

Commonwealth of Kentucky

Court of Appeals

NO. 2003-CA-001394-MR

DOUGLAS HAWKINS

APPELLANT

v. APPEAL FROM WOLFE CIRCUIT COURT
HONORABLE WILLIAM LARRY MILLER, JUDGE
ACTION NO. 97-CR-00026

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON AND NICKELL, JUDGES; AND GRAVES,¹ SENIOR JUDGE.

NICKELL, JUDGE: Douglas Hawkins (“Hawkins”), *pro se*, has appealed from entry of the May 6, 2003, order of the Wolfe Circuit Court denying his RCr² 11.42 motion to vacate, set aside, reduce or correct the judgment of conviction and sentence of imprisonment entered following a jury trial. For the following reasons, we affirm.

¹ Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

² Kentucky Rules of Criminal Procedure.

Hawkins was indicted by a Wolfe County grand jury on September 4, 1997, on one count of murder following a motor vehicle collision on the Mountain Parkway in the early morning hours of June 21, 1997. Hawkins had been traveling at a high rate of speed in the wrong lane of travel when he struck and killed Stanley Adams (“Adams”) as Adams stepped into the roadway in Hawkins’ path. Hawkins had an estimated blood alcohol content of 0.135 mg/L at the time of the collision. Hawkins rejected a plea offer from the Commonwealth which recommended a sentence of five years’ imprisonment, choosing instead to proceed to a jury trial on March 14, 1998. The jury convicted Hawkins and recommended a sentence of twenty years’ imprisonment. His conviction was affirmed by the Supreme Court of Kentucky on direct appeal.³

On August 1, 2001, Hawkins filed a *pro se* RCr 11.42 motion to vacate his conviction alleging his trial counsel had been ineffective, as well as a motion for appointment of counsel. The trial court appointed counsel, and on August 20, 2002, counsel filed a supplemental memorandum of law and facts in support of Hawkins’ motion. Counsel also requested an evidentiary hearing. On October 10, 2002, the trial court held the evidentiary hearing wherein three witnesses testified, including Hawkins and his trial counsel. On December 19, 2002, Hawkins filed a summary of the evidence and additional arguments in support of the motion. On May 8, 2003, the trial court entered an order denying Hawkins’ RCr 11.42 motion. This appeal followed.⁴ The

³ *Hawkins v. Commonwealth*, 98-SC-000129-MR (unpublished opinion rendered June 17, 1999).

⁴ Hawkins has previously moved for leave to file a belated appeal which this Court denied. However, the Supreme Court reversed that ruling and instructed that Hawkins be permitted to

Department of Public Advocacy has been granted permission to withdraw as counsel of record after filing a brief pursuant to *Anders v. California*, 386 U.S. 738, 875 S.Ct. 1396, 18 L.Ed.2d 493 (1967), thus Hawkins is proceeding *pro se* in this appeal.

Before this Court, Hawkins contends his trial counsel was ineffective in failing to: (1) inform him of the weight of the evidence against him, (2) explain the elements of the crime for which he stood charged, and (3) thoroughly advise him of the potential benefits and consequences of proceeding to trial *vis a vis* accepting a plea bargain. After a careful review of the record, we disagree.

To prevail on an ineffective assistance of counsel claim, a defendant must allege and prove his counsel's performance was deficient and that such deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). There is a strong presumption that counsel's performance was competent and a reviewing court looks only at whether counsel's performance fell outside the wide range of reasonable professional assistance. *Id.* Further, there must be a reasonable probability that, but for counsel's alleged deficiencies, the outcome of the trial would have been different in order for there to have been actionable prejudice to the defendant. *Id.*

In *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), the Supreme Court modified the *Strickland* rule in cases challenging a guilty plea based on ineffective assistance of counsel to require a showing that (1) counsel made serious errors

proceed with the instant appeal.

outside the wide range of reasonable professional assistance, and (2) the deficient performance so seriously undermined the plea process that a reasonable probability exists that without the errors of counsel the defendant would not have entered a guilty plea but would have insisted on going to trial. In *Osborne v. Commonwealth*, 992 S.W.2d 727 (Ky.App. 1999), a panel of this Court adopted the *Hill* rationale as applicable to converse situations such as in the case *sub judice* where a defendant alleges he was induced by counsel to reject a plea offer and instead proceed to a jury trial.

Pursuant to the mandate of RCr 11.42(6), following the evidentiary hearing the trial court made findings relating to all material facts and entered a comprehensive final order accordingly. We review such findings for clear error. CR⁵ 52.01. Factual findings are not clearly erroneous if they are supported by substantial evidence; that is, when taken alone or in light of all of the evidence, there is sufficient probative value to induce the minds of reasonable men. *See Black Motor Co. v. Greene*, 385 S.W.2d 298, 308 (Ky. 1972). Further, a trial court is in the best position to judge the credibility of witnesses and the weight to be given to their testimony and we grant substantial deference to those findings. *Bronk v. Commonwealth*, 58 S.W.3d 482, 487 (Ky. 2001). We review a trial court's legal rulings *de novo*. *See McQueen v. Scroggy*, 99 F.3d 1302, 1310-1311 (6th Cir. 1996).

The trial court's ten-page order set forth in detail the evidence presented at the hearing as well as from the supplemental briefs filed by the parties. The order

⁵ Kentucky Rules of Civil Procedure.

specifically set forth the arguments made by Hawkins and the Commonwealth. Upon consideration of the record, the evidence, and arguments of counsel, the trial court found Hawkins' arguments were not credible. It specifically found Hawkins and his counsel had engaged in meaningful discussions regarding the Commonwealth's plea offer, the strength of the evidence against him, including the elements of the offense for which he stood charged and the penalty range for that charge. Our review of the totality of the circumstances surrounding Hawkins' rejection of the plea offer and insistence on proceeding to trial finds substantial evidence which supports the trial court's findings that his counsel was not ineffective. As such, the trial court's factual findings were not clearly erroneous and will not be disturbed on appeal.

Finally, the trial court correctly found as a matter of law that Hawkins had failed to carry the substantial burden of overcoming the regularity of his conviction. *Kiper v. Commonwealth*, 415 S.W.2d 92 (Ky.App. 1967). Based on the record before us, we hold Hawkins' counsel's performance fell within the wide range of acceptable professional assistance. We are unable to perceive any deficiency in counsel's performance which could result in actual prejudice to Hawkins. Hawkins received a fair trial untainted by any constitutional irregularities and received effective assistance of counsel. Hawkins has further failed to meet his burden of showing a reasonable probability the outcome of his trial would have been different but for counsel's alleged deficient performance. Thus, there was no error in the trial court's denial of the instant RCr 11.42 motion.

For the foregoing reasons, the order of the Wolfe Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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