

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002424-MR

JOSEPH C. BOWDEN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, CIRCUIT JUDGE
INDICTMENT NO. 01-CR-00525

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON AND TAYLOR, JUDGES; KNOPF,¹ SENIOR JUDGE.

DIXON, JUDGE: Joseph C. Bowden appeals *pro se* to this Court from the Fayette Circuit Court's denial of his RCr² 11.42 motion for post-conviction relief. Bowden asserts in this appeal that he suffered ineffective assistance of counsel at trial, and he claims the trial court erred by failing to hold an evidentiary hearing on his RCr 11.42 motion.

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

² Kentucky Rules of Criminal Procedure.

In the early morning of March 23, 2001, Lexington police arrested Bowden after finding him forcibly restraining and sexually assaulting a female victim. Bowden had followed the victim from a downtown Lexington bar and dragged her into the stairwell of an apartment complex. Bowden told police the contact was consensual and that the victim was a prostitute. However, a Fayette County grand jury subsequently indicted Bowden for kidnapping, sexual assault, resisting arrest, and being a second-degree persistent felony offender.

The court appointed a public defender to represent Bowden. The case went to trial November 8, 2001 and resulted in a hung jury and mistrial. Bowden received a second trial on February 11, 2002, and the jury returned a guilty verdict on all charges. The court sentenced Bowden to a total of forty years' imprisonment pursuant to the jury's recommendation. The Supreme Court of Kentucky affirmed Bowden's conviction in an unpublished opinion.³

In the case at bar, Bowden contends that his trial counsel rendered ineffective assistance because counsel allegedly coerced Bowden into going to trial rather than pleading guilty. This Court has said that in such a scenario,

³ *Bowden v. Commonwealth*, 2002-SC-0378-MR (Ky. 2003).

the *Hill v. Lockhart*⁴ analysis of ineffective assistance of counsel applies upon appellate review.⁵

[First,] 'the defendant must show that counsel's representation fell below an objective standard of reasonableness.' . . . [Second,] the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.⁶

In support of his claim, Bowden points to a status hearing held on July 20, 2001. At the hearing, Bowden's attorney requested a trial date when Bowden suddenly interjected, much to counsel's surprise, and told the court he did not want to go to trial. The court asked Bowden if he wished to plead guilty and he answered in the affirmative. After a brief exchange between Bowden, his attorney, and the court, the case was continued for one week so Bowden and his attorney could further discuss whether to enter a guilty plea. The video records provided to this Court do not contain the hearing that took place on July 27, 2001. However, the trial judge referenced the events of this hearing in the court order denying RCr 11.42 relief. Consequently, we assume the missing

⁴ 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

⁵ *Osborne v. Commonwealth*, 992 S.W.2d 860, 864 (Ky. App. 1998).

⁶ *Hill*, 474 U.S. at 57-59, 106 S.Ct. at 369-70 (citations omitted).

portion of the record supports the order of the court.⁷ The court noted that during the July 27 hearing Bowden agreed to a trial date and lamented to the court that the date was not soon enough to suit him. We also point out that Bowden had two trials and retained the same attorney throughout his circuit court proceedings. Accordingly, after review of the record, we find no proof that trial counsel's performance was objectively unreasonable.

Additionally, Bowden argues his attorney failed to advise him of the maximum penalty he faced if convicted by a jury. This claim is refuted on the face of the record. Bowden was present with his attorney at hearings prior to both trials where counsel argued to dismiss the kidnapping charge because of the potential enhancement of the penalty to life imprisonment.

Finally, Bowden asserts the trial court erred by refusing to hold an evidentiary hearing on his RCr 11.42 motion. An evidentiary hearing is warranted only when "the [RCr 11.42] motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." ⁸

⁷ *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985).

⁸ *Baze v. Commonwealth*, 23 S.W.3d 619, 622 (Ky. 2000) (quoting *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967)).

We find that Bowden's claims are clearly resolved on the face of the record, and Fayette Circuit Court properly declined to hold an evidentiary hearing.

For the foregoing reasons the order of Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE

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