

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000622-MR

ROMELLO RICE

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE KATHLEEN S. LAPE, JUDGE
ACTION NO. 12-CR-00236

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: JONES, KRAMER, AND MAZE, JUDGES.

MAZE, JUDGE: Romello Rice appeals the order of the Kenton Circuit Court denying without an evidentiary hearing his motion to set aside his conviction and sentence on the grounds he suffered ineffective assistance of counsel. After careful review, we hold that Rice's allegations against trial counsel, assumed true, do not warrant post-conviction relief. Hence, we affirm.

A Kenton County grand jury indicted Rice for murder and first-degree robbery. The Commonwealth alleged that Rice, along with Christopher Hill, murdered Brett Thornberry during an attempted robbery. Attorneys from the Department of Public Advocacy (DPA) were appointed to represent Rice. Hill was also appointed a public defender, but from a different DPA office than Rice's attorneys. The trial court did not require Rice to sign a waiver to dual representation, presumably because it believed separate DPA offices did not constitute the same law firm for conflict of interest purposes.

Trial counsel eventually informed Rice that Thornberry's family had provided the Commonwealth with a letter that Rice had allegedly written implicating himself in Thornberry's murder. Rice subsequently accepted the Commonwealth's plea offer to serve concurrent sentences of twenty years' imprisonment on the murder and robbery charges in exchange for testifying against his co-conspirators. Two days later, Hill pled guilty to murder and first-degree robbery and to being the actual shooter.

Rice subsequently moved to vacate his sentence under RCr¹ 11.42, alleging his guilty plea was rendered involuntary by trial counsel's ineffective assistance. Rice raised three grounds for ineffective assistance. First, he argued that trial counsel was ineffective for not moving to suppress the letter from

¹ Kentucky Rules of Criminal Procedure.

Thornberry's family. Second, Rice contended that trial counsel was burdened by a conflict of interest because Hill's attorneys were also employed by the DPA. Finally, Rice claimed that he accepted the Commonwealth's plea offer after trial counsel visited him in jail and informed him that Hill intended to accept a plea offer requiring Hill to testify that Rice was the "triggerman" in Thornberry's murder. Rice alleged he was subsequently reunited with Hill in prison, and Hill informed him that he never received a plea offer from the Commonwealth. The trial court denied the motion without an evidentiary hearing. This appeal follows.

Under RCr 11.42, "A prisoner in custody under sentence or a defendant on probation, parole or conditional discharge 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." RCr 11.42(1). An evidentiary hearing on the motion is required only if it "raises a material issue of fact that cannot be determined on the face of the record[.]" RCr 11.42(5).

"[T]o be entitled to relief from a guilty plea on the ground of ineffective assistance of counsel a defendant must show both that counsel provided deficient assistance and that he, the defendant, was prejudiced as a result."

Commonwealth v. Pridham, 394 S.W.3d 867, 875 (Ky. 2012) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)).

Counsel's performance and any potential deficiency caused by counsel's performance is reviewed *de novo*. *Wagner v. Commonwealth*, 483 S.W.3d 381, 383 (Ky. App. 2015).

I. Suppression Motion

A defendant claiming defense counsel was ineffective for failing to litigate a Fourth Amendment claim must prove the claim was meritorious and there was a reasonable probability that failing to file a motion to suppress caused actual prejudice. *Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S.Ct. 2574, 2583, 91 L.Ed.2d 305 (1986). Rice argues trial counsel should have moved to suppress the letter provided by Thornberry's family because he did not actually write the letter. This argument fails to raise a potentially meritorious Fourth Amendment claim. The protection against unlawful searches and seizures applies only to public officers. *Chapman v. Commonwealth*, 206 Ky. 439, 267 S.W. 181 (1924). "[E]vidence obtained by private individuals by search or observation has not been excluded under section ten of our Constitution and the fourth amendment to the Constitution of the United States." *Stone v. Commonwealth*, 418 S.W.2d 646, 650 (Ky. 1967). Thus, the Fourth Amendment did not provide grounds to suppress evidence voluntarily provided to the Commonwealth by Thornberry's family. Moreover, Rice's allegation that he did not write the letter only affects its weight as evidence, not its admissibility.

II. Conflict of Interest

Effective assistance of counsel requires representation by an attorney whose loyalty is not divided by conflicting interest. *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1979). Accordingly, attorneys in the same public defender's office may not represent multiple defendants accused of the same offense unless the trial court explains to the defendant the possible conflict of interest and the defendant waives in writing any objection to counsel's representation. RCr 8.30(1); *Kirkland v. Commonwealth*, 53 S.W.3d 71 (Ky. 2001). Failure to obtain a signed waiver to conflict-free counsel is not presumptively prejudicial. *Mitchell v. Commonwealth*, 323 S.W.3d 755, 760 (Ky. App. 2010). When a defendant pleads guilty, prejudice is presumed only if the attorney's potential conflict of interest materialized into an actual conflict of interest and the conflict adversely affected the voluntary nature of the defendant's guilty plea. *Id.* This requires that the movant show that the conflict actually affected counsel's performance when advising the movant to plead guilty. *Bartley v. Commonwealth*, 400 S.W.3d 714, 719 (Ky. 2013).

The Supreme Court has yet to resolve if different DPA offices constitute the same law firm for conflict of interest purposes. *Id.* at 719 n.5. It is a question that does not need to be resolved in this opinion. Even assuming trial counsel was burdened by an actual conflict in this case, Rice has failed to allege

facts showing the conflict adversely affected trial counsel's performance. Rice's RCr 11.42 motion is devoid of any allegation that his plea deal would have been better absent counsel's allegedly divided loyalty. Rice's trial counsel negotiated a bargain in which Rice received a reduced sentence in exchange for testifying against his co-conspirators. This was the worst possible outcome for his codefendants and led to Hill admitting he was the shooter. Because the benefits of Rice's plea deal all came at his codefendants' expense, we can discern no prejudice from trial counsel's employment with the DPA. Accordingly, this claim for ineffective assistance of counsel failed on its face and did not warrant an evidentiary hearing.

III. Trial Counsel's Alleged Misstatements

Rice's final claim for ineffective assistance is that trial counsel falsely informed him that Hill intended to testify that Rice was the "triggerman" despite knowing that Hill had no intention of negotiating a plea with the Commonwealth. Even if this allegation were true, we hold that it does not establish prejudice.

A movant establishes prejudice, in the guilty plea context, by demonstrating "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). This determination "should be made objectively, without regard for the idiosyncrasies of the particular

decisionmaker.” *Id.*, 474 U.S. at 60, 106 S.Ct. at 371 (quoting *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2068). The movant “must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.” *Padilla v. Kentucky*, 559 U.S. 356, 372, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010).

Ethical rules prohibited Hill’s trial counsel from informing Rice that Hill intended to accept a favorable plea deal at Rice’s expense before the Commonwealth made such an offer. SCR² 3.130(1.1; 1.6). Thus, the threat that Hill would agree to testify Rice was the most culpable party—the worst possible scenario for Rice—remained a distinct possibility. Moreover, Rice has not alleged either he or Hill had reasonable grounds to believe they would be acquitted of all charges at trial. Under these circumstances, it would not have been reasonable for Rice to reject the Commonwealth’s plea offer, hope Hill did not turn on him, and proceed to trial on the robbery and murder charges.

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

ALL CONCUR.

² Rules of the Supreme Court.

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