

RENDERED: NOVEMBER 10, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-002127-MR

ANDRE COLLINS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 00-CR-000979

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KNOPF AND TACKETT, JUDGES; ROSENBLUM, SENIOR JUDGE.¹

TACKETT, JUDGE: Andre Collins appeals, *pro se*, from an order of the Jefferson Circuit Court denying his motion for post-conviction relief without an evidentiary hearing. He argues that his attorney provided ineffective assistance, both at trial and in advising him to plead guilty and accept an agreed upon sentence after the jury convicted him. His guilty plea waives

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

any issues regarding counsel's performance except insofar as it related to his decision to plead guilty. Thus, the only issues for our consideration are counsel's performance in advising Collins to plead guilty, the trial court's decision to appoint counsel only for Collins' appeal, and the refusal to hold an evidentiary hearing. We find that the trial court acted properly within the bounds of its discretion in denying all of Collins' requests, and we affirm the trial court's order denying post-conviction relief.

Collins was charged with first-degree robbery after a purse snatching which occurred in April 2000. The victim, Terra Grant, was entering a restaurant in Louisville when Collins ran up and attempted to grab her purse. She struggled and was dragged across the pavement, sustaining injuries, before she relinquished the purse. Grant was able to obtain the license plate number of the car in which her assailant escaped, and that vehicle was registered to Collins' girlfriend, Tonya Trumbo. Later, Grant called her cell phone and Trumbo answered after she heard it ringing in the back seat of her car. Grant told Trumbo that her phone had been stolen and Trumbo agreed to meet her in order to return the phone. When Trumbo drove up to Grant, Collins was in the car with her, and Grant identified him as the person who had stolen her purse.

Collins was indicted and charged with first-degree robbery and being a persistent felony offender in the first degree based on two prior second-degree robbery convictions. After a jury convicted Collins of second-degree robbery, he pled guilty to the PFO and waived his right to appeal the jury's verdict in exchange for a sentencing recommendation of fifteen years' imprisonment. Subsequently, he filed a motion claiming that his trial attorney provided ineffective assistance. Among the acts or omissions complained of were counsel's failure to investigate and prepare for trial, failure to object to a tape-recorded conversation, and incorrect advice regarding Collins' parole eligibility. The trial court refused Collins' requests for an evidentiary hearing and for appointment of counsel and found no grounds under which he would be entitled to post-conviction relief. This appeal followed. The Department of Public Advocacy was appointed to represent Collins on appeal, but was allowed to withdraw after determining that a person with means to pay would not retain counsel to pursue such an action.

Collins asked the trial court to appoint counsel to supplement his request for post-conviction relief. The trial court refused, finding that Collins' brief sufficiently explained his grounds for requesting relief. He argues on appeal that the trial court abused its discretion by failing to appoint counsel in a timely manner. Collins contends that

appointed counsel would have supplemented his motion with additional grounds and corrected deficiencies in his pleading. The Kentucky Supreme Court has determined in post-conviction proceedings "[i]f an evidentiary hearing is not required, counsel need not be appointed, 'because appointed counsel would [be] confined to the record.'" Fraser v. Commonwealth, 59 S.W.3d 448, 453 (Ky. 2001), quoting Hemphill v. Commonwealth, 448 S.W.2d 60, 63 (Ky. 1969). The trial court concluded that Collins was not entitled to appointed counsel since all of his allegations of ineffective performance were refuted by reference to the record. We agree.

On appeal, Collins argues that his attorney was ineffective for failing to investigate his case prior to trial and failing to object to a tape-recording of a phone conversation between himself, Trumbo, and a police detective. As part of his plea agreement to the charge of being a persistent felony offender in the first degree, Collins specifically waived his right to appeal "any issues that arose during his jury trial." (plea agreement) In reviewing a guilty plea, our only inquiry is whether counsel's performance was so deficient that it caused the defendant to plead guilty where he would otherwise have insisted on a trial. Sparks v. Commonwealth, 721 S.W.2d 726 (Ky. App. 1986). We find nothing in these allegations that suggests that Collins was forced to

plead guilty by his counsel's alleged failure to adequately prepare for trial.

In addition, Collins contends that the trial court was required to grant an evidentiary hearing on his motion for relief. An evidentiary hearing would have been required only if Collins had raised issues that could not be determined from the face of the record. Bowling v. Commonwealth, 981 S.W.2d 545 (Ky. 1999). With regard to his assertions that his attorney failed to properly investigate and failed to object to a tape-recorded conversation, Collins failed to show how the actions complained of resulted in prejudice and, thus, he was not entitled to a hearing. In his motion for relief, Collins claimed that his attorney incorrectly told him that, if he pled guilty to the PFO, he would be eligible for parole after serving twenty percent of his sentence. Although there was no evidence in the record to support or disprove this claim, the trial court found that, even if it were true, no prejudice had resulted. Collins, with two prior felony convictions, met the statutory criteria for PFO sentencing. His parole eligibility would have been governed by his status as a persistent felony offender whether he was convicted by guilty plea or jury verdict. The trial court was able to make this determination from the face of the record, thus no evidentiary hearing was required.

Finally, Collins claims that his attorney was ineffective for failing to challenge his classification as a persistent felony offender. He argues that the dates of his prior convictions do not meet the statutory requirements for being classified as a persistent felony offender. Since Collins failed to raise this argument before the trial court, it is not properly before us for consideration on appeal.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Andre Collins, *Pro Se*
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

William Robert Long, Jr.
Assistant Attorney General
Frankfort, Kentucky