

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001164-MR

KEYON DACOLBI GRAY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. TRAVIS, JUDGE
ACTION NO. 12-CR-01503-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, KRAMER, AND LAMBERT, JUDGES.

DIXON, JUDGE: Keyon Dacolbi Gray, *pro se*, appeals from the Fayette Circuit Court's order denying his motion for postconviction relief pursuant to RCr 11.42 and denial of his request for an evidentiary hearing. Finding no error, we affirm.

On September 20, 2012, Gray was arrested in connection to an incident that occurred two days prior. An individual approached a customer leaving a convenience store, pointed a semi-automatic gun at the customer, and demanded that he give him all of his money. The customer proceeded to get in his

vehicle to leave, and the armed individual shot at the customer through the windshield, hitting him on the right side of his chest. The armed individual then fled the scene. There was also evidence that multiple individuals fled with the perpetrator.

Gray was arrested based on incriminating information given to law enforcement by Gray's co-defendant, Jaleel T. Robinson. At the time of his arrest, Gray was fifteen years of age. According to the Detention/Arraignment Hearing Checklist, Gray's mother was contacted minutes after his arrest.

On October 25, 2013, Gray entered a guilty plea to the charges of criminal attempt to commit first-degree robbery and criminal attempt to commit first-degree assault. On December 13, 2013, Gray was sentenced to five years for the robbery charge (three years to run consecutively and two years to run concurrently) and ten years for the assault charge, for a total of thirteen years' imprisonment, subject to resentencing upon reaching eighteen years of age, pursuant to KRS 640.030(2)(b). He was also ordered to pay restitution, which was owed jointly and severally by him and his co-defendant. Gray appeared in court on December 13, 2014, for resentencing. The same term of imprisonment was imposed.

On December 15, 2015, Gray moved to vacate, set aside, or alter the judgment pursuant to RCr 11.42. He asserted several grounds for a claim of

ineffective assistance of counsel: (1) counsel failed to investigate video footage, witness testimony, and whether Gray's confession was coerced; (2) counsel failed to raise certain defenses; (3) counsel failed to object to ordered restitution; and (4) counsel did not subject the case to an adversarial process. He also requested an evidentiary hearing on the issues raised. Postconviction counsel was appointed and submitted pleadings on the motion. The trial court denied Gray's RCr 11.42 motion and the request for an evidentiary hearing. This appeal followed.¹

At the outset, we point out that the Commonwealth has failed to comply with CR 76.12 in the submission of their responsive brief. Pursuant to CR 76.12(4)(d)(iii), briefs should contain a counterstatement of the case. The Commonwealth has included a statement of facts applicable to a different case. The charges involved here are not trafficking of methamphetamine. We opt to ignore the Commonwealth's error and proceed to review the case on its merits, but we urge the Commonwealth to be more attentive in the drafting of their responsive briefs.

On appeal, Gray claims the trial court improperly denied his motion for postconviction relief without an evidentiary hearing. He argues his counsel rendered ineffective assistance of counsel by failing to move to suppress his

¹ Though the Department of Public Advocacy was originally appointed in Gray's appeal to this Court, it withdrew from the case prior to briefing. He now proceeds *pro se*.

confession to the police based on KRS 610.200. This, he claims, makes his guilty plea involuntary.

On a motion for postconviction relief pursuant to RCr 11.42, “[t]he burden is upon the accused to establish convincingly that he was deprived of some substantial right which would justify . . . extraordinary relief[.]” *Dorton v.*

Commonwealth, 433 S.W.2d 117, 118 (Ky. 1968). A movant seeking to set aside his guilty plea must allege with particularity specific facts that 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). An evidentiary hearing on an RCr 11.42 motion is warranted only “if there is an issue of fact which cannot be determined on the face of the record.” *Stanford v.*

Commonwealth, 854 S.W.2d 742, 743-44 (Ky. 1993), *cert. denied*, 510 U.S. 1049, 114 S.Ct. 703, 126 L.Ed.2d 669 (1994); RCr 11.42(5). “The purpose of an evidentiary hearing is to resolve questions of fact not resolvable from resort to the

record alone. The hearing ensures a defendant the protections of due process in securing his right to effective assistance of trial counsel.” *Knuckles v.*

Commonwealth, 421 S.W.3d 399, 401 (Ky. App. 2014).

Typically, a claim of ineffective assistance of counsel is evaluated under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 672, 104 S.Ct. 2052, 2056, 80 L.Ed.2d 674 (1984), and adopted by Kentucky in *Gall v.*

Commonwealth, 702 S.W.2d 37 (Ky. 1985). This standard involves a two-prong test requiring the defendant to show: (1) deficient performance by counsel and (2) resulting prejudice to the defendant. *Id.* However, when a guilty plea is challenged based on ineffective assistance of counsel, a defendant is instead required to show:

(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.

Sparks v. Commonwealth, 721 S.W.2d 726, 727-28 (Ky. App. 1986).

Specifically, Gray argues that law enforcement, who knew he was a juvenile, violated KRS 610.200 when it brought him in for questioning without notifying his guardian and allowing his guardian to be present. He claims that this rendered his confession to the police involuntary because it was induced through coercive efforts. He further claims his counsel should have moved to suppress the confession as involuntary and his counsel's failure to investigate this issue led him to plead guilty. If his confession had been successfully suppressed, he states that he would not have pled guilty.

“KRS 610.200 requires a peace officer to immediately notify a child's parent that the child has been taken into custody, and to give the parent notice of

the specific charge and the reason for taking the child into custody.” *Murphy v. Commonwealth*, 50 S.W.3d 173, 184 (Ky. 2001). A technical violation of this statutory provision “does not automatically render a minor’s confession inadmissible where it is otherwise shown to have been given voluntarily.” *Taylor v. Commonwealth*, 276 S.W.3d 800, 806 (Ky. 2008) (citing *Murphy*, 50 S.W.3d at 184-85).

According to Gray’s brief, confirmed by a review of the record, he was arrested at 7:24 p.m. on September 20, 2012, and his mother was notified of his status the same day at 7:38 p.m. This complies with the requirements of KRS 610.200(1). There is no requirement that a juvenile’s parent or guardian must be present before law enforcement may question the juvenile, and Gray does not allege that he was not advised of his *Miranda*² rights prior to questioning.

Furthermore, Gray admitted to the offenses under oath when he pled guilty following a thorough plea colloquy in accordance with *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). He also stated unequivocally that there was nothing more he wished his counsel to do for his case and that he was satisfied with the assistance of his counsel. There is no suggestion from the plea colloquy that Gray was uncomfortable with entering a guilty plea or that it

² *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

was entered involuntarily. The record, then, directly refutes Gray's claim that his plea was involuntary and his counsel was ineffective.

Accordingly, we conclude Gray's claim of ineffective assistance of counsel is meritless. Gray has not alleged specific facts that would render his plea tainted by ineffective assistance of counsel, and the properly conducted plea colloquy directly refutes his claim that his counsel should have moved for suppression of his confession. There is also no indication that a motion to suppress would have succeeded as his claim that the confession was involuntary is based on bare, speculative allegations. "The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible." *Edmonds v. Commonwealth*, 189 S.W.3d 558, 569 (quoting *Blackledge v. Allison*, 431 U.S. 63, 74, 97 S.Ct. 1621, 1629, 52 L.Ed.2d 136 (1977)). Thus, Gray was not entitled to an evidentiary hearing, and he is not entitled to relief from this Court.

For the foregoing reasons, the Fayette Circuit Court order is
AFFIRMED.

ALL CONCUR.

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