RENDERED: NOVEMBER 15, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001303-MR

CORNELIUS COCHRUM — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 13-CR-002397

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, JONES, AND L. THOMPSON, JUDGES.

COMBS, JUDGE: Appellant, Cornelius Cochrum (Cochrum), *pro se*, appeals from the denial of his motion to vacate his judgment of conviction and sentence pursuant to RCr[1] 11.42. Finding no error after our review, we affirm.

[1] Kentucky Rules of Criminal Procedure.

On June 1, 2013, Donald and Janet Brinkman were visiting some tourist sites in Louisville, Kentucky. After they returned to their car, Cochrum jumped into the car, held a knife to Janet's throat, grabbed her purse, which contained checks among other things, and fled. One of the stolen checks was deposited by an individual named David Taylor. In a police interview, Taylor recounted that he had received the check from Cochrum. Another individual, William D. Jones, was identified by a paint store employee as having written a check on the Brinkmans' account to Sherwin Williams. Janet Brinkman identified Cochrum from a photo pack and later positively identified him in the courtroom at trial.

A jury convicted Cochrum of two counts of Robbery in the First Degree. After the jury returned its verdict, Cochrum entered a plea of guilty to being a Persistent Felony Offender (PFO) in the First Degree. He agreed to a sentence of twenty (20) years and waived his right to an appeal. On August 27, 2015, the trial court entered a judgment of conviction and sentenced Cochrum to a total sentence of twenty (20) years per the terms of his plea agreement.

On August 23, 2016, Cochrum filed a motion to vacate and set aside his sentence pursuant to RCr 11.42, claiming ineffectiveness on the part of his counsel, Mr. Franklin Jewell. Cochrum also requested an evidentiary hearing and that the court appoint counsel "for the purpose of 'supplementing' these pleadings,

and representing the Movant during any hearings held on this matter." Record on Appeal (ROA), at p. 141.

By an opinion and order entered on July 10, 2018, the trial court denied Cochrum's motion without an evidentiary hearing, reciting as follows:

> The Defendant raises three issues by his RCr 11.42 motion: 1) trial counsel failed to elicit that a witness was charged with criminal possession of a forged instrument and that the Commonwealth dismissed the charges prior to trial; 2) the victim identified an alternative perpetrator; and 3) the foregoing amounted to cumulative error. The Defendant's claims are refuted by the record. The witness was questioned about the criminal possession charge by the prosecution and trial counsel. During his testimony, the witness indicated the charge was dismissed. The defendant's claim that the victim identified an alternative perpetrator is based on an email from the prosecutor to trial counsel. In the email, the prosecutor says the witness said that another individual was responsible for the crime and she did not understand why the Defendant was on trial. The prosecutor also opines that the witness was confusing the matter with a matter that was pending before the District Court. The court finds the email is hearsay and would have been inadmissible if offered at trial. Notwithstanding the inadmissibility of the email, the witness previously identified the Defendant in a photo pack and made a positive in-court identification of the Defendant at trial. As the above did not constitute error the claim of cumulative error fails. The Defendant's claims are without merit and will be denied.

Cochrum appeals from that order and raises five issues on appeal: (1) that counsel was ineffective when he failed to present an email which was withheld to impeach the victim; (2) that counsel was ineffective when he failed to file a

motion to exclude Taylor's statement; (3) that the trial court erred in denying Cochrum's motion for an evidentiary hearing; (4) that the trial court erred in finding that Cochrum was not entitled to a free portion of the trial transcript; and (5) that the trial court erred in finding that Cochrum was not entitled to appointment of counsel to supplement his pleadings.

> *Strickland* [*v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)] recites the mandates of the Sixth Amendment to the United States Constitution of the right of effective assistance of counsel for all defendants. The underlying question to be answered is whether trial counsel's conduct has so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. The Kentucky Supreme Court has adopted *Strickland* in *Gall v. Commonwealth*, Ky., 702 S.W.2d 37 (1985).
>
> An appellant who asserts an ineffectiveness claim must prove to the satisfaction of the trial court that the performance of the trial counsel was deficient and, then, that that deficiency resulted in actual prejudice so as to deprive the appellant of a fair trial. If trial counsel's performance was determined to be deficient, but it appears the end result would have been the same, the appellant is not entitled to relief under RCr 11.42.
>
> Prejudice is defined in *Strickland* as proof by the defendant that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different.
>
> The trial court is permitted to examine the question of prejudice *before* it determines whether there have been errors in counsel's performance. In making its decision on *actual* prejudice, the trial court obviously may and

> should consider the totality of the evidence presented to the trier of fact. If this may be accomplished from a review of the record the defendant is not entitled to an evidentiary hearing.

Brewster v. Commonwealth, 723 S.W.2d 863, 864-65 (Ky. App. 1986).

Brown v. Commonwealth, 253 S.W.3d 490, 500 (Ky. 2008), provides that "[i]n appealing from the trial court's grant or denial of relief based on ineffective assistance of counsel the appealing party has the burden of showing that the trial court committed an error in reaching its decision."

Cochrum first argues that counsel was ineffective when he failed to present an email to impeach the victim during the trial. Cochrum contends that the email which the prosecutor sent to defense counsel advised that the victim had identified "an alternative perpetrator" as the assailant. However, that email[2] further reflects that the prosecutor stated as follows:

> As I said on the call, I believe [the victim] is confused because she mentioned a subpoena she received regarding a William David Jones for a date in December 2013 . . . I have not seen this subpoena, as we were talking on the phone, but I believe this subpoena likely is related to the district court case involving Jones. I believe Jones was charged with possessing a forged instrument for having the checks taking [*sic*] from Ms. Brinkman.

[2] Attachment "A" to Cochrum's Brief.

The trial court found that the record refuted Cochrum's claim and that the email was hearsay which would have been inadmissible if offered at trial. The court also found that the witness had previously identified Cochrum in a photo pack and again positively identified him in court at trial. We agree that Cochrum has failed to satisfy either prong of *Strickland* on this issue.

Cochrum also claimed that defense counsel was ineffective because he failed to file a motion to exclude Taylor's "self-serving out of court hearsay unreliable statement" (that Cochrum gave him stolen checks). We agree with the trial court that the record refuted this claim because the witness was questioned about the criminal possession charge at trial and indicated that it had been dismissed.

Next, Cochrum argues that the trial court erred in denying his motion for an evidentiary hearing. However, no hearing is required where -- as here -- the movant's claims are refuted by the record. *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986). Our determination also disposes of Cochrum's argument that the trial court erred in determining that he was not entitled to counsel to supplement his pleadings. In *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001), our Supreme Court held that "[i]f an evidentiary hearing is not required, counsel need not be appointed, because appointed counsel would [be] confined to the record." *Id.* at 453 (citation and internal quotation marks omitted);

Hopewell v. Commonwealth, 687 S.W.2d 153, 154 (Ky. App. 1985) (holding that hearings and appointments of counsel are not necessary where the record refutes the movant's allegations).

Cochrum's remaining argument is that the trial court erred in denying his motion to furnish a free portion of the trial transcript. Filed on November 7, 2016, that motion requested that the court enter an order directing the clerk to forward a written copy of the portions of the trial transcript specified therein. The tendered order also reflected that Cochrum had requested a written copy. At the bottom of the tendered order is a handwritten order entered November 23, 2016, [3] stating as follows: "Denied at this time. Ct. will re-visit upon filing of CW's [Commonwealth's] response."

The Commonwealth responded: that it does not appear that Cochrum submitted a renewed request after the Commonwealth filed its response; that, regardless, Cochrum was not entitled to a free ***written*** copy; that Cochrum apparently had access to the video record because it was referenced in his reply and appellate brief; and that if there were any error, it was harmless under RCr 9.24. The Commonwealth's points are well taken.

[3] Attachment "F" to Cochrum's Brief.

Another panel of this Court explained in *Walton v. Commonwealth*, No. 2007-CA-002078-MR, 2008 WL 5264340, at *1 (Ky. App. Dec. 19, 2008), as follows:

> It is well-established that the Equal Protection Clause of the United States Constitution and Kentucky Constitution requires an indigent criminal defendant be provided a free copy of the circuit court proceeding if he has filed a postconviction motion establishing a valid basis for relief. *Jones v. Breslin*, 385 S.W.2d 71 (Ky. 1964); *Gilliam v. Com.*, 652 S.W.2d 856 (Ky. 1983). . . . Simply put, an indigent criminal defendant is entitled to a copy of the circuit court record at the Commonwealth's expense if he has filed a postconviction motion asserting valid grounds for relief.

In the case before us, Cochrum has failed to assert valid grounds for relief in his RCr 11.42 motion. Accordingly, we find no error.

We affirm the opinion and order of the Jefferson Circuit Court entered on July 10, 2018.

ALL CONCUR.

BRIEF FOR APPELLANT:

Cornelius Cochrum, *Pro Se*
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky