

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000669-MR

JOHN BOSTON

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
V. HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NOS. 01-CR-000939, 01-CR-002488, AND 02-CR-002543

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART AND REMANDING IN PART

** **

BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

BARBER, JUDGE: On April 18, 2001, Appellant, John Boston (Boston), was indicted in Jefferson County, Kentucky, on two counts of robbery in the first degree, one count of burglary in the first degree, one count of fleeing or evading the police in the first degree, and one count of cruelty to animals in the second degree in case number 01-CR-939. Also named in this indictment was Carl Roderick Bruce (Bruce).

The indictment stemmed from an incident on April 9, 2001, in which Anthony and Frieda Polio were robbed in their

home at gunpoint by two men wearing ski masks. The Polios' dog was also killed by the assailants during the incident. The Polios were bound with duct tape in their bedroom then robbed by the two armed men. When finished, the two men left the home. However, the two men quickly returned to the parties' bedroom because they were unable to open the Polios' garage door. The two men released Mr. Polio (Polio) to open the garage door for them. After Polio opened the door, the two men left in his car. Polio returned to his bedroom to free his wife so she could call the police. Polio then began a car chase with the two men. During the chase, the two men changed cars¹ and Polio continued to follow the other car. Shortly thereafter, the local police joined Polio in the chase. At one point, the car slowed down enough so that Bruce could jump out. Bruce dropped a pillow case containing evidence from the robbery of the Polios while jumping from the automobile. Bruce was quickly apprehended by the police. The driver continued to flee, later abandoning the car and evading the police that evening.

While in police custody, Bruce implicated Boston as his accomplice in the criminal acts against the Polios. Also, the police gathered Boston's driver's license and work photo identification card attached to the keys in the ignition from

¹ The two men got into the car of Boston's sister, which Boston had borrowed from her earlier.

the automobile used by the two men. Boston eluded the police until May 2002.

On October 25, 2001, Boston, was indicted in Jefferson County, Kentucky on a charge of persistent felony offender in the first degree in case number 01-CR-2488 due to prior felony convictions in the following Jefferson County cases 95-CR-1943 (receiving stolen property); 96-CR-1089 (three counts of burglary in the third degree); 82-CR-797 (three counts of robbery in the first degree, one count of burglary in the first degree, and two counts of burglary in the third degree); and 82-CR-509 (burglary in the first degree). Case numbers 01-CR-2488 and 01-CR-939 were consolidated.

Boston accepted the Commonwealth's offer to the consolidated cases and entered a guilty plea on all charges on June 23, 2003. A Judgment and Conviction of Sentence was entered on June 25, 2003, resulting in Boston receiving twenty years for each count of robbery in the first degree; twenty years for burglary in the first degree; five years for fleeing or evading police in the first degree; and twelve months for cruelty to animals in the second degree. Each sentence was to be served concurrently for a total of twenty years in the penitentiary. The twenty-year sentence was enhanced by the persistent felony offender in the first degree charge to forty years in the penitentiary. This sentence was to also run

concurrently with the sentence imposed in case number 02-CR-2543, which is discussed below.

On November 13, 2002, Boston was indicted in Jefferson County, Kentucky on four counts of robbery in the first degree, two counts of burglary in the first degree, three counts of burglary in the third degree, two counts of theft by unlawful taking over \$300, and persistent felony offender in the first degree in case number 02-CR-2543. The persistent felony offender in the first degree charge was based on the same prior offenses stated in case number 01-CR-2488. The charges in this indictment stemmed primarily from incriminating statements made by Boston to the Louisville Police on May 10, 2002.²

On June 23, 2003, Boston also accepted the Commonwealth's plea offer in case number 02-CR-2543. Subsequently, the Jefferson Circuit Court entered a Judgment of Conviction and Sentence on June 25, 2003. Boston was sentenced to twenty years for each count of robbery in the first degree; twenty years for each count of burglary in the first degree; twenty years for each count of burglary in the third degree³; and five years for each count of theft by unlawful taking over \$300.00 with each sentence to be served concurrently for a total of twenty years in the penitentiary. The twenty-year sentence

² Included in the record is a waiver of rights form Boston signed on May 10, 2002, prior to making the statements to the police.

³ The Commonwealth's plea agreement was for Boston to serve five years for each count of burglary in the third degree.

was enhanced by the persistent felony offender in the first degree charge to forty years in the penitentiary. As stated earlier, this sentence was to run concurrently with sentences imposed under cases 01-CR-939 and 01-CR-2488.

Boston now appeals the denial of his motions pro se arguing that (1) the trial court abused its discretion and clearly erred in denying his RCr 11.42 motion based upon ineffective assistance of counsel and imposition of an unauthorized sentence for each count of burglary in the third degree; (2) the trial court erred in denying his RCr 11.42 motion without a finding of fact and conclusion of law pursuant to CR 52; (3) the trial court erred in not granting him an evidentiary hearing on his RCr 11.42 motion; and (4) the trial court abused its discretion and clearly erred when it denied his motion for transcript of proceedings to perfect his appeal.

Boston's first argument is that the trial court abused its discretion and clearly erred in denying his RCr 11.42 motion. The crux of Boston's RCr 11.42 motion is that he received ineffective assistance of counsel and that the trial court imposed an unauthorized sentence for each count of burglary in the third degree. Boston filed a series of pro se motions on February 18, 2004,⁴ which contained his motion to vacate or set

⁴ These motions were filed in all three cases: 01-CR-939, 01-CR-2488, and 02-CR-2543.

aside sentence pursuant to RCr 11.42⁵. In case number 02-CR-2488, the RCr 11.42 motion had a handwritten notation on the final page that stated "Denied" and signed by the judge, which had been stamped "entered" on February 20, 2004. We will first examine Boston's ineffective assistance of counsel claims.

In order to prevail on a ineffective assistance of counsel claim, Boston must satisfy the two-part test established in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1985), cert. denied, 478 S.W. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986), showing that counsel's performance was deficient and that the deficiency caused actual prejudice affecting the outcome of the proceeding. First, we must analyze counsel's performance. Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, supra 466 U.S. at 690. Second, in order for a defendant to show actual prejudice in the context of a guilty plea, he must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, he would not have pled guilty and would have insisted on going to trial. Phon v. Commonwealth, 51 S.W.3d 456, 459-460 (Ky.App. 2001), (citing Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88

⁵ Boston did not tender orders on any motion other than the order of indigency, which was an Administrative Office of the Courts (AOC) form.

L.Ed.2d 203 (1985)). With these principles to guide us, we address each of the ineffective assistance of counsel arguments raised by Boston.

Boston argues that his trial counsel, Joy Kidwell⁶, coerced him to plead guilty in case number 02-CR-2543 involuntarily, unintelligently, and unknowingly to three counts of third-degree burglary wherein he was sentenced to twenty years on each count. The plea agreement signed by Boston and Ms. Kidwell stated that he agreed to serve five years for each count of the burglary in the third degree. However, the Judgment of Sentence and Conviction sentenced Boston to twenty years for each count of burglary in the third degree. This discrepancy will be discussed in greater detail later.

Boston also signed a motion to enter a guilty plea on June 23, 2003, which states in relevant part,

3. I have reviewed a copy of the indictment and told my attorney all the facts known to me concerning my charges. I believe he/she is fully informed about my case. We have fully discussed, and I understand, the charges and any possible defenses to them.

7. In return for my guilty plea, the Commonwealth has agreed to recommend to the Court the sentence(s) set forth in the attached "Commonwealth's Offer on a Plea of Guilty." Other than that recommendation, no one, including my attorney, has promised me any other benefit in return for my guilty

⁶ Joy Kidwell was appointed through the Dept. of Public Advocacy.

plea nor has anyone forced or threatened me to plead "**GUILTY.**"

9. I declare my plea of "**GUILTY**" is freely, knowingly, intelligently and voluntarily made; that I have been represented by counsel; that my attorney has fully explained my constitutional right to me, as well as the charges against me and any defenses to them and that I understand the nature of this proceeding and all matters contained in this document.

Kentucky Rule of Criminal Procedure 11.42 requires that motions must state specifically the grounds on which the conviction is being challenged as well as state the facts relied on in support of such grounds. Stanford v. Commonwealth, 854 S.W.2d 742, 748 (Ky. 1993), cert. denied 510 U.S. 1049, 114 S.Ct. 703, 126 L.Ed.2d 669(1994); see also RCr 11.42(2). Boston failed to state specifically how he was coerced by Ms. Kidwell to plead guilty to the burglary in the third degree charges contained in 02-CR-2543. As such, we find no merit to his argument.

Boston also argues that Ms. Kidwell provided ineffective assistance of counsel when she failed to notify him that he would be sentenced to twenty years for each count of burglary in the third degree in case number 02-CR-2543. The plea agreement signed by Ms. Kidwell and Boston clearly states that Boston would serve five years for each count of burglary in the third degree. This was in conformity with KRS 511.040 and KRS 532.060. The discrepancy that occurred when the Judgment of

Conviction and Sentence was entered will be discussed later in this opinion. Boston presented no proof that the discrepancy was based upon any acts of Ms. Kidwell. Ms. Kidwell advised Boston what the correct sentence was and had him sign a plea agreement which accurately reflected the same. Therefore, we find no merit to this argument.

Boston next argues that Ms. Kidwell failed to properly investigate his cases prior to the entry of his guilty plea. Specifically, Boston claims Ms. Kidwell failed to determine whether he was in Texas⁷ during the commission of the crimes and to interview two alleged alibi witnesses of Boston, Shawn Brown and Karen Rucker.⁸

Defense counsel has an affirmative duty to make a reasonable investigation for mitigating evidence or to make a reasonable decision that a particular investigation is not necessary. Strickland, supra 466 U.S. at 691. Based on the record, Ms. Kidwell was persistent in gathering all evidence available from the Commonwealth.

In case number 01-CR-939, there was evidence linking Boston to the automobile driven by the two assailants⁹ as well as a statement from Bruce implicating Boston. In case number 02-

⁷ Boston did not state in his RCr 11.42 motion when he was in Texas or submit any proof of the same.

⁸ Boston did not submit affidavits of these two alleged alibi witnesses with his RCr 11.42 motion.

⁹ Boston's driver's license and work photo identification card was attached to the keys in the ignition.

CR-2543, Boston implicated himself in these crimes during his voluntary May 10, 2002 statement to the Louisville police. Ms. Kidwell did attempt to have Boston's statement made to the police suppressed in a motion filed February 13, 2003, but her tendered order was not signed by the trial judge.

In any effectiveness of counsel case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. Strickland supra at 691, 466 U.S. 668. Given the evidence and Boston's prior criminal record, we believe Ms. Kidwell's decision not to investigate Boston's alleged alibis was reasonable. Thus, Boston failed to satisfy the first element of the Strickland test.

Further, Boston failed to show actual prejudice by Ms. Kidwell's alleged failure to investigate in the context of his guilty plea. Boston stated that if his witnesses would have been interviewed it could have easily been determined that Boston's version of events was credible. In order to show actual prejudice, there must be more than self-serving statements provided by the movant. Unfortunately, that is all that Boston has offered. As such, he failed to prove he was prejudiced by Ms. Kidwell's alleged failure to investigate and thus, failed to satisfy the second element. Therefore, Boston

failed to satisfy either element of the Strickland test in relation to this argument.

Boston's last argument that he received ineffective assistance of counsel is related to his persistent felony offender in the first degree charge in case number 02-CR-2543. Boston claims that he was not advised that an enhancement to forty years' imprisonment was impermissible. We believe that he was not advised of such, because it is incorrect. Persistent felony offender in the first degree sentencing is outlined in KRS 532.080(6)(a) and allows for a sentence of no less than twenty years nor more than fifty years or life imprisonment in circumstances such as Boston's.¹⁰ Boston agreed to serve twenty years, which is the minimum under the KRS 532.060. As such, we find no merit to this argument.

Based on the foregoing, we do not believe the trial court abused its discretion or was clearly erroneous in denying Boston's RCr 11.42 motion based on an ineffective assistance of counsel claim.

Boston's next argument is that the trial court abused its discretion and was clearly erroneous when it denied his RCr 11.42 motion based upon imposition of an unauthorized sentence in case number 02-CR-2543. The imposition of an unauthorized sentence is an error correctable by appeal, by writ, or by

¹⁰ The majority of Boston's crimes which he pled guilty to, i.e. Robbery in the first degree and Burglary in the first degree, were Class B felonies.

motion pursuant to RCr 11.42 or CR 60.02. Myers v. Commonwealth, 42 S.W.3d 594, 596 (Ky. 2001). Boston's plea agreement specifically stated that Boston would serve five years for each count of burglary in the third degree. However, the trial court sentenced Boston to twenty years for each count of burglary in the third degree.

Boston properly points out that the sentence imposed exceeds that maximum allowed under KRS 511.040 and KRS 532.060. The trial court clearly stated that it found the plea to be voluntary and accepted the plea in its Judgment of Conviction and Sentence dated June 25, 2003.¹¹ Based on the court's acceptance of the plea agreement, we believe the subsequent sentence imposed for the burglary in the third degree charges is a clerical mistake. See RCr 10.10. As such, the trial court shall correct Boston's Judgment of Conviction and Sentence in case number 02-CR-2543 to conform to the plea agreement the trial court stated it accepted in its original Judgment and Conviction of Sentence dated June 25, 2003. Because we believe the sentence imposed related to the burglary in the third degree charges to be a clerical mistake, there was no reversible error

¹¹ The Judgment stated: "The defendant on this date having appeared in open Court with his attorney, by agreement with the attorney for the Commonwealth, withdrew his plea of not guilty and entered a plea of guilty to: 1. Robbery, First Degree - four (4) counts; 2. Burglary, First Degree - two (2) counts; 3. Burglary, Third Degree- three (3) counts; 4. Theft by Unlawful Taking over \$300.00 - two (2) counts; 5. Persistent Felony Offender, First Degree as charged in the indictment and **the Court having found the plea to be voluntary, and having accepted the plea. . .**" (Emphasis added.)

committed by the trial court in relation to this issue. Therefore, we do not believe the trial court abused its discretion or was clearly erroneous in denying Boston's RCr 11.42 motion based on a claim of imposition of an unauthorized sentence.

Boston's second basis of his appeal is that the trial court erred in denying his RCr 11.42 motion without a finding of fact and conclusion of law pursuant to CR 52. The requirement for findings by the trial court in RCr 11.42 proceedings is contained in RCr 11.42(6) which states in relevant part, "At the conclusion of the hearing or hearings, the court shall make findings determinative of the material issues of fact and enter a final order accordingly." No hearing was held by the trial court on Boston's RCr 11.42 motion. If there is no hearing, then no findings are required. Stanford v. Commonwealth, 854 S.W.2d 742, 744 (Ky. 1993), cert. denied 510 U.S. 1049, 114 S.Ct. 703, 126 L.Ed.2d 669 (1994). Therefore, the court did not err in failing to prepare findings of fact and conclusions of law in relation to Boston's RCr 11.42 motion, because a hearing was not held.

Boston's third argument is that the trial court erred in not granting him an evidentiary hearing for his RCr 11.42 motion. A RCr 11.42 movant is not automatically entitled to an evidentiary hearing. Stanford supra, 854 S.W.2d at 743, (citing

Skaggs v. Commonwealth, 803 S.W.2d 573 (Ky. 1990), cert. denied 502 U.S. 844, 112 S.Ct. 140, 116 L.Ed.2d 106 (1991)). A hearing is required on a RCr 11.42 motion only if there is an issue of fact which cannot be determined on the face of the record. Stanford, supra 854 S.W.2d at 743-744. In other words, if the record refutes the claims of error, there is no basis for granting an RCr 11.42 motion. Id. at 743, (citing Glass v. Commonwealth, 474 S.W.2d 400, 401, (Ky. 1971)). In the foregoing paragraphs, we were unable to substantiate any of alleged errors proposed by Boston based upon the record, other than the sentencing error previously discussed. We believe the record refuted each error. There was no basis for the trial court to hold an evidentiary hearing on the RCr 11.42 motion. Therefore, the trial court did not err when it did not hold an evidentiary hearing on Boston's RCr 11.42 motion.

Boston's final issue is that the trial court abused its discretion and was clearly erroneous when it denied his pro se motion for transcript of proceedings to perfect his appeal.¹² Boston filed his motion on February 26, 2004. On the last page of each motion contained in each case file, the trial judge handwrote the following: In case number 01-CR-939, the trial judge handwrote "Denied"; in case number 01-CR-2488, the trial judge handwrote "Denied, not specific, fishing expedition"; and

¹² This motion was filed in all three cases under appeal: 01-CR-939, 01-CR-2488, and 02-CR-2543.

in case number 02-CR-2543, the trial judge handwrote "Denied, not specific, no trial held." These orders of denial were entered in each case on March 2, 2004.

In his motion, Boston requested a transcript of proceedings to prepare and perfect his appeal, but does not state which specific proceedings he is requesting or why he needs them. Boston also requested a transcript of the original trial. Boston pled guilty to all charges, thus no trial was held. No hearing was held in relation to Boston's RCr 11.42 motion either. Further, none of these transcripts were required to perfect Boston's appeal.

A trial court should not grant a motion that lacks specificity. It also should not grant a motion that cannot be properly complied with due to impossibility. Based on the record, we cannot find that the trial court abused its discretion nor was clearly erroneous in denying Boston's pro se motion for court transcripts.

For the reasons set forth above, we affirm the Jefferson Circuit Court's denial of Boston's RCr 11.42 motion and his pro se motion for transcript of proceedings to perfect his appeal. The case is remanded to the circuit court to correct the clerical error concerning the sentence in case number 02-CR-2543. All other matters are affirmed.

ALL CONCUR.

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