

RENDERED: SEPTEMBER 23, 2005; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-002539-MR
AND
NO. 2004-CA-002543-MR

JAMES DALE HIGHTOWER

APPELLANT

v.

APPEALS FROM McCracken Circuit Court
HONORABLE ROBERT J. HINES, JUDGE
INDICTMENT NO. 03-CR-00342

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AND ORDER
AFFIRMING IN APPEAL NO. 2004-CA-002539-MR
DISMISSING APPEAL NO. 2004-CA-002543-MR

** ** *

BEFORE: DYCHE, KNOFF, AND TACKETT, JUDGES.

KNOFF, JUDGE: James Dale Hightower separately appeals from orders of the McCracken Circuit Court denying his motions for production of records and to vacate his conviction pursuant to RCr 11.42. Hightower has failed to file a timely appeal from the trial court's denial of his records motion, and therefore, we must dismiss this appeal. We also find that the record clearly refutes Hightower's claims of ineffective assistance of

counsel. Hence, we affirm the trial court's denial of Hightower's RCr 11.42 motion.

On September 17, 2003, a McCracken County grand jury indicted Hightower on one count each of first degree attempted rape,¹ kidnapping,² and being a persistent felony offender in the second degree (PFO II).³ Subsequently, Hightower entered a plea of guilty to these charges without benefit of an agreement with the Commonwealth. Subsequently, on February 25, 2004, the trial court sentenced Hightower to ten years for attempted rape and twenty years for kidnapping, enhanced to life imprisonment by virtue of his status as a PFO II.

On September 27, 2004, Hightower filed a *pro se* motion seeking to obtain "all court records and all statements and grand jury tapes that are maintained by the Commonwealth Attorney's office." Following a response by the Commonwealth, the trial court denied the motion on October 25, 2004. Hightower filed a notice of appeal from this order on December 7, 2004.

On October 29, 2004, Hightower filed a motion seeking to set aside his conviction pursuant to RCr 11.42. After

¹ KRS 510.040, a class C felony.

² KRS 503.040, a class B felony.

³ KRS 532.080.

considering the Commonwealth's response, the trial court denied the motion in an order entered on November 19, 2004. Hightower filed a separate notice of appeal from this order on December 7, 2004.

As an initial matter, we find that Hightower's appeal from the trial court's order denying his motion for production of records was untimely. Since there were no other motions pending when the trial court denied that motion, the court's order of October 25, 2004, was final and appealable as of that date. Hightower's notice of appeal from this order, on December 7, 2004, was filed more than thirty days after the notation of service of the order. Filing of the notice of appeal within the prescribed time period is mandatory and failure to do so is fatal to the appeal.⁴ Consequently, Hightower's appeal in Action No. 2004-CA-002543-MR must be dismissed.

Hightower's appeal from the trial court's denial of his RCr 11.42 motion, entered on November 19, 2004, was timely. Hightower contends that his trial counsel failed to investigate his prior history of mental illness. Had counsel done so, Hightower asserts that counsel would have discovered that Hightower had previously attempted suicide while incarcerated and had been hospitalized for mental evaluation after each

⁴ CR 73.02(2); Fox v. House, 912 S.W.2d 450, 451 (Ky.App. 1995).

attempt. Hightower further argues that if his trial counsel had adequately investigated the issue, counsel should have filed a motion for a mental health evaluation and a competency hearing.⁵ Consequently, Hightower asserts that he received ineffective assistance of counsel and that he was prejudiced as a result.

In order to establish ineffective assistance of counsel, a movant must satisfy a two-part test showing that counsel's performance was deficient and that the deficiency caused actual prejudice affecting the outcome of the proceeding.⁶ Where an appellant challenges a guilty plea alleging ineffective assistance of counsel, he must show that trial counsel made serious errors outside the wide range of professionally competent assistance and that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the appellant would not have pled guilty but would have insisted on going to trial.⁷ The burden is on the movant to overcome a strong presumption that counsel's assistance was

⁵ See KRS 504.080.

⁶ Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984); Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1985).

⁷ Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L. Ed. 2d 203 (1985); Phon v. Commonwealth, 51 S.W.3d 456, 459-460 (Ky. 2001).

constitutionally sufficient.⁸ Hightower also notes that an RCr 11.42 movant whose facially meritorious allegations are neither refuted nor confirmed by the underlying record is entitled to an evidentiary hearing at which his allegations may be tried.⁹

But after reviewing the record of Hightower's guilty plea, we find that the record clearly refutes Hightower's claims of ineffective assistance of counsel. The trial court engaged in a full Boykin¹⁰ colloquy, at which Hightower stated that his guilty plea was voluntary and that he was satisfied with the performance of his counsel. Hightower expressly denied that he suffered from any mental illness or other impairment that might interfere with his ability to enter a guilty plea.

Furthermore, trial counsel told the court that Hightower had informed her of his prior evaluation at the Kentucky Correctional Psychiatric Center (KCPC) following a failed suicide attempt. But Hightower also told his trial counsel that the suicide attempts were well in the past and that he no longer had that problem. Even accepting Hightower's allegations regarding his other suicide attempts while he was

⁸ Strickland, 466 U.S. at 689, 104 S.Ct. at 2065; Commonwealth v. Pelphrey, 998 S.W.2d 460, 463 (Ky. 1999).

⁹ Fraser v. Commonwealth, 59 S.W.3d 448, 452 (Ky. 2001).

¹⁰ Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

incarcerated as a juvenile, Hightower failed to show that his trial counsel would have had a basis to question his competency at the time he entered his guilty plea. Therefore, the trial court did not err by denying Hightower's RCr 11.42 motion without a hearing.

Accordingly, the November 19, 2004, order of the McCracken Circuit Court denying Hightower's RCr 11.42 motion is affirmed.

IT IS FURTHER ORDERED that Hightower's appeal in Action No. 2004-CA-002543-MR is DISMISSED as untimely.

ALL CONCUR.

ENTERED: September 23, 2005

/s/ Wm. L. Knopf
JUDGE, COURT OF APPEALS

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