 156, 164, 132 S. Ct. 1376, 1385, 182 L. Ed. 2d 398 (2012). Instead, it argues the trial court correctly found that statements made during a pretrial conference demonstrated Madden was aware that his out-of-state convictions could be used to prove he was

a first-degree PFO. Having carefully reviewed the recording of this pretrial conference, we must disagree.

At the pretrial conference, the Commonwealth indicated it was still awaiting out-of-state records that were relevant to sentencing but did not explicitly state what these records were or what they would be used to prove at trial. The trial court also engaged in a lengthy colloquy with Madden in which Madden stated his understanding that he could be sentenced to a maximum of twenty years if convicted of being a first-degree PFO and would be ineligible for parole until serving a minimum of ten years. Madden also testified that he reviewed a discovery packet the Commonwealth provided to trial counsel. However, this discovery packet is not contained in the record. Trial counsel also stated he discussed "at length" with Madden the PFO charge and "the felony indictments" but did not specify which felony indictments he was referring to.

Although the trial court went to great pains to prevent a collateral attack following a conviction, the pretrial conference does not conclusively prove or disprove Madden's allegation that he was not informed his Washington felony conviction could be used to prove his status as a first-degree PFO. An evidentiary hearing on an RCr 11.42 motion is required whenever a material issue of fact cannot be determined on the face of the record, no matter how incredible the allegation. *See Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2011). Accordingly, Madden is entitled to an evidentiary hearing on this issue.

IV. CONCLUSION

For the foregoing reasons, we affirm in part, vacate in part, and remand Madden's ineffective assistance of counsel claim to the Allen Circuit Court for an evidentiary hearing regarding his allegation that trial counsel did not inform him that his Washington conviction could be used to prove his status as a first-degree PFO.

J. LAMBERT, JUDGE, CONCURS.

JOHNSON, JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

JOHNSON, JUDGE, DISSENTING: I agree with the majority that Madden's claims concerning the value of Williams's truck do not rise to the level entitling him to relief under a RCr 11.42 motion. However, where I disagree with the majority is that Madden's claim that his counsel failed to adequately inform him of the consequences of his prior Washington state felony conviction being used to enhance his sentence based on the persistent felony offender ("PFO") statute. It is established law in this jurisdiction that if the record is sufficient to refute the claim of the appellant, then an evidentiary hearing is not necessary. *Harper v. Commonwealth*, 978 S.W.2d 311, 314 (Ky. 1998) (citing *Stanford v. Commonwealth*, 854 S.W.2d 742, 743 (Ky. 1993)).

Here, the record is clear that Madden was fully informed by his attorney of the consequences of being a PFO. At the outset of the pretrial conference the Commonwealth stated it was waiting for criminal records from out-

of-state for the penalty phase of the trial, and this statement gave notice to Madden that out-of-state convictions could be used against him in the penalty phase. The court asked if Madden understood that conviction of either felony count in his trial would allow the Commonwealth to present evidence of him being a PFO at the penalty phase. Madden answered that he understood. The court then asked Madden if he understood that if he was found guilty he could be imprisoned for up to twenty years, only being eligible for parole after ten years. Again, Madden answered that he understood. Further, Madden said he had a full opportunity to look over the evidence provided by the Commonwealth, and that he had a full opportunity to discuss his guilty plea with his attorney.

The statements by Madden, on the record during the pretrial conference, clearly indicated that he knew what the consequences of his being guilty would be concerning the possibility of enhancement. Madden was clearly put on notice of out-of-state evidence by the Commonwealth's statements in the pretrial conference. Due to the sufficiency of the record I would affirm the trial court.

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