

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000510-MR

SEAN E. THOMAS

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFERY HINES, JUDGE
INDICTMENT NO. 02-CR-00277

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BARBER, COMBS AND KNOPF, JUDGES.

BARBER, JUDGE: Sean E. Thomas ("Thomas") appeals from an order of the McCracken Circuit Court denying his motion to vacate his sentence pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. We affirm.

On December 10, 1999, the McCracken County Grand Jury returned an indictment against Thomas charging him with first-degree robbery. This indictment stemmed from events occurring on August 5, 1999 wherein Thomas entered the Gold Galleria in

Paducah, Kentucky, pointed a gun at the store's owner and stole cash, a gun and other merchandise from the business. Several witnesses placed Thomas at the Gold Galleria on the day of the robbery. The store's owner identified Thomas as the robber during an investigation undertaken by the Paducah Police Department. Moreover, Thomas made incriminating statements during taped conversations with his girlfriend. Finally, Thomas admitted to Desmond Lee that he committed this robbery. On February 18, 2000, the grand jury also indicted Thomas for being a persistent felony offender (PFO) in the second degree.

This matter proceeded to trial on October 2, 2000. At the end of the three-day trial, the jury found Thomas guilty of first-degree robbery. Before the commencement of the trial's sentencing phase, Thomas reached a plea agreement with the Commonwealth. In this plea agreement, Thomas agreed to enter a plea of guilty to the robbery charge in exchange for the Commonwealth's recommendation that he receive a total sentence of twenty (20) years imprisonment for the robbery and persistent felony offender charges.

After reaching this plea agreement with the Commonwealth, Thomas changed his plea from not guilty to guilty. After being placed under oath, Thomas confirmed that he read the plea agreement forms, discussed those forms with his two trial attorneys, Raymond McGee and Mike Ruschell, and declared that he

understood and signed those forms. Thomas further indicated that he was satisfied with the terms of the plea agreement after conferring with his trial attorneys and considering this matter himself as co-counsel¹. At this point, Thomas admitted that he did commit first-degree robbery on August 5, 1999 at the Gold Galleria and that he was a second-degree persistent felony offender.

During the plea hearing, defense counsel Ruschell requested that the trial court inquire as to whether Thomas believed that both trial attorneys and the investigator assisting with Thomas's defense had done everything that Thomas asked of them. Thomas informed the trial court that his attorneys had done a "great job" and that he had no complaints concerning his representation. At this point, the trial court indicated that it had known Thomas for a very long time and that Thomas was extremely familiar with Kentucky's criminal justice system². From this personal knowledge, the trial court found that Thomas fully understood the consequences of his guilty plea because he was fully aware of the potential penalties to which he would be subjected if he proceeded to the sentencing phase of

¹ The trial court granted Thomas's motion to serve as co-counsel in these proceedings despite his lack of legal training.

² The trial judge remarked that, despite Thomas's lack of legal training, the pro se pleadings he filed in this matter were of better quality than those produced by legal aides who assist inmates incarcerated at Kentucky's correctional institutions.

the trial. On December 15, 2000, the trial court sentenced Thomas in accordance with the plea agreement.

On January 15, 2002, Thomas filed his RCr 11.42 motion, alleging that his trial attorneys provided ineffective assistance during trial. Specifically, Thomas alleged that his trial attorneys failed to demonstrate that the taped conversations with his girlfriend had been tampered with, failed to request that the jury be polled, intimidated him into accepting the plea agreement and refused to move for the disqualification of the trial judge. Additionally, Thomas alleged that one of his trial attorneys had a prejudicial conflict of interest because that attorney represented the victim's son for an unrelated criminal charge during the course of Thomas's representation. The trial court denied Thomas's motion for RCr 11.42 relief without a hearing on February 8, 2002. This appeal followed.

On appeal, Thomas presents only one argument for our review. Thomas argues that the trial court committed reversible error in denying his motion for RCr 11.42 relief without holding an evidentiary hearing. Specifically, Thomas asserts that one of his trial attorneys provided inadequate assistance by representing the robbery victim's son during the course of Thomas's criminal action. We disagree.

The standard for addressing a claim of ineffective assistance of counsel is set out in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to be ineffective, counsel's performance must be deficient and below the objective standard of reasonableness and prejudicial so as to deprive a defendant of a fair trial and reasonable result. Id. "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would have probably won." United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992). The critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory. Foley v. Commonwealth, Ky., 17 S.W.3d 878, 884 (2000).

In considering ineffective assistance, the reviewing court must focus on the totality of evidence before the lower court and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). Moreover, the reviewing court must be mindful that RCr 11.42 exists to provide a forum for known grievances, not to provide an opportunity to research for grievances. Foley, 17 S.W.3d at 884; Gilliam v.

Commonwealth, Ky., 652 S.W.2d 856, 858 (1983). In an RCr 11.42 proceeding, the movant has the burden to establish convincingly that he was deprived of some substantial right that would justify the extraordinary relief afforded by the post-conviction proceeding. Foley, 17 S.W.3d at 884.

In this matter before us, Thomas alleges that one of his trial attorneys acted ineffectively, but has offered nothing more than suppositions and speculation in support of his claim. RCr 11.42 requires not only a statement addressing the specific grounds for the claim, but a citation to the facts on which the movant relies in support of the claim. See RCr 11.42(2). Here, Thomas merely speculates that he was prejudiced because one of his trial attorneys represented the victim's son for an unrelated criminal offense sometime during the course of Thomas's criminal proceedings. Unfortunately for Thomas, he failed to identify which of his trial attorneys³ represented or provided legal advice to the victim's son. Moreover, while asserting that the unnamed trial attorney informed the victim's son that Thomas was guilty and that he would not put forth his best efforts in representing Thomas, this appellant simply failed to provide any concrete facts supporting this claim. In fact, nowhere in his RCr 11.42 motion or in his brief to this Court does Thomas specify how he learned of his unnamed

³ McGee, Ruschell or even Thomas himself.

attorney's allegedly improper conduct. Thomas not only failed to identify which attorney committed the acts at issue herein, he failed to specifically identify the victim's son, the source of his information, how he came to possess the facts supporting his allegations and the exact time in which he learned of the facts supporting his allegations. In light of these bare assertions, it appears to us that Thomas simply failed to plead his claim with "sufficient specificity to generate a basis for relief." Lucas v. Commonwealth, Ky., 465 S.W.2d 267, 268 (1971). Accordingly, the trial court properly denied an evidentiary hearing because RCr 11.42 should not serve as a fishing expedition or a discovery deposition. Gilliam, supra. Since Thomas failed to adequately assert facts and grounds in support of his assertions, the trial court was entitled to summarily dismiss his motion without holding an evidentiary hearing. Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 452 (2001). Consequently, we find no error.

For the aforementioned reasons, the judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

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