

RENDERED: DECEMBER 17, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002342-MR

RANDALL R. CASWELL

APPELLANT

v. APPEAL FROM HARRISON CIRCUIT COURT
HONORABLE ROBERT W. MCGINNIS, JUDGE
ACTION NO. 99-CR-00022

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: DYCHE AND McANULTY, JUDGES; EMBERTON, SENIOR JUDGE.¹
McANULTY, JUDGE: Randall R. Caswell (hereinafter appellant)
appeals the denial of his motion pursuant to RCr 11.42 to vacate
his conviction for criminal attempt to commit murder. The
offense occurred on March 2, 1999, when appellant shot his wife
numerous times and then shot himself in the head. Appellant

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

pled guilty and received a fifteen year sentence. He filed a pro se motion to vacate on July 14, 2003. The court below entered an order denying the motion without a hearing based on the fact that appellant's allegations were refuted by the record.

Appellant contends on appeal that he has raised issues of ineffective assistance of counsel not refuted on the face of the record. For 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. 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. Taylor v. Commonwealth, Ky. App., 724 S.W.2d 223, 226 (1986), citing Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985).

Appellant's primary argument on appeal is that he should have received an evidentiary hearing because the court could not have disposed of these issues solely by review of the record. He also contends he should have been appointed counsel below. The Commonwealth responds that the trial court acted

correctly since appellant failed to plead each of his claims with the specificity required by RCr 11.42(2).

RCr 11.42 provides a forum for known grievances, not an opportunity to research grievances. Gilliam v. Commonwealth, Ky., 652 S.W.2d 856, 858 (1983). RCr 11.42(2) requires that the movant state specifically the grounds on which the sentence is being challenged and the facts relied on in support of those grounds, or the motion will be summarily dismissed. Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 452 (2001); Lucas v. Commonwealth, Ky., 465 S.W.2d 267, 268 (1971); RCr 11.42(2). A pro se movant is not held to the same standards as counsel for purposes of determining the sufficiency of the motion. Brooks v. Commonwealth, Ky., 447 S.W.2d 614, 618 (1969). However, the motion still must be specific. Id. The burden is on the movant 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. Commonwealth v. Campbell, Ky., 415 S.W.2d 614 (1967).

It is unnecessary for the court to hold a hearing if the material issues of fact can fairly be determined on the face of the record. Maggard v. Commonwealth, Ky., 394 S.W.2d 893, 894 (1965). Conclusionary allegations unsupported by facts do not justify an evidentiary hearing; RCr 11.42 does not call for a hearing to serve the function of discovery. Sanborn v.

Commonwealth, Ky., 975 S.W.2d 905, 909 (1998). Appointment of counsel is not necessary where the record refutes the movant's allegations. Fraser, 59 S.W.3d at 453. When a trial court denies a motion for an evidentiary hearing, appellate 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. Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726, 727 (1986).

Appellant argues in his brief on appeal that the court in reviewing his motion was required to "accept all the factual allegations as true." This is incorrect. The text of RCr 11.42 does not state that the fact finder must accept the truth of the movant's statements. We believe appellant is confusing the RCr 11.42 standard with that of a motion for directed verdict. A motion under RCr 11.42 is a collateral attack on a conviction. Rather than being entitled to a belief that his allegations are true, the movant bears the "heavy burden to overcome the regularity of the conviction," Kiper v. Commonwealth, Ky., 415 S.W.2d 92, 95 (1967), and the "strong presumption" that counsel's assistance was constitutionally sufficient. Jordan v. Commonwealth, Ky., 445 S.W.2d 878 (1969).

On appeal, appellant provides a list of grievances which he alleges entitle him to RCr 11.42 relief. First, he makes a number of claims relating to inadequate communication

with counsel, and complains his counsel only spent 45 minutes conferring with him. Appellant has not shown, however, that more communication would have had any effect on his decision to plead guilty. Appellant's decision to plead guilty negated the need for additional time to develop a defense. Cox v. Commonwealth, Ky., 465 S.W.2d 76, 77-78 (1971). Thus, we agree this claim is refuted by the record. There is no impropriety in the act of a defense attorney influencing his client to plead guilty. Glass v. Commonwealth, Ky., 474 S.W.2d 400, 401 (1977).

Next, appellant alleges that counsel failed to investigate or advise him as to the possibility of lesser included offenses. However, appellant does not specify what lesser included offenses were applicable in his case. He does not assert that any lesser included offenses would have caused him to forego a guilty plea and instead proceed to trial. This claim is not sufficiently specific and was properly dismissed.

Appellant alleges his counsel informed him that a change of venue was impossible. Appellant does not establish that a change of venue would have been desirable, or that he would not have pled guilty if he had obtained a change of venue. The trial court correctly dismissed this claim.

Appellant argues that counsel refused to let him watch the crime scene video before he entered his plea. Appellant does not argue that this would have affected his decision to

plead guilty. Therefore, the trial court was correct in summarily dismissing this claim.

Appellant argues that his counsel failed to inform him of the defense of extreme emotional disturbance, and this defense reasonably could have resulted in the finder of fact finding a lesser included offense. Appellant cites no facts to support his claim that this was a possible defense. This claim was properly dismissed.

Appellant claims counsel wrongly informed him that there was no such defense as voluntary intoxication, when this defense was feasible in his case. For this claim, appellant does provide facts in support. Appellant alleged in his affidavit filed with his RCr 11.42 motion that he suffered from substance abuse addiction and had been admitted to the hospital to treat this several times. Appellant attached medical reports from his hospitalizations for alcohol dependence and a suicide attempt in 1989. He alleged he suffered from black-outs. He stated that he informed his counsel that he had been drinking between a fifth and a liter of whiskey each day for approximately six years. He also alleged he was taking prescription Valium which interacted with the alcohol he was consuming at the same time. Finally, he alleged that he "was in a black-out at the time of the incident" and does not remember the actual shooting. Appellant included the discharge summary

form for his hospital admission immediately following the shooting in which it stated that appellant was "reportedly not aware" that he had shot his wife and himself.

Voluntary intoxication is a defense if it negates that existence of an element of the offense. KRS 501.080(1). It operates not as a complete defense, but only as a mitigating element which serves to reduce an intentional crime to one requiring a culpable mental state of wantonness or recklessness. Meadows v. Commonwealth, Ky., 550 S.W.2d 511 (1977); Cooper, Instructions to Juries, § 11.30, p. 710. The defendant must introduce evidence of intoxication and evidence from which a jury could determine that the defendant did not know what he was doing or was deprived of the substantial capacity either to appreciate the criminality of his conduct, or conform his conduct to the requirements of law. Callison v. Commonwealth, Ky. App., 706 S.W.2d 434 (1986).

The record indicates that counsel did consider intoxication as a defense. Counsel filed a motion for funds to obtain an expert witness in which he stated that one of the facts supporting the motion was evidence of "severe intoxication." Ultimately, however, the record reveals significant evidence to negate a defense that appellant was too intoxicated at the time of the offense to form criminal intent to attempt to kill his wife. According to the police record,

when police arrived appellant gave them his name, and when they asked him what happened he replied, "I shot my wife." When asked why, appellant responded, "I wanted to kill her." In discovery, the Commonwealth reported that it had received information from two named witnesses that appellant allegedly told them that if his wife ever tried to leave him he would take a pistol and shoot her. Appellant pled guilty three days after this statement was provided by the Commonwealth.

The fact that appellant confessed to police to wanting to kill his wife and to have discussed doing so before the event cast doubt on appellant's potential to prove that he could not form criminal intent due to alcohol intoxication. Thus, appellant has not shown ineffectiveness of counsel. Appellant further has not shown that there was a reasonable probability that he would have insisted on trial based on this defense. The trial court correctly held that this claim was refuted by the record.

Appellant argues that his counsel never explained his constitutional rights to him or what it meant to waive his rights. This claim is refuted by the record. When appellant entered his guilty plea, he signed a motion which stated that he was aware of his constitutional rights and he understood that by pleading guilty he waived those rights. It stated that he fully discussed the charges and possible defenses with his counsel. A

defendant's statements when entering a guilty plea preclude his later arguing otherwise in a motion to vacate his sentence. Harris v. Commonwealth, Ky. App., 688 S.W.2d 338, 340 (1985).

Finally, appellant alleges that counsel never explained to him that after serving 85% of his sentence, he merely would be eligible to be considered for parole rather than being entitled to release. Failure to inform a defendant about the maximum service of sentence before parole eligibility is not a ground to vacate judgment under RCr 11.42. Turner v. Commonwealth, Ky. App., 647 S.W.2d 500 (1982). Further, we consider the failure to be with appellant's comprehension and not counsel's assistance since it is self-evident that parole eligibility does not mean immediate release. A guilty plea that is brought about by a person's own free will is not less valid because he did not know all possible consequences of the plea and all possible alternative courses of action. Id. at 501.

Appellant has not shown that his counsel was ineffective. We observe no claims which required an evidentiary hearing or the appointment of counsel. We affirm appellant's conviction and the denial of his motion to vacate.

ALL CONCUR.

BRIEF FOR APPELLANT:

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