

RENDERED: SEPTEMBER 29, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-002177-MR

CHRISTOPHER MCFARLAND

APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 01-CR-00110-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: ABRAMSON AND GUIDUGLI, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

GUIDUGLI, JUDGE: Christopher McFarland appeals from an order of the Warren Circuit Court denying his motion for RCr 11.42 relief. McFarland argues that the trial court erred in failing to grant an evidentiary hearing on the motion. For the reasons stated below, we affirm the order on appeal.

On February 21, 2001, McFarland was indicted by the Warren County grand jury on one count each of receiving stolen

¹ Senior Judge David C. Buckingham, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

property valued over \$300 and for being a second-degree persistent felony offender. It was alleged that McFarland stole a vehicle in Bowling Green, Kentucky, and fled on foot after being pulled over by police. McFarland's step-brother, Ralph Glass, was an occupant in the vehicle. He originally told the police that a third party had been driving the stolen vehicle, but later changed his testimony to identify the driver as McFarland.

The matter proceeded to trial, whereupon the jury returned a guilty verdict on the charge of receiving stolen property over \$300. At the conclusion of the penalty phase, the jury found McFarland to be a persistent felony offender in the second degree, and recommended a total sentence of 10 years in prison. On February 15, 2002, the Circuit Court sentenced McFarland in accordance with the jury's recommendation.

McFarland appealed his conviction, arguing that the trial court improperly admitted hearsay evidence and failed to allow McFarland the right to confront the witnesses against him.² A panel of this Court affirmed the judgment of conviction on April 18, 2003. The Kentucky Supreme Court denied discretionary review on March 10, 2004.

On July 8, 2005, McFarland filed a pro se RCr 11.42 motion, which forms the basis of the instant appeal. The

² Appeal No. 2002-CA-000427-MR.

circuit court granted McFarland's request to proceed in forma pauperis and appointed the Department of Public Advocacy to represent him. The order also stated that "an evidentiary hearing shall be assigned upon proper motion of either party's attorney, or if the Court determines one is necessary."

On August 18, 2005, the Commonwealth filed a brief arguing that McFarland's motion for RCr 11.42 relief failed to recite facts sufficient to comply with RCr 11.42(2). In response, a supervisor for the Department of Public Advocacy moved for an extension of time to assign an attorney and supplement the RCr 11.42 motion. On September 6, 2005, the Circuit Court granted the motion for an extension of time, allowing the Department an additional 90 days to supplement the original motion. Less than one month later, the circuit court entered an order denying McFarland's motion for RCr 11.42 relief on the grounds that McFarland failed to allege facts sufficient to comply with RCr 11.42(2). This appeal followed.

McFarland now argues that the trial court committed reversible error when it failed to grant an evidentiary hearing on his motion for relief. Subsumed in this argument is his contention that the court abused its discretion when it disposed of his motion prior to the expiration of the 90-day period it had granted for supplementation of the motion. He argues that the motion set forth facts which, if true, warranted relief,

that counsel's performance was deficient and prejudicial under Strickland,³ and that the allegations raised in the motion could not be resolved by reference to the record. In sum, he seeks an order reversing the order on appeal and remanding the matter for an evidentiary hearing.

We have examined the record, the written arguments and the law, and find no basis for reversing the order denying McFarland's RCr 11.42 motion. On the first issue, whether McFarland's pro se motion failed to allege facts to support his claim of ineffective assistance, the circuit court properly answered this question in the affirmative. RCr 11.42(2) states, the "motion shall . . . state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion."

Each of McFarland's claims of ineffective assistance either fails to state the facts on which he relies, or is refuted by the record. For example, McFarland's claim that counsel was ineffective for failing to call McFarland's wife as an alibi witness does not reveal what his wife would have testified to, or whether counsel was made aware of her alleged alibi statement. Decisions relating to witness selection are

³ Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 647 (1984).

left to trial counsel's discretion and "will not be second-guessed by hindsight."⁴ Similarly, McFarland claimed that trial counsel should have impeached the testimony of the Commonwealth's witness, Betty Glass, who is McFarland's mother, and also contends that counsel should have called an expert witness. Again, McFarland does not identify the basis for Glass's impeachment, the identity of the expert, or what the expert would have testified to.

McFarland's also contends that the Circuit Court erred in failing to conduct an evidentiary hearing. We find no error on this issue. Because the court properly found that McFarland's motion failed to allege facts sufficient to support his claim of ineffective assistance, no additional inquiry was merited.

Lastly, McFarland argues that his trial counsel's performance was deficient and resulted in prejudice under Strickland. As the parties are well aware, McFarland's claims of ineffective assistance would merit vacating and setting aside the judgment only if McFarland 1) identified specific errors by counsel, 2) demonstrated that counsel's errors were objectively unreasonable at the time of trial, 3) rebutted the strong presumption that counsel's actions were the result of trial strategy, and 4) demonstrated that the errors prejudiced his

⁴ Foley v. Commonwealth, 17 S.W.3d 878, 885 (Ky. 2000).

right to a fair trial to such a degree that a reasonable probability exists that he would have been found not guilty but for the errors.⁵

McFarland's argument on this issue is misplaced, as the Circuit Court's summary dismissal of his motion precluded the court from entering into a Strickland analysis. Having disposed of the motion for failure to allege the specific facts on which McFarland relied in support of his claim, the court was never availed of the opportunity to apply the facts at bar to Strickland. Accordingly, we find no error on this issue.

For the foregoing reasons, we affirm the order of the Warren Circuit Court denying McFarland's motion for RCr 11.42 relief.

ALL CONCUR.

BRIEF FOR APPELLANT:

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⁵ Strickland, 466 U.S. 668.