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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000473-MR

KEITH SMITH

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 98-CR-000889

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: EMBERTON, CHIEF JUDGE; SCHRODER AND TACKETT, JUDGES.
SCHRODER, JUDGE: Keith Smith (Keith) appeals from a January 28, 2003, opinion and order of the Jefferson Circuit Court that denied Keith's motion to alter, amend or vacate his conviction, pursuant to RCr 11.42. Keith argues that the Jefferson Circuit Court should not have accepted his guilty plea regarding criminal facilitation to murder, criminal facilitation to criminal syndication, and criminal facilitation to trafficking

in a controlled substance in the first degree because of insufficient evidence. He also contends that the trial court denied him his constitutionally protected due process rights when it denied his RCr 11.42 motion without granting him an evidentiary hearing because the record does not conclusively refute his allegations of ineffective assistance of counsel. Finding that the trial court did not err, this Court affirms.

In 1998, both Andre Smith (Smith) and Cecil "CJ" Turner (CJ) were drug dealers in Louisville, Kentucky. Apparently, CJ regularly sold large quantities of cocaine to Smith. However, CJ had provided poor quality cocaine to Smith on several occasions. Smith felt slighted by this and, in apparent revenge, devised a plan to kill CJ and steal cocaine from him. To assist him, Smith recruited his roommate, Curtis Coleman (Coleman). Subsequently, either Smith or Coleman recruited Marcellus Mason (Mason). On April 4, 1998, CJ went to Smith's apartment to traffic cocaine. When he arrived, he found Smith, Coleman, and an unknown woman there. Shortly after CJ's arrival, Mason showed up as well. At that time, CJ did not have the cocaine with him. So, he and Smith went, in CJ's vehicle, to the home of CJ's mother to retrieve it.

After they left, Coleman told Mason that Smith would pay him a kilogram of the cocaine if he shot and killed CJ. However, Mason did not have a gun, so Coleman contacted yet

another individual, Kellenthia Jones (Jones), who brought Mason a .44 caliber revolver. Jones then promptly left. However, Mason did not like the revolver and wished to use a semi-automatic pistol to kill CJ. Mason then called Keith Fields (Fields), who brought Mason a semi-automatic pistol. Mason asked Fields to help him kill CJ in exchange for half of the promised kilogram of cocaine. Fields agreed.

While CJ and Smith were retrieving the cocaine, CJ contacted his younger brother, Chad Turner (Chad), and asked Chad to follow him and Smith back to Smith's apartment in order to watch CJ's back. This development threatened to ruin Smith's plan. Therefore, on the return trip, Smith asked CJ to make a brief detour. Unbeknownst to CJ and Chad, Smith used this detour to find the appellant, Keith, and his younger step-brother, Michael Rushin (Rushin). Smith asked Keith and Rushin to help him kill someone. Keith and Rushin agreed and left for Smith's apartment in Keith's rust-colored Chevy Suburban. The brothers went ahead of CJ and Smith, while Chad followed CJ and Smith.

Keith and Rushin arrived first and entered the apartment building's basement garage. CJ and Smith then followed the brothers into the garage. Chad never entered because an unknown individual immediately closed the garage's

door after CJ and Smith had entered. Chad waited outside in a red vehicle while the others went up to Smith's apartment.

Keith and Rushin entered the apartment first. CJ, not Smith, then entered the apartment. Upon seeing CJ, Fields and Mason left and met Smith in the stairwell. Smith told them to find an individual in a red vehicle, meaning Chad, and kill him. The two found Chad and persuaded him that CJ had sent them so Chad could take them to get the money for the drug deal. Fields and Mason got into Chad's vehicle and directed him to a parking lot behind the Crums Lane Elementary School. There, Fields shot Chad twice, killing him.

Back at Smith's apartment, Smith took CJ into his bedroom. After a few minutes, Smith yelled for Keith and Rushin and told them to "take CJ out", meaning to kill him. CJ pled for his life and in desperation tried to flee. A struggle ensued. According to CJ, he scuffled with both Smith and Keith. Keith, however, denied this, although he did admit that he struck CJ with a pistol. According to the record, the struggle spilled into the kitchen where Smith found a knife and stabbed CJ multiple times. CJ was forced out of the apartment, down the stairs and into the garage. Once more the accounts from the record differ. According to CJ, Keith and Rushin helped Smith. CJ claimed, once in the garage, the three attempted to force him into a rust-colored Suburban. According to Keith and Rushin,

they merely followed Smith, who alone forced CJ into the garage. Furthermore, Keith denied trying to force CJ into any vehicle. Regardless, CJ broke free and successfully escaped.

CJ ended up at a local hospital to receive treatment for his wounds. The police were contacted and an investigation was initiated. Eventually, Chad's body was reported to the police as well. The police investigated and discovered Chad's identity. The police soon realized the relationship between the two victims and quickly found Chad's shooter, Fields. The police then discovered Smith's plot and quickly apprehended all the individuals involved, except Smith who fled the jurisdiction with the stolen cocaine.

On April 8, 1998, a Jefferson County Grand Jury indicted Keith along with Smith, Coleman, Fields, Mason, and Jones. Rushin, who was a juvenile at the time, was indicted separately. The grand jury indicted Keith for complicity to murder; criminal syndication; kidnapping; robbery in the first degree; criminal attempt to murder or assault in the second degree; and trafficking in a controlled substance in the first degree, cocaine.

On December 22, 1998, Keith entered a guilty plea in reliance on an offer made by the Commonwealth. In exchange for Keith's guilty plea, the Commonwealth offered to amend complicity to murder to criminal facilitation to murder and

recommend a five-year sentence; amend criminal syndication to criminal facilitation to criminal syndication and recommend a five-year sentence; amend kidnapping to criminal facilitation to kidnapping and recommend a five-year sentence; amend robbery in the first degree to criminal facilitation to robbery and recommend a one-year sentence; amend attempted murder to criminal facilitation to attempted murder and recommend a five-year sentence; merge the assault with the facilitation to attempted murder; and recommend a five-year sentence on trafficking. According to the Commonwealth's recommendation, Keith would serve the five-year sentences concurrently but serve the one-year sentence consecutively for a total of six years. As part of the plea bargain, Keith agreed to testify truthfully against all of his co-defendants and agreed not to be sentenced until after he had testified against all his co-defendants. The Commonwealth acknowledged that Keith was eligible for Jefferson County's home incarceration program; however, if Keith got in trouble, then the Commonwealth reserved the right to request consecutive sentencing.

Approximately thirty months later, the trial court sentenced Keith. Unfortunately, while on home incarceration, Keith did get into trouble. Before Keith was sentenced, he was convicted of felony escape and charged with two counts of assault in the first degree. At sentencing on June 25, 2001,

the Commonwealth asked for consecutive sentencing and the trial court sentenced Keith to sixteen years.

On March 21, 2002, Keith filed a motion to alter, amend or vacate his conviction, pursuant to RCr 11.42. In his RCr 11.42 motion, Keith argued that the trial court violated his due process rights when it accepted his guilty plea regarding facilitation to murder; facilitation to criminal syndication; facilitation to kidnapping; facilitation to robbery; and trafficking. According to Keith, the Commonwealth could not have proven these charges at trial. Since the record lacked evidence to support a conviction on these charges, Keith contended that his guilty plea regarding these charges was neither intelligently nor knowingly made.

Also, Keith argued that the Commonwealth's offer stated that he may be placed on home incarceration and if he got into trouble, it may ask for consecutive sentencing. However, Keith argued that this language had not been incorporated into the trial court's order. In a non sequitur, Keith argued that this constituted a Workman violation. Keith also argued that the trial court erred because it unreasonably delayed his sentencing.

Finally, Keith argued that his trial attorney rendered ineffective assistance of counsel by failing to properly investigate the facts of the case. If his attorney had properly

investigated, he would have realized that Keith could not have been convicted of complicity to murder; criminal syndication; robbery or trafficking. Thus, the attorney was ineffective for recommending that Keith plead guilty to these charges. The trial court denied Keith's RCr 11.42 motion without benefit of an evidentiary hearing. Keith then appealed to this Court.

On appeal, Keith presents two arguments for our consideration: that the evidence was not sufficient to support a conviction for complicity to murder, criminal syndication or trafficking; and that his trial attorney rendered ineffective assistance of counsel.

Sufficiency Of The Evidence

Keith argues that the trial court should not have accepted his guilty plea regarding facilitation to murder, facilitation to criminal syndication, and trafficking. Keith cites North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), and argues because he denied involvement in these offenses and the fact that the record contains no evidence of his involvement in these offenses, his plea was not intelligently made. He argues that under the totality of the circumstances, he pled without fully understanding the nature of the charges against him.

Keith asserts that the record contains no evidence to support a conviction for complicity to murder, criminal

syndication or trafficking. According to the record, Keith fervently insisted that he knew nothing about Chad Turner's murder. In his statement to police, he denied knowing Chad Turner; denied knowing that Chad had followed CJ and denied knowing about Smith's hastily devised plan to kill Chad. He asserts that neither Fields nor Mason implicated him in Chad's murder. Both claimed not to know Keith. Also, Keith denied knowing either Fields or Mason. He denied knowing why they were at Smith's apartment, and he denied having any knowledge regarding their involvement in Smith's plan. Furthermore, Keith argues that the record clearly shows that he never saw the cocaine let alone trafficked in it.

Despite Keith's contentions, this Court must reject Keith's argument. In Taylor v. Commonwealth, Ky. App., 724 S.W.2d 223, 225 (1986), this Court stated:

Entry of a voluntary, intelligent plea of guilty has long been held by Kentucky Courts to preclude a post-judgment challenge to the sufficiency of the evidence. The reasoning behind such a conclusion is obvious. A defendant who elects to unconditionally plead guilty admits the factual accuracy of the various elements of the offenses with which he is charged. By such an admission, a convicted appellant forfeits the right to protest at some later date that the state could not have proven that he committed the crimes to which he pled guilty. To permit a convicted defendant to do so would result in a double benefit in that defendants who elect to plead guilty would receive the benefit of the plea bargain which ordinarily

precedes such a plea along with the advantage of later challenging the sentence resulting from the plea on grounds normally arising in the very trial which defendant elected to forego. (Citations omitted.)

To put it simply, Keith is precluded from using RCr 11.42 to challenge the sufficiency of the evidence in the case *sub judice*. See also Newsome v. Commonwealth, Ky., 456 S.W.2d 686 (1970) and King v. Commonwealth, Ky., 408 S.W.2d 622 (1966).

Even if Keith were not so precluded, his argument would still fail. Keith pled guilty; thus, he admitted to the factual accuracy of the charges against him. Taylor v. Commonwealth, 724 S.W.2d at 225. Moreover, the record clearly shows that Smith planned to kill and rob CJ, and in order to do that, he felt it was necessary to kill Chad as well. To accomplish his plan, Smith recruited Keith. Keith agreed to kill in exchange for a kilogram of the soon-to-be-stolen cocaine. Since Smith had previously recruited Mason to kill CJ, a jury could have concluded that Smith recruited Keith to kill Chad. The inference being that Keith knew that Smith intended not only to rob and kill CJ but that he also intended to kill Chad. Keith went to Smith's apartment. On Smith's command, he helped Smith kidnap, assault, and rob CJ. Once more, the implication being that Keith knew Smith's plan and actively helped Smith. Fields's statement further corroborated the evidence of Keith's involvement. While Fields claimed not to

know Keith, he told the police that he assumed that Keith was involved in Smith's plan since Keith was there at Smith's apartment. In fact, Keith admitted to selectively participating in Smith's plan, and the circumstantial evidence found in the record implicates Keith on all the charges against him including complicity to murder, criminal syndication, and trafficking.

Ineffective Assistance Of Counsel

Keith also argues on appeal that he was entitled to an evidentiary hearing. He cites Fraser v. Commonwealth, Ky., 59 S.W.3d 448 (2001), and argues that if an RCr 11.42 motion raises material issues of fact that cannot be conclusively resolved by the record, then the trial court must grant an evidentiary hearing. He contends that he did raise such material issues of fact.

Keith argues that his trial attorney was ineffective for failing to adequately investigate the facts of his case. According to Keith, because the attorney failed to investigate, he advised him to plead guilty to charges for which he could not have been convicted if he had proceeded to trial. Keith alleges that if his trial attorney had properly advised him, he would have insisted on proceeding to a jury trial. Furthermore, Keith feels that his trial attorney did not advocate forcefully enough regarding dismissal of these charges. Keith alleges that had he been properly advised, he would have held out for a plea offer

that dismissed the murder, syndication, and trafficking charges. According to Keith, this demonstrates that his trial attorney's representation was deficient and ineffective. Furthermore, the trial attorney's deficient performance prejudiced Keith because if these three charges had been dismissed, then he would have been sentenced to eleven years not sixteen.

When this Court analyzes claims of ineffective assistance of counsel, it usually applies the two-prong standard set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). However, when analyzing claims of ineffective assistance of counsel in the context of a guilty plea, this Court replaces the second prong found in Strickland with the standard set forth in Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). Thus, a criminal defendant who alleges ineffective assistance of counsel must, first, prove that his trial attorney's performance was deficient to such an extent that the attorney was not functioning as counsel as guaranteed by the Sixth Amendment, and, second, prove he was so prejudiced by the attorney's deficient performance that there exists, "a reasonable probability that, but for counsel's errors, [defendant] would not have pleaded guilty and would have insisted on going to trial." Taylor v. Commonwealth, Ky. App., 724 S.W.2d 223, 226 (1986).

Keith bases his allegation of ineffective assistance of counsel on his insistence that the record contained no evidence to support a conviction on the charges of complicity to murder, criminal syndication, and trafficking and that his trial attorney failed to investigate and failed to discover this lack of evidence. However, the record contains circumstantial evidence that implicates Keith in all the charges contained in the indictment including complicity to murder, syndication, and trafficking. Since the record does contain evidence to support a conviction on all charges, it refutes Keith's allegation that his attorney failed to investigate and discover this supposed lack of evidence. Thus, Keith failed to meet the first standard set forth in Strickland, that his trial attorney's performance was so deficient that he was not acting as counsel as guaranteed by the Sixth Amendment.

Even if Keith could meet the first standard, he failed to meet the second standard set forth in Hill v. Lockhart, that he was so prejudiced by his trial attorney's deficient performance that, but for the attorney's errors, he would have, in all reasonable probability, insisted on a trial. Keith was charged with complicity to murder, and the Commonwealth was seeking the death penalty. Given the choice between going to trial and facing the death penalty or pleading guilty and receiving a six-year sentence, in all reasonable probability,

Keith would not have insisted on proceeding to trial. It is much more likely that Keith would have still pled guilty in reliance on the Commonwealth's offer rather than face the possibility of receiving the death penalty. In his brief, Keith admits that when he says, had his attorney properly investigated and advised him, he would have insisted on a plea bargain, one which dismissed the murder, syndicate, and trafficking charges, rather than insisting on a trial.

For the foregoing reasons, this Court opines that the trial court did not err when it denied Keith's RCr 11.42 motion and did not err when it denied his motion for an evidentiary hearing. Hence, we affirm.

ALL CONCUR.

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