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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000052-MR

GARY BARNETT — APPELLANT

v.

APPEAL FROM ROBERTSON CIRCUIT COURT
HONORABLE JAY DELANEY, JUDGE
ACTION NO. 12-CR-00003

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, GOODWINE, AND MAZE, JUDGES.

MAZE, JUDGE: Gary Barnett appeals the Robertson Circuit Court's order denying his RCr[1] 11.42 motion to vacate his judgment and sentence for alleged ineffective assistance of counsel. For the reasons stated below, we affirm.

[1] Kentucky Rules of Criminal Procedure.

I. Facts and Procedural History

In February 2012, Barnett was indicted on seventeen counts of terroristic threatening, one count of first-degree burglary, one count of first-degree wanton endangerment, and one count of murder. Barnett retained Gwen Pollard to represent him, and the Commonwealth served Pollard with discovery responses the next month. Barnett's jury trial was scheduled for September 26, 2012, with a final pre-trial conference scheduled for September 10, 2012.

On September 8, 2012, the Commonwealth provided Pollard with supplemental discovery and offered a plea agreement in which Barnett would plead guilty to first-degree manslaughter in return for a recommended sentence of eighteen years' imprisonment. According to Barnett, Pollard notified him of the Commonwealth's offer the next day and recommended that he take it because she was not prepared for trial. Barnett maintains that he informed Pollard that he would not accept the offer and terminated her representation. Nonetheless, Barnett appeared with Pollard in court the next day and pled guilty to first-degree manslaughter. Barnett's sentencing was initially scheduled for November 5, 2012, but Pollard obtained a continuance after notifying the trial court that she had been fired and Barnett intended to hire a new attorney.

Barnett, represented by new counsel, then moved to withdraw his guilty plea pursuant to RCr 8.10, contending his plea was not voluntary because

Pollard failed to inform him that reckless homicide was a lesser-included offense to murder. He also alleged that he pled guilty under duress because he believed he had no better option. The trial court held a hearing on the matter in which Barnett and Pollard testified. The trial court found that Barnett's guilty plea had been voluntary; therefore, it denied his motion to withdraw its guilty plea. In its written findings of fact, the trial court found that Pollard informed Barnett of the elements of his charges and possible lesser included offenses. It also found no evidence Barnett pled guilty under duress. A different panel of this court affirmed the trial court on appeal, holding that the trial court's factual findings were supported by substantial evidence. *Barnett v. Commonwealth*, 2012-CA-002172-MR, 2013 WL 6158346 (Ky. App. Nov. 22, 2013).

Two years later, Barnett moved to vacate his conviction pursuant to RCr 11.42 on the basis of ineffective assistance of counsel. Barnett's motion alleged that Pollard failed to independently investigate the case, review discovery with her client, or prepare for a possible trial. In support of this allegation, Barnett alleged that Pollard did not visit him in prison until she received the Commonwealth's plea offer and failed to inform him of the supplemental discovery material she received on September 8, 2012. The trial court held an evidentiary hearing on the matter in which Barnett testified to the above facts. Barnett alleged he only pled guilty because he believed he was stuck with an

attorney who was not prepared for trial and would receive a life sentence as a result. When asked on cross-examination how a more thorough investigation would have proven his innocence, Barnett contended it would have shown "it was self-defense. It wasn't murder." Barnett did not elaborate how the known evidence or a more thorough independent investigation could have supported a self-defense strategy. He conceded on cross-examination that he was not aware of any evidence unknown to Pollard that would have assisted his defense at trial.

Pollard testified that she reviewed all of the discovery initially tendered by the Commonwealth and that she visited Barnett on four occasions before receiving the Commonwealth's final plea offer. She alleged that the evidence within the Commonwealth's supplemental discovery was already known to her and would not have improved the defense's case. Pollard also testified she was prepared for a trial, but believed it was in Barnett's best interest to accept a plea deal. Pollard alleged that she did not receive any indication Barnett was dissatisfied with her representation until after he pled guilty, which she attributed to other inmates telling Barnett that his plea agreement was not favorable.

The trial court took the matter under submission and entered written findings of fact and conclusions of law denying Barnett's RCr 11.42 motion. The trial court found that Barnett had failed to allege facts that would have supported a self-defense argument or could have convinced a reasonable jury to convict on a

lesser-included offense to murder; therefore, it concluded Barnett had failed to show that it would have been rational to reject the Commonwealth's plea offer and proceed to trial. This appeal follows.

II. Analysis

a. *Law-of-the-Case Doctrine*

The Commonwealth argues that Barnett's appeal of his motion to withdraw his guilty plea precludes this court from considering the merits of his RCr 11.42 motion under the law-of-the-case doctrine. We disagree. "'Law of the case' refers to a handful of related rules giving substance to the general principle that a court addressing later phases of a lawsuit should not reopen questions decided by that court or by a higher court during earlier phases of the litigation." *Brown v. Commonwealth*, 313 S.W.3d 577, 610 (Ky. 2010). When multiple appeals occur during litigation, issues decided in earlier appeals should not be revisited. *Id.* The law-of-the case doctrine applies only to matters the appellate court decided on the merits. *Id.* However, "an extension of the core law-of-the-case doctrine is the rule that precludes an appellate court from reviewing not just prior appellate rulings, but decisions of the trial court which could have been but were not challenged in a prior appeal." *Id.*

Barnett's motion to withdraw his guilty plea resembled an ineffective of counsel claim because he alleged he was not advised of possible lesser-included

offenses. However, neither the trial court nor this Court reviewed the motion under the standard applied to ineffective assistance of counsel claims. The law-of-the case doctrine might preclude Barnett from arguing his plea was involuntary or that he was not fully aware of the law before pleading guilty. But that is not the argument made in his RCr 11.42 motion. In that motion, he argued that his decision to plead guilty in lieu of trial was prejudiced by trial counsel's constitutionally deficient pre-trial investigation. This issue was not raised before the trial court in Barnett's motion to withdraw his plea and could not have been challenged on appeal. We will therefore consider Barnett's RCr 11.42 motion on the merits.

b. *Ineffective Assistance of Counsel*

RCr 11.42 motions alleging 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); *accord Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985).

> A "deficient performance" contains errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Second, the appellant must show that counsel's deficient performance prejudiced his defense at trial. "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." An appellant must satisfy both elements of the Strickland test in order to merit relief.

Commonwealth v. McGorman, 489 S.W.3d 731, 736 (Ky. 2016) (quoting *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064). A movant establishes prejudice in 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). 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). "On appeal, the reviewing court looks *de novo* at counsel's performance and any potential deficiency caused by counsel's performance." *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008).

After carefully reviewing Barnett's filings before the trial court, his appellate brief, and the transcript from his RCr 11.42 hearing, we conclude he has failed to satisfy the prejudice prong of *Strickland*. Barnett conceded to killing the victim at the hearing but has not explained what evidence was available to support a self-defense strategy or convince a reasonable jury to convict on a lesser-included offense to murder. Nor has he alleged the existence of mitigating evidence that would have been beneficial during the penalty phase of a trial. A conviction for murder would have carried a sentence of twenty years to life

imprisonment. KRS[2] 532.020(2); KRS 532.030(1). Under the circumstances of this case, it would not have been objectively reasonable for Barnett to reject the Commonwealth's offer of pleading guilty to first-degree manslaughter in exchange for a sentence of eighteen years' imprisonment.

III. Conclusion

The order of the Robertson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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[2] Kentucky Revised Statutes.