

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001225-MR

ROBERT STIVER

APPELLANT

v. APPEAL FROM OWEN CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 04-CR-00015

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART,
AND REMANDING

** ** * * *

BEFORE: GUIDUGLI AND SCHRODER, JUDGES; MILLER,¹ SPECIAL JUDGE.

SCHRODER, JUDGE: Robert Stiver appeals from an order of the Owen Circuit Court which denied his motion for relief pursuant to RCr 11.42 without holding an evidentiary hearing. For the reasons stated herein, we affirm in part, vacate in part, and remand for an evidentiary hearing solely on the issue of counsel's alleged ineffectiveness for failing to investigate and interview witnesses. In all other aspects, we affirm.

¹ Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

On April 6, 2004, Stiver was charged with one count of second-degree sodomy and being a first-degree persistent felony offender. Pursuant to a plea agreement, on August 10, 2004, Stiver moved to enter a guilty plea. Per the plea agreement, Stiver would plead guilty in exchange for the Commonwealth's amending the second-degree sodomy charge to third-degree sodomy, dismissal of the PFO I charge, and a recommended sentence of eighteen months. The trial court accepted the plea, and entered orders amending the second-degree sodomy charge to third-degree sodomy and dismissing the PFO I charge. At final sentencing on September 21, 2004, pursuant to the plea agreement, the trial court sentenced Stiver to eighteen months' imprisonment.

On January 17, 2005, Stiver, *pro se*, filed a motion for relief pursuant to CR 60.02(c) and (f). Following a hearing thereon, the trial court denied the motion in an order entered on January 31, 2005. No appeal appears to have been taken therefrom. On April 6, 2005, Stiver, *pro se*, filed a motion pursuant to RCr 11.42 to vacate his sentence and conviction, along with motions for appointment of counsel and an evidentiary hearing. In the RCr 11.42 motion, Stiver specifically alleged that his counsel was ineffective in that he failed to adequately investigate his claims and failed to interview and secure the attendance of exculpatory witnesses, and failed to request discovery and move for a bill of particulars.

In an order entered on May 23, 2005, the trial court denied the motion for an evidentiary hearing on grounds that no hearing was necessary as the allegations in the RCr 11.42 motion were refuted on the face of the record, and that all material issues of fact were determined on the face of the record. In the same order, the trial court denied the RCr 11.42 motion. This appeal followed.

Stiver's first allegation of ineffective assistance of counsel raised in the RCr 11.42 motion is that counsel failed to investigate the claims and failed to interview alibi witnesses. The charge in this case stemmed from an allegation by the victim (who is Stiver's minor son) that Stiver had picked him up while he (the victim) was walking to the grocery store, drove him to his grandmother's (Stiver's mother's) house, and there Stiver forced him to engage in oral sex. In the motion, Stiver argued that counsel failed to investigate the fact that the pick-up truck with which he was alleged to have abducted the victim was not running during the time when the crime allegedly occurred. Further, Stiver argued counsel was ineffective by failing to speak to his mother, who would have stated that the crime could not have happened because Stiver and the victim (her grandson) were never in her apartment at the same time. In support of the RCr 11.42 motion, an affidavit of Stiver's mother was attached which stated the above.

To prevail on a claim of ineffective assistance of counsel on a guilty plea, the defendant must show that counsel's performance was deficient relative to current professional standards and that, but for the deficient performance, there is a reasonable likelihood that the defendant would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 808 L. Ed. 2d 203 (1985); Sparks v. Commonwealth, 721 S.W.2d 726 (Ky.App. 1986).

On appeal, Stiver contends that the trial court erred in denying his RCr 11.42 motion without holding an evidentiary hearing. Stiver argues that his grounds for relief contained issues that were collateral to the record and could not be adjudicated by reference to the record.

During the plea colloquy, the trial court did review with Stiver the rights he was waiving by pleading guilty, including the right to confront and cross-examine witnesses, and "the right to subpoena your own witnesses in to tell your side of it." Further, Stiver answered affirmatively when asked if he had enough time to speak with counsel, if counsel had answered all of his questions, and if he was satisfied with the help that counsel had given him. When asked if counsel had "looked into the parts about your case you wanted him to look into for you", Stiver replied "He has. He has very thoroughly investigated it."

We first note that the effect of entering a voluntary guilty plea is to waive all defenses other than that the indictment charges no offense. Centers v. Commonwealth, 799 S.W.2d 51, 55 (Ky.App. 1990). Accordingly, Stiver's guilty plea waived all defenses unless the plea was involuntary. Id. "A criminal defendant may demonstrate that his guilty plea was involuntary by showing that it was the result of ineffective assistance of counsel." Rigdon v. Commonwealth, 144 S.W.3d 283, 288 (Ky.App. 2004). And, "[i]n such an instance, a trial court is to consider the totality of the circumstances surrounding the guilty plea and juxtapose the presumption of voluntariness inherent in a proper plea colloquy with a *Strickland v. Washington* inquiry into the performance of counsel." Id. (citations and quotation marks omitted). "[G]enerally, an evaluation of the circumstances supporting or refuting claims of coercion and ineffective assistance of counsel requires an inquiry into what transpired between attorney and client that led to the entry of the plea, i.e., an evidentiary hearing.'" Id., quoting Rodriguez v. Commonwealth, 87 S.W.3d 8, 11 (Ky. 2002). An evidentiary hearing on an RCr 11.42 motion is required where "there is a material issue of fact that cannot be conclusively resolved, i.e., conclusively proved or disproved, by an examination of the record." Fraser v. Commonwealth, 59 S.W.3d 448, 452 (Ky. 2001). Having reviewed the record, in

light of the affidavit from Stiver's mother, in whose apartment the crime was alleged to have occurred, we believe that the allegation of counsel's failure to interview Stiver's mother is a material one that cannot be resolved on the face of the record. The trial court's order denying the RCr 11.42 motion included no findings. Accordingly, we conclude that the order denying the RCr 11.42 motion must be vacated and the matter remanded for an evidentiary hearing on the issue of whether defense counsel needed to investigate or interview witnesses in light of the guilty plea.

Stiver further contends that counsel was ineffective for failing to request discovery or move for a bill of particulars. The record does not include any requests for discovery or a motion for a bill of particulars. However, the record does contain the documents "First Discovery and Inspection as Provided by the Commonwealth", filed April 20, 2004, and "Supplemental Discovery and Inspection as Provided by the Commonwealth", filed on August 12, 2004. Both documents state that the Commonwealth is providing the discovery pursuant to RCr 6.22, RCr 7.24, and RCr 7.26. Pursuant to these rules, the Commonwealth would have provided therein all discoverable material, including witness statements and police reports, as well as that which would have been supplied through a bill of particulars (RCr 6.22). Stiver has failed to show any

deficiency, nor prejudice as a result of this alleged error. No evidentiary hearing on this issue was required. Fraser, 59 S.W.3d at 452.

Stiver finally contends that counsel was ineffective for failing to inform him of the consequences of entering a guilty plea to a sex offense, in particular, that the residency restrictions were not explained to him. This issue was not raised in the RCr 11.42 motion, and hence, is not preserved for our review. Further, "a knowing, voluntary and intelligent waiver does not necessarily include a requirement that the defendant be informed of every possible consequence and aspect of the guilty plea." Turner v. Commonwealth, 647 S.W.2d 500, 500-501 (Ky.App. 1982). Again, no evidentiary hearing on this issue was necessary.

For the aforementioned reasons, the order of the Owen Circuit Court denying the RCr 11.42 motion is vacated as to the sole issue of ineffective assistance of counsel for failure to investigate and interview witnesses, and remanded for an evidentiary hearing thereon. As to all other issues, the order of the Owen Circuit Court denying the RCr 11.42 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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