

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001502-MR

BRIAN ANTHONY DAVIS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 16-CR-00785

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

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

COMBS, JUDGE: Appellant, Brian Anthony Davis (Davis), *pro se*, appeals from an opinion and order of the Fayette Circuit Court denying his RCr¹11.42 motion to vacate, set aside, or correct judgment. Finding no error, we affirm.

¹ Kentucky Rules of Criminal Procedure.

We limit our discussion of the record to the issues on appeal. The opinion of the trial court entered on September 24, 2018, provides a summary of the underlying relevant facts:

Davis was charged with and indicted on eight (8) counts of Trafficking in Controlled Substance First Degree Greater than Two Grams Heroin. Kentucky State Police Officers used confidential informant to purchase drugs from Davis, and a total of 133.225 grams of heroin was recovered from him. Each count carried a penalty of five (5) to ten (10) years, with a statutory cap of twenty (20) years when sentences are added consecutively. Davis was represented by Jerry Wright (“Wright”). On November 28, 2016, there was a judgment for a plea of guilty for the maximum sentence of twenty (20) years. On February 24, 2017, Davis was sentenced to twenty (20) years. Davis filed a Motion . . . pursuant to RCr 11.42 on March 3, 2018, claiming the assistance he received from his attorney was ineffective. The Commonwealth filed a Response on June 12, 2018.

On September 24, 2018, the trial court entered an opinion and order denying Davis’s motion without an evidentiary hearing. The court found that Davis had pled guilty to all charges willingly and voluntarily and that he was also aware he waived his constitutional rights to an appeal by accepting the plea. The court explained that the video record established as follows:

Davis stated under oath that he understood all possible defenses in his case and was satisfied with his representation. Davis was also asked if he had any complaints about his attorney to which he responded “no.” Davis swore under oath that he understood all of his rights and no one had pressured him to enter this plea. Davis was warned that he may receive up to the

maximum amount of twenty (20) years by entering this plea. Davis agreed that he understood the sentencing range. He was asked if he still wanted to continue with the guilty plea to which he responded “yes.” Davis also stated he was “guilty of selling heroin eight times.” Davis was asked if he had taken any drugs that would affect his ability to understand the proceeding [sic] questions. Davis stated he was [sic] not and answered the questions in an articulate manner. The record alone defeats any allegation that Davis’ guilty plea was not knowingly, voluntarily or willingly made.

(Opinion and Order, at pp. 3-4, citations to record omitted).

On appeal, Davis contends that he received ineffective assistance of counsel and that he was denied due process of law as guaranteed under §§ 2, 7, 10, and 11 of the Kentucky Constitution and the 4th, 5th, 6th, and 14th Amendments of the United States Constitution when defense counsel: (1) coerced him into accepting a plea agreement; (2) failed to investigate or prepare any defense for trial; (3) failed to file meritorious pretrial motions; (4) failed to challenge for preservation and appellate review trial court errors and abuse of discretion; (5) failed to make objection or have noted for the purpose of preserving on appeal several issues; and (6) that the cumulative effect of each of these alleged errors deprived Davis of his constitutional right to due process of law and effective assistance of counsel as guaranteed under §§ 2, 7, 10, and 11 of the Kentucky Constitution and the 4th, 5th, 6th, and 14th Amendments of the United States Constitution.

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).

In *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008), our Supreme Court explained that:

[E]ven though, [sic] both parts of the *Strickland* test for ineffective assistance of counsel involve mixed questions of law and fact, the reviewing court must defer to the determination of facts and credibility made by the trial court. *McQueen v. Commonwealth*, 721 S.W.2d 694, 698 (Ky. 1986). Ultimately however, if the findings of the trial judge are clearly erroneous, the reviewing court may set aside those fact determinations. Ky. CR 52.01 (“[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness.”) The test for a clearly erroneous determination is whether that determination is supported by substantial evidence. . . .

In appealing from the trial court’s grant or denial of relief based on ineffective assistance of counsel [sic] the appealing party has the burden of showing that the trial court committed an error in reaching its decision.

Davis’s first argument is that he received ineffective assistance of counsel because Wright coerced him into accepting a plea agreement and that, therefore, his guilty plea was not knowingly, intelligently or voluntarily made. The argument is wholly conclusory and fails to persuade us that the trial court committed an error in reaching its decision. “Solemn declarations in open court carry a strong presumption of verity. 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 (Ky. 2006) (emphasis added) (quoting *Blackledge v. Allison*, 431 U.S. 63, 74, 97 S. Ct. 1621, 1629, 52 L. Ed. 2d 136

(1977)). We agree with the Commonwealth that the record refutes Davis's assertion that his plea was coerced.

We address the next two arguments together. Davis's second argument is that defense counsel "failed to make any substantial investigation into the case beyond cursory review of documents and statements provided by the Commonwealth, made no preparation for a trial; and prepared no defense, concentrating, rather on convincing Appellant to accept a guilty plea." His third argument is that defense counsel "failed to file meritorious pre-trial motions." Other than citation to authority, that synopsis is the sum total of those arguments on appeal. The trial court found that "Davis stated under oath that he understood all possible defenses in his case and was satisfied with his representation. Davis was also asked if he had any complaints about his attorney to which he responded 'no.'" Davis has failed to demonstrate that the trial court committed any error in denying his RCr 11.42 motion.

For his fourth argument, Davis contends that defense counsel failed to challenge for preservation for appellate review alleged trial court errors and abuse of discretion in that he "failed to object to the Court's statements during [the] sentencing hearing that indicated a failure to properly limit the scope of its considerations when sentencing Appellant." The Commonwealth submits that the trial court was well within its discretion to impose the maximum sentence of

twenty years and that given the nature and circumstances of his crime, Davis has not demonstrated that his outcome at sentencing would have been any different. We agree. We conclude that Davis has failed to meet the prejudice prong under *Strickland*; therefore, we need not address the performance prong because he cannot prevail on this issue. *Commonwealth v. Pelfrey*, 998 S.W.2d 460, 463 (Ky. 1999) (Unless movant makes both showings under *Strickland*, he cannot prevail in his attack). For the same reason, we reject Davis’s fifth argument that defense counsel was ineffective for failing to appeal the sentencing based upon objectionable statements by the trial court (or by failing to preserve Davis’s right to do so).

We also reject Davis’s final argument based upon cumulative error, “the doctrine under which multiple errors, although harmless individually, may be deemed reversible if their cumulative effect is to render the trial fundamentally unfair.” *Brown v. Commonwealth*, 313 S.W.3d 577, 631 (Ky. 2010). In *Brown*, “none of the errors individually raised any real question of prejudice, [and the Court] declined to hold that the absence of prejudice plus the absence of prejudice somehow adds up to prejudice.” *Id.*

We AFFIRM.

ALL CONCUR.

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