

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002197-MR

JEFFREY RUSSELL

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 02-CR-00070

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: JOHNSON AND McANULTY, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

McANULTY, JUDGE: In December of 1998, Jeffrey (Jeff) Russell seriously injured his then two-month-old daughter, KR. Jeff was indicted for criminal abuse in the first degree. He was released on bond upon condition to appear on May 8, 2001, for a pre-trial hearing. After Jeff failed to appear at the hearing and was arrested a few months later in Florida, he was indicted

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

by a superseding indictment on the additional charges of bail jumping in the first degree and assault in the first degree (relative to KR's injuries). Eventually, Jeff entered a guilty plea to all three charges and received a total sentence of eleven years. Jeff made a collateral attack on the judgment under RCr 11.42. In his motion, he asserted that his trial counsel was ineffective in failing to investigate his case before advising him to plead guilty. The trial court denied the motion without an evidentiary hearing. Because we conclude that Jeff did not establish that his counsel rendered ineffective assistance, we affirm.

Consistent with his argument in the lower court, in this appeal, Jeff argues that his trial counsel did not investigate his case before advising him to plead guilty. He claims that in failing to perform a thorough investigation, his trial counsel violated his right to effective assistance of counsel. Jeff goes on to assert that but for counsel's failure to investigate there is a reasonable probability that Jeff would have insisted on going to trial and that the outcome of the trial would have been different. At the very least, Jeff argues that his allegation that his attorney failed to investigate his case entitled him under RCr 11.42(5) to an evidentiary hearing and the appointment of counsel.

Jeff entered a guilty plea to all three offenses for which he was indicted. In a challenge arising from the entry of a guilty plea, the defendant claiming ineffective assistance of counsel must first prove that counsel's performance was deficient in that he made errors so serious that he was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. See Taylor v. Commonwealth, 724 S.W.2d 223, 226 (Ky.App. 1986) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984)). Second, he must prove that he was prejudiced by the deficiency such that there exists a reasonable probability that but for those errors he would not have pleaded guilty and would have insisted on going to trial. See id. (citing Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985)).

Jeff asserts that he has provided facts showing that his attorney needed to perform a thorough investigation of the law and facts of his case. What Jeff provides, however, is an analysis of the proof the Commonwealth presented in the trial of KR's biological mother -- who was convicted by a jury of second-degree criminal abuse relative to her abuse of KR -- and how that proof would have been insufficient to convict Jeff on the assault and abuse charges. In addition, Jeff raises a defense to the bail jumping charge.

What Jeff does not provide are any facts that if true would establish that his attorney failed to fully investigate his charges. Jeff points to no witnesses whose testimony his attorney failed to consider. Jeff cites no evidence that his attorney failed to obtain that may have absolved Jeff of any wrongdoing. Jeff acknowledges that his attorney watched -- with Jeff -- the entire trial of KR's mother. Only then did his attorney advise him to accept the Commonwealth's plea offer. And advising a defendant to plead guilty does not, in and of itself, constitute ineffective assistance of counsel. See Russell v. Commonwealth, 992 S.W.2d 871, 875 (Ky.App. 1999). The burden is on Jeff to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceedings allowed by RCr 11.42. See Commonwealth v. Campbell, 415 S.W.2d 614, 616 (Ky. 1967). Based on the facts alleged in support of Jeff's motion, he did not do so.

We move to the issue of whether the trial court should have conducted an evidentiary hearing. Jeff argues that the plea colloquy is silent about what investigation Jeff's lawyer did or decided not to do. For this reason, Jeff contends that RCr 11.42(5) required the trial court to conduct an evidentiary hearing.

When a trial court denies a motion for an evidentiary hearing, our review is limited to whether the motion on its face states grounds that are not conclusively refuted by the record, and which, if true would invalidate the conviction. See Sparks v. Commonwealth, 721 S.W.2d 726, 727 (Ky.App. 1986). The trial court is not required to hold a hearing if the record as a whole refutes the movant's allegations. See id. And if the record refutes the movant's allegations, appointment of counsel is unnecessary. See Fraser v. Commonwealth, 59 S.W.3d 448, 453 (Ky. 2001). Finally, conclusory allegations do not justify an evidentiary hearing because RCr 11.42 does not call for a hearing to serve the function of discovery. See Sanborn v. Commonwealth, 975 S.W.2d 905, 909 (Ky. 1998).

In this case, Jeff presents no specific facts in support of his allegation that his attorney did not conduct a thorough investigation of his case. His statement that his attorney must not have investigated his case because she recommended that he plead guilty does not warrant an evidentiary hearing. Without specific facts, the trial court was correct in relying on the record as a whole as conclusively establishing that Jeff's guilty plea was voluntary and intelligent.

Jeff has not shown that his counsel was ineffective. We observe no claims that required an evidentiary hearing or the

appointment of counsel. We affirm Jeff's conviction and the denial of his motion to vacate.

JOHNSON, JUDGE, CONCURS IN RESULT.

HUDDLESTON, SENIOR JUDGE, CONCURS.

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