

Commonwealth of Kentucky
Court of Appeals

NO. 2005-CA-002414-MR

KALTON ADKINS

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 99-CR-00326

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: ABRAMSON AND DIXON, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.

ABRAMSON, JUDGE: In October 2000, a Pike County jury found Kalton Adkins guilty of the November 6, 1999 murder of sixty-eight-year-old Richard Roberts. The Commonwealth alleged that Adkins, who was addicted to cocaine at the time and who was acquainted with Roberts, had bludgeoned Roberts to death in the course of stealing money and perhaps other valuables to purchase drugs. In addition to murder, the jury found Adkins guilty of first-degree robbery and first-degree burglary. In a December 22,

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

2000 judgment, the Pike Circuit Court sentenced Adkins in accord with the jury's verdict to a total of seventy years in prison. Our Supreme Court affirmed that judgment in an opinion that became final in February 2003. *Adkins v. Commonwealth*, 96 S.W.3d 779 (Ky. 2003). In December of that year, prompted in part by a footnote in the Supreme Court's opinion noting that excludable habit evidence had not been objected to at trial, Adkins moved for relief from his conviction pursuant to RCr 11.42 and alleged that trial counsel had rendered ineffective assistance. His present appeal is from the October 24, 2005 Order of the Pike Circuit Court denying RCr 11.42 relief. He contends not only that the trial court erred, but that counsel appointed to supplement his RCr 11.42 motion and to represent him at the September 2005 hearing on the matter rendered ineffective post-conviction assistance. Having reviewed the record and considered Adkins's contentions, we affirm.

As our Supreme Court has noted many times, RCr 11.42 provides relief only for errors, such as constitutional violations, that are serious enough to invalidate the original conviction or sentence, and only for errors that were not subject to review upon direct appeal. *Hodge v. Commonwealth*, 116 S.W.3d 463 (Ky. 2003). The rule is also limited to known errors; it is not a discovery mechanism. *Id.* To proceed under the rule, therefore, the movant must allege specific facts which, if true, would constitute grounds for relief. A motion asserting insufficient grounds, speculative allegations, or allegations conclusively refuted by the record may be summarily dismissed. *Id.* A hearing is required, however, if there is a material issue of fact that the record does not conclusively

resolve, and in that case an indigent movant is entitled to the appointment of counsel to supplement the motion and to assist with the hearing. *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001). It is well established, of course, that the ineffective assistance of trial counsel is a constitutional deprivation subject to challenge under RCr 11.42. *Id.*

In its initial response to Adkins's motion, the trial court ruled that Adkins had alleged six instances of counsel's ineffectiveness that were not refuted on the face of the record and that thus required the appointment of counsel and a hearing. Adkins alleged that trial counsel (1) had failed, as the Supreme Court had noted, to object to the introduction of inadmissible evidence concerning the victim's habits; (2) had denied Adkins his right to testify at trial; (3) had failed to obtain experts to refute portions of the Commonwealth's case; (4) had failed to conduct an adequate investigation and had not been prepared for trial; (5) had not meaningfully cross-examined Ronnie Adkison, Adkins's brother, who testified concerning a purported confession; and (6) had labored under a conflict of interest because of animosity counsel bore toward Adkins's mother. Numerous continuances and nearly a year later, appointed counsel informed the court that he had nothing to add to Adkins's *pro se* pleading and requested simply that the court rule on the basis of the record as it stood, a basis the court had already indicated was inadequate. Adkins, on his own behalf, promptly reminded the court that he had requested a hearing and that the court had granted the request. The matter was heard in September 2005.

Adkins did not testify at his murder trial, nor did counsel call other witnesses on his behalf. Counsel attempted, rather, through cross-examination of the Commonwealth's witnesses, to make it appear likely that someone other than Adkins had perpetrated the crime. Unfortunately for Adkins, the Commonwealth's case, though circumstantial, was a strong one. The Supreme Court summarized it as follows:

[T]here was evidence that (1) the victim was expecting Appellant [Adkins] on the night of the murder; (2) Appellant was absent from the mobile home he shared with Caudill [Adkins's girlfriend at the time] for two to three hours on the night of the murder; (3) Appellant admitted being on Roberts's property that night; (4) the victim was well acquainted with Appellant and would not have opened his door clad only in underwear unless the visitor was a male with whom he was well acquainted; (5) Appellant had cocaine and funds to purchase a motel room when he returned home that night; (6) the clothes Appellant wore that night were stained with the victim's blood; (7) Appellant's military-style brass belt buckle was found on a belt on the blood-stained jeans in Caudill's vehicle with the ratchet missing; (8) a ratchet from a military-style brass belt buckle similar in appearance to Appellant's buckle was found at the crime scene; (9) the victim's shotgun and billfold were missing and the billfold was found discarded along the route Appellant admitted traveling to Wheelwright on the night of the murder and the morning after; and (10) Appellant told his brother that "I might have done it."

Adkins v. Commonwealth, 96 S.W.3d at 786.

At the RCr 11.42 hearing, Adkins testified that he had argued for a defense based on mental incapacity, an incapacity, he claimed, that arose from a blow to his head about a month prior to the murder and from his drug addiction. He pleaded with counsel, he claimed, to permit him to testify that he simply could not remember the events of that

night when he had not been in his right mind. Counsel, he claimed, adamantly advised him against that approach and insisted that his testimony would result in his conviction. He conceded, however, that counsel had informed him of his right to testify, and, though strongly urging him not to do so, had explained that the ultimate decision was his. Adkins also complained at the RCr 11.42 hearing that counsel's failure to call any defense witnesses indicated a lack of investigation and preparation, and he again noted the Supreme Court's comment that counsel had not objected to the introduction of excludable evidence about the victim's habits.

Adkins's trial counsel also testified at the RCr 11.42 hearing. She acknowledged having advised Adkins not to testify, but explained that she had, consistent with her regular practice throughout several years of defense representation, informed him of his right to testify if he so decided. She also insisted that she and the investigator assigned to the case had duly explored every lead Adkins suggested, but that none of them produced favorable evidence. The record reflects, in fact, that counsel obtained a psychiatric evaluation of Adkins, indicating that she did investigate the line of defense Adkins claims he urged. The record does not include the results of the evaluation, but in light of counsel's testimony it is reasonable to infer that the results did not support a mental impairment defense. Finally, counsel explained that she had not objected to the introduction of evidence about the victim's habits, indeed that she elicited much of that evidence, because she hoped to show that those habits were inconsistent with the Commonwealth's theory of the case.

The trial court first ruled that because Adkins had presented no evidence at the RCr 11.42 hearing with respect to counsel's alleged conflict of interest, her alleged failure to obtain rebuttal experts, and her alleged failure meaningfully to cross-examine Ronnie Adkison, those issues had been waived. The court then ruled that the evidence elicited at the hearing refuted Adkins's other claims. The court found that, as Adkins admitted, counsel had not forbidden him to testify, but had only urged him not to in pursuit of a reasonable trial strategy. Counsel's investigation had been adequate, the court found, particularly in light of Adkins's admission that he had not been as forthcoming with counsel as he might have been. And, finally, the court found that counsel's decision to elicit rather than object to evidence about the victim's sleeping habits was reasonable in the circumstances. Adkins challenges all of these rulings. He contends that the trial court erred by failing to address the "waived" issues. He also argues that the evidence supports rather than refutes his other claims. We disagree.

To be entitled to relief on the ground of ineffective assistance of counsel, an RCr 11.42 movant must show both that counsel's performance was deficient and that the deficiency was prejudicial. *Mills v. Commonwealth*, 170 S.W.3d 310 (Ky. 2005). There is a strong presumption in counsel's favor, which the movant must overcome by showing, not that counsel failed to obtain a favorable result or that, with the benefit of hindsight, a different course might have been chosen, but that counsel's performance was unreasonable in the circumstances, that she "made errors so serious that [s]he was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* At 327. The

movant must also show that “there is a reasonable probability that but for counsel’s error the result of the proceeding would have been different.” *Id.* at 328.

Looking first at the issues the trial court did address, we agree with that court that Adkins’s evidence did not establish any errors by counsel, let alone errors of constitutional magnitude. At the RCr 11.42 hearing, Adkins conceded that counsel and her investigator interviewed everyone connected with the crime and everyone he referred them to. As noted above, the record reflects that counsel investigated Adkins’s psychiatric status. Adkins has not identified any exculpatory evidence counsel overlooked. His contention, rather, is merely that had counsel tried harder, something might have turned up. Speculative claims like this, however, are not sufficient to overcome the presumption, borne out in this case by the trial record and the testimony at the hearing, that counsel’s investigation was adequate.

Nor has Adkins shown that counsel’s defensive strategy, including her advice that Adkins not testify, was unreasonable. As noted above, the Commonwealth’s case was a strong one, but, in the absence of exculpatory evidence, counsel’s strategy, including her strategy of trying to show that the victim’s habits suggested that he had opened his door that night to someone other than Adkins, at least put the Commonwealth to its proof and offered a hope, however slim, that someone on the jury would doubt that Adkins was the perpetrator. Adkins’s testimony that he could not remember the crime, though he may have committed it, would not have helped that defense and may well have undermined it. There is no evidence that counsel misrepresented Adkins’s right to

testify, and we agree with the trial court that neither her advice against testifying nor her use of habit evidence has been shown to be unreasonable.

Adkins's other claims are similarly without merit. Even if the trial court erred by deeming them waived, they do not entitle Adkins to relief. He contends, first, that counsel should have obtained a series of experts: a blood spatter expert to discuss why so little of the victim's blood appeared on Adkins's pants when photos of the crime scene indicate that blood spattered widely, a psychologist to discuss why Adkins might have made a false confession to his brother, and a DNA specialist to analyze hair and skin samples apparently removed from under the victim's fingernails.

In *Mills v. Commonwealth*, *supra*, our Supreme Court rejected a similar claim that defense counsel should have retained a mental health expert to explore the possible effects of abuse during the defendant's childhood. The Court explained that RCr 11.42 requires the movant to assert specific, known facts which justify relief. A speculative claim "that certain facts *might* be true, in essence an admission that Appellant does not know whether the claim is true, cannot be the basis for RCr 11.42 relief." *Id.* At 328. Adkins's claims are similarly speculative in that he does not allege that counsel failed to discover any specific fact, only that she *might* have discovered useful facts had she enlisted additional experts. As *Mills* indicates, that sort of speculative allegation is not enough.

Adkins contends that counsel did not effectively cross-examine his brother, Ronnie Adkison, concerning Adkins's alleged confession. Apparently Adkison talked

with Adkins not long after the murder and urged him, for their family's sake, to own up to the crime if he was in fact guilty. Adkins does not deny that he told his brother, just as he maintained at the RCr 11.42 hearing, that he could not remember the crime, but he was mentally distraught and could have done it. Adkins apparently contends that at trial, counsel should have elicited testimony from Adkison making it clearer that the supposed "confession" was not so much an admission of guilt but an admission of the bad mental state into which Adkins had fallen. Even if counsel's cross-examination could be deemed lacking, however (though we do not suggest that it was), it is clear that putting a slightly different spin on Adkison's testimony is not reasonably likely to have had any effect on the trial's outcome. As noted above, Adkison's testimony was only one small piece of a large and compelling case against Adkins. Altering that piece or even removing it, is not reasonably likely to have changed the result.

Finally, Adkins contends that a conflict of interest—counsel's animosity toward Adkins's mother—interfered with counsel's efforts on his behalf. Adkins hopes to benefit from the rule according to which prejudice will be presumed where it is shown that counsel's performance was adversely affected because he or she actively represented conflicting interests. *See* Gregory Sarno, "Circumstances Giving Rise to Prejudicial Conflict of Interests Between Criminal Defendant and Defense Counsel—State Cases," 18 ALR 4th 360 (1982). In *Mickens v. Taylor*, 535 U.S. 162, 122 S.Ct. 1237, 152 L. Ed. 2d 291 (2002), however, the United States Supreme Court strongly suggested that the sort of ethical conflict Adkins alleges does not give rise to the presumption of prejudice that

arises in cases of conflicted multiple representations. Even if the presumption were to apply, Adkins is still obliged to show that counsel's performance was adversely affected by the conflict, and he has failed to make that showing. As discussed above, counsel's investigation and trial strategy were adequate under the Constitution and do not suggest any diversion of trial counsel's loyalty. We conclude, therefore, that Adkins is not entitled to relief on any of the grounds the trial court declined to consider.

Finally, Adkins complains that his post-conviction counsel ineffectively represented him in the RCr 11.42 proceeding. He notes counsel's nearly year long delay in reviewing the case; his failure to amend Adkins's *pro se* pleading; and, most especially, his failure to present evidence at the RCr 11.42 hearing on the three issues the trial court deemed waived. We might add that, though there is no indication in the record that RCr 11.42 counsel withdrew from the case, he apparently provided no assistance with Adkins's appeal, which, like the original motion, Adkins has pursued *pro se*.

As the Commonwealth notes, and as Adkins concedes, Adkins does not have a right to RCr 11.42 counsel under either the Sixth Amendment to the United States Constitution or Section 11 of the Kentucky Constitution. *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L. Ed. 2d 640 (1991); *Harper v. Commonwealth*, 978 S.W.2d 311 (Ky. 1998). Those provisions, therefore, provide no remedy for RCr 11.42 counsel's alleged ineffectiveness. Adkins contends, however, that he does have a due process right to fair and meaningful RCr 11.42 proceedings and that counsel's derelictions in this case deprived him of that right. At least one of our sister states has

recognized the sort of due process claim Adkins asserts. *Bahm v. State*, 789 N.E.2d 50 (Ind.App. 2003). We decline to address the constitutional issue, however, because it is clear that Adkins, as an indigent whose RCr 11.42 motion raised material issues of fact unresolved by the trial record, has a statutory right to counsel pursuant to RCr 11.42(5) and KRS 31.110, *Fraser v. Commonwealth*, *supra*. This statutory right, our Supreme Court has noted, “anticipates that the representation provided to indigent defendants will be at least minimally competent.” *Moore v. Commonwealth*, 199 S.W.3d 132, 139 (Ky. 2006).

It appears that no published case in Kentucky has attempted to specify what “minimally competent” RCr 11.42 representation entails, but sister courts, again, construing statutory schemes similar to ours, have noted that collateral, post-conviction counsel at least has the duty to consult with the movant; to review the trial court record, including the trial if there was one; to review the movant’s pleading and to amend or supplement it where necessary to conform to legal standards and to avoid, where possible, obvious default; and to assist the movant with the presentation of his or her claim at the post-conviction hearing. *People v. Jennings*, 802 N.E.2d 867 (Ill.App. 2003); *Commonwealth v. Hampton*, 718 A.2d 1250 (Pa.Super. 1998). *See* Gregory Sarno, “Adequacy of Defense Counsel’s Representation of Criminal Client Regarding Appellate and Postconviction Remedies,” 15 ALR 4th 582 (1982). We agree with our sister courts that these duties are all included within the notion of “minimally competent” RCr 11.42 representation. Where post-conviction counsel’s breach of these duties is so

extensive as to amount to an abandonment of the movant and to virtually no representation at all, the remedy is an automatic remand for new, adequately represented RCr 11.42 proceedings. *Id.* Where counsel's alleged dereliction is less egregious, however, harmless error analysis is appropriate, and remand is not required unless it appears that counsel's errors prejudiced the RCr 11.42 proceedings. Finally, a movant may raise on his own behalf the claim of ineffective RCr 11.42 counsel in the trial court at the conclusion of RCr 11.42 proceedings, or on appeal from those proceedings, but such a claim does not provide grounds for a successive RCr 11.42 motion. *Moore v. Commonwealth, supra.*

In this case, although we agree with Adkins that post-conviction counsel's representation was not exemplary, counsel cannot be said to have abandoned Adkins or to have prejudiced his RCr 11.42 claim. He did consult with Adkins, he apparently reviewed the record, and he did, at least to some extent, provide assistance at the RCr 11.42 hearing. On the other hand, though we recognize the heavy case loads borne by public defenders at all levels, it is distressing that counsel took a year to review the case and Adkins's motion, and then failed to supplement the motion in any way, not even helping to clarify Adkins's claims or the legal standards that would apply to them. Nevertheless, even without counsel's clarification, the trial court found six issues in Adkins's *pro se* motion which merited a hearing, so it can hardly be said that counsel's performance in this regard was prejudicial. It is also distressing that counsel utterly neglected three of those issues at the hearing, which resulted in their being dismissed

without trial court review. The avoidance of default is, of course, one of counsel's most important services, and here counsel performed little better than a layman. Again, however, as we discussed above, the defaulted issues, had they been addressed, would not have entitled Adkins to relief, so there was no prejudice. Accordingly, although counsel's assistance was in part deficient, the deficiency does not require that Adkins's RCr 11.42 proceeding be remanded.

In sum, we agree with the trial court that Adkins received reasonably effective trial counsel and thus was not entitled to RCr 11.42 relief. Counsel adequately investigated the case and presented a reasonable defense in the face of compelling evidence of Adkins's guilt. Counsel did not err by advising Adkins not to testify, by not cross-examining Adkins's brother in a different manner, or by not consulting additional experts. Counsel's performance was not impaired by her alleged animosity toward Adkins's mother. Finally, it does not appear that more competent RCr 11.42 counsel would have altered this result. Accordingly, we affirm the October 24, 2005 Order of the Pike Circuit Court.

ALL CONCUR.

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