RENDERED: MAY 25, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000528-MR

JERRY L. BEATTY — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISSAC, JUDGE
ACTION NO. 01-CR-00436

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; BUCKINGHAM, SENIOR JUDGE.[1]

BUCKINGHAM, SENIOR JUDGE: Jerry L. Beatty appeals from an order of the Fayette Circuit Court denying his petition for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. For the reasons stated below, we affirm.

On April 24, 2001, Beatty was indicted for two counts of first-degree sodomy, Kentucky Revised Statutes (KRS) 510.070, and two counts of first-degree sexual abuse, KRS 510.110. The charges were brought in connection with an allegation

[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

that Beatty had had deviate sexual intercourse and sexual contact with a male child less than 12 years old on numerous occasions.

Beatty subsequently entered into a plea agreement with the Commonwealth under which he agreed to plead guilty to one count of first-degree sexual abuse, and the Commonwealth agreed to recommend a sentence of five years' imprisonment and dismissal of the remaining three charges. On July 1, 2003, the circuit court entered a final judgment in accordance with the plea agreement.

On February 17, 2005, Beatty filed a pro se motion for post-conviction relief pursuant to RCr 11.42. The motion alleged that, for various reasons, he received ineffective assistance in connection with trial counsel's representation of him in connection with his guilty plea, and that his guilty plea was not entered knowingly and voluntarily. Post-conviction counsel was appointed and given the opportunity to supplement Beatty's pro se motion; however, upon reviewing the case, counsel determined that there was "no need to supplement."

On March 6, 2006, the trial court entered an order denying Beatty's motion. This appeal followed.

INEFFECTIVE ASSISTANCE OF COUNSEL

We first consider Beatty's various allegations of ineffective assistance of counsel. In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) , the United States Supreme Court set forth the standard governing review of claims of ineffective assistance of counsel. Under this standard, a party asserting such a

claim is required to show: (1) that the trial counsel's performance was deficient in that it fell outside the range of professionally competent assistance; and (2) that the deficiency was prejudicial because there is a reasonable probability that the outcome would have been different but for counsel's performance. *Id.* at 687. This standard was adopted by the Kentucky Supreme Court in *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985).

This test is modified in cases involving a defendant who enters a guilty plea. In such instances, the second prong of the Strickland test includes the requirement that a defendant demonstrate that but for the alleged errors of counsel, there is a reasonable probability that the defendant would not have entered a guilty plea, but rather would have insisted on proceeding to trial. *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985); *Sparks v. Commonwealth*, 721 S.W.2d 726 (Ky.App. 1986).

A reviewing court must entertain a strong presumption that counsel's challenged conduct falls within the range of reasonable professional assistance. *Strickland*, *466 U.S.* at 688-89. The defendant bears the burden of overcoming this strong presumption by identifying specific acts or omissions that he alleges constitute a constitutionally deficient performance. *Id.* at 689-90. The relevant inquiry is whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*. at 694.

Beatty's first allegation of ineffective assistance is that trial counsel misled him into believing that he was entering a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1977), under which he would not actually admit guilt to the underlying charges, and that counsel had worked out a "deal" with the judge whereby Beatty would receive probation in connection with the plea agreement.

Beatty's allegation of these assurances by trial counsel is refuted by the record. Alternatively, assuming that trial counsel made those misrepresentations, any misperceptions they may have created were corrected by the trial court at the May 8, 2003, plea agreement hearing. Accordingly, as any misrepresentations have been corrected, Beatty was not prejudiced thereby. Refuting his claim that he was to enter an *Alford* plea is the following exchange between Beatty and the trial court:

> Trial Court: Okay. Alright, did you in fact, on or about between the dates of August 20th, I'm sorry, August of 2000 and March of 2001, in this county, did you commit the offense of sexual abuse first degree, by subjecting the person less than twelve years old, initials J.C., to sexual contact?
>
> Beatty: Yes, your honor.
>
> . . . .
>
> Trial Court: Knowing you have the rights which I went over with you, do you still want to give those up and plead guilty to this, a Class D felony, sexual abuse first?
>
> Beatty: Yes, your honor.

This absolute admission of guilt to the underlying conduct refutes Beatty's allegation that he was under the misperception that he was to enter an *Alford* plea and

avoid admitting to criminal conduct. If Beatty were under the impression that he was to enter an *Alford* plea, there would have been no basis for him to make his unequivocal admission of guilt. In any event, even if there was an agreement for Beatty to enter an *Alford* plea, and he had in fact entered such a plea, the appellant has failed to identify how this would have produced a different outcome in the trial proceedings.

Beatty's allegation that he was in some way assured that he would receive probation in connection with the plea agreement is also refuted by the record. At the plea agreement hearing, the following exchange occurred between Beatty and the trial court:

> Trial Court: And have any threats been made to you or promises or assurances been made to you by anyone that if you plead guilty the court will go easy on you, probate the sentence or give you special treatment? Has anybody promised that would happen and is that why you're pleading guilty?
>
> Beatty: No, your honor.

"Solemn declarations in open court carry a strong presumption of verity." *Centers v. Commonwealth*, 799 S.W.2d 51, 54 (Ky.App. 1990). Beatty's declarations in open court refute his post-conviction claims that he was assured by trial counsel that there was a "deal" with the trial court assuring him probation.

In addition, we note that Beatty's "Waiver of Further Proceedings with Petition to Enter a Guilty Plea," AOC Form AOC-034-36, executed by Beatty and entered into the record on May 8, 2003, likewise refutes his contentions. That form contained the statement "I declare that no . . . person, has made any promise or suggestion of any kind to me, or within my knowledge to anyone else, that I would

receive a lighter sentence, or probation, or any other form of leniency if I would plead 'Guilty.'" We note that at the plea agreement hearing Beatty acknowledged that he had read and understood the Waiver and Petition, and he signed it in open court during the course of the hearing.

In summary, Beatty's allegations alleging ineffective assistance of counsel on the basis that he was misled into believing he would enter an *Alford* plea and would receive probation are refuted by the record.

FAILURE TO INVESTIGATE/ RESEARCH LEGAL PRECEDENT

Beatty also alleges that he received ineffective assistance of counsel based upon trial counsel's failure to investigate and failure to research controlling legal precedent.

In support of his contention that trial counsel failed to adequately investigate the charges against him, Beatty argues that "[h]ad Counsel interviewed material [witnesses], such as social workers, medical doctors, there may have been a different outcome in [sic] regarding this case."

Counsel has a duty to conduct a reasonable investigation, including defenses to the charges. In evaluating whether counsel has discharged this duty to investigate, develop, and present such defenses, Kentucky has adopted a three-part analysis. *Hodge v. Commonwealth*, 68 S.W.3d 338, 344 (Ky. 2001). First, it must be determined whether a reasonable investigation should have uncovered the defense. *Id*. If so, then a determination must be made whether the failure to raise this defense was a

tactical choice by trial counsel. *Id*. Counsel's tactical choice must be given a strong presumption of correctness, and the inquiry is generally at an end. *Id*. If the choice was not tactical and the performance was deficient, then it must be determined whether there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *Id*. *See also Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

However, "RCr 11.42 exists to provide the movant with an opportunity to air known grievances, not an opportunity to conduct a fishing expedition for possible grievances, and post-conviction discovery is not authorized under the rule. *Mills v. Commonwealth*, 170 S.W.3d 310, 325 (Ky.2005) (footnotes omitted).

Here, Beatty has failed to identify any particular witnesses who would have been helpful to his defense who were not interviewed by trial counsel, what information they may have regarding the case, or what their testimony would have been. Consequently, this allegation of ineffective assistance amounts to no more than a fishing expedition, and the claim is outside the scope of RCr 11.42. *Mills*, *supra*.

In support of his allegation that trial counsel failed to adequately research controlling law, Beatty asserts that "when allegations of this nature arise, there must be other independent evidence in which to support said allegation." This contention, however, is not an accurate statement. Rather, a rape victim's testimony alone is sufficient to support a conviction. *Fletcher v. Commonwealth*, 250 Ky. 597, 63 S.W.2d 780, 781 (1933). As such, this allegation of ineffective assistance is without merit.

EVIDENTIARY HEARING

Finally, Beatty contends that the trial court erred by failing to conduct an evidentiary hearing because the claims raised in his RCr 11.42 motion are not refuted by the record.

An evidentiary hearing upon an RCr 11.42 motion "is required if there is a material issue of fact that cannot be conclusively resolved, i.e., conclusively proved or disproved, by an examination of the record. The trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them." *Fraser v. Commonwealth*, 59 S.W.3d 448, 452-53 (Ky. 2001).

As discussed in the preceding sections of this opinion, the allegations of ineffective assistance raised by Beatty are conclusively resolved from the record, and the trial court did not err by failing to conduct an evidentiary hearing.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Jerry L. Beatty, pro se
Little Sandy Correctional Complex
Sandy Hook, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Samuel J. Floyd, Jr.
Assistant Attorney General
Frankfort, Kentucky