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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000642-MR

KENTON COLEMAN — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 02-CR-002105

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON, ACREE, AND WINE, JUDGES.

WINE, JUDGE: Kenton Coleman appeals the Jefferson Circuit Court's dismissal of his RCr 11.42 motion asserting ineffective assistance of counsel and his CR 60.02 motion based upon newly-discovered evidence. Having reviewed the record, the parties' briefs, and applicable law, we affirm.

On July 30, 2002, Coleman shot the father of his sister's child after the two men were in an argument. Later, on August 15, 2002, police saw and then chased Coleman from an illegal dice game where he and several other men were playing.

During the chase, police observed Coleman take a handgun out of his pocket and throw it under a car. The police arrested Coleman and recovered the handgun. Coleman had previously been convicted of four felony counts involving possession of controlled substances. Coleman was indicted by a Jefferson County Grand Jury on September 30, 2002, for assault in the first degree, illegal possession of a firearm by a convicted felon (two counts), tampering with physical evidence, giving a police officer a false name and being a persistent felony offender in the first degree.

After his arraignment, the Commonwealth provided discovery including recordings of phone calls made by Coleman to at least one prospective witness between January 29 and 30, 2003. Coleman entered a plea of guilty on April 16, 2003, on all the charges in the indictment. As a result of the plea negotiations, the Commonwealth recommended an aggregate of twenty-five years to serve in prison. The court explained to Coleman that he had a right to a pre-sentencing investigation report but Coleman waived that right and the trial court accepted the Commonwealth's recommendation of twenty-five years to serve. Coleman's sentence was formally entered in a judgment on April 29, 2003.

Thereafter, on January 8, 2004, Coleman filed, *pro se*, an RCr 11.42 motion where he made two allegations of ineffective assistance of counsel. First, he argued that his attorney did not interview three important witnesses. And second, Coleman alleged his counsel did not spend a sufficient amount of time with him preparing for his case. On that same day, Coleman also filed a CR 60.02 motion contending new evidence,

specifically affidavits submitted by the witnesses Coleman's counsel allegedly did not interview, came to light.

The trial court appointed counsel to represent Coleman in these post-conviction motions. On December 6, 2005, his counsel filed a supplemental RCr 11.42 motion but no supplement to the CR 60.02 motion. The Commonwealth responded to both motions on February 2, 2006. The trial court denied Coleman's motions in an order entered February 16, 2006. This appeal followed.

To prove that he was afforded ineffective assistance of counsel, Coleman must satisfy a two-prong test. He must show both that counsel's performance was deficient and also that the deficiency caused actual prejudice affecting the outcome of the proceeding. *Harper v. Commonwealth*, 978 S.W.2d 311, 315 (Ky. 1998), *citing Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). *See also Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). Further, counsel is presumed to have been constitutionally efficient and the movant has the heavy burden of averring "facts with sufficient specificity" so as to generate a basis for relief under RCr 11.42. *Lucas v. Commonwealth*, 465 S.W.2d 267, 268 (Ky. 1971). And since the trial court denied Coleman's RCr 11.42 motion without either an evidentiary hearing or any written findings, our review is limited to whether his motion "on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." *Baze v. Commonwealth*, 23 S.W.3d 619, 622 (Ky. 2000), *quoting Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967).

A constitutionally valid guilty plea is one that is knowingly, voluntarily and intelligently made. *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). After reviewing the record, it is clear that Coleman made a knowing, voluntary and intelligent plea of guilty. The Commonwealth put forth in the beginning that Coleman was subject to federal prosecution if he did not accept the plea agreement. Furthermore, during the plea colloquy, trial counsel told the court that he had explained the plea agreement to Coleman. Counsel indicated to the court that he had gone over the evidence with Coleman and explained his rights to him.

While under oath and without hesitation, Coleman acknowledged he understood the Commonwealth's recommendation. He further told the court that he had plenty of time to discuss the case with his attorney and he was satisfied with the advice his attorney had afforded him. When asked by the court, Coleman stated that his attorney had advised him of his rights. Coleman indicated to the court that he had read and understood the guilty plea forms before signing them.

Coleman specifically indicated on the record that he understood that by pleading guilty he was waiving his right to a jury trial, his right to remain silent, his right to cross-examine witnesses, and his right to appeal. In doing so, Coleman indicated that he in fact was not under the influence of any narcotics or alcohol, nor did anyone coerce him into pleading guilty.

However, Coleman still asserts his counsel was ineffective because he only met with him twice for twenty minutes each time during the nine months leading up to

Coleman pleading guilty. Coleman contends that these short meetings negatively affected his decision to plead guilty. The record clearly refutes this claim. First, as noted above, Coleman told the court at his plea colloquy that he had sufficient time to review the evidence with his attorney and consult his attorney regarding the ramifications of pleading guilty. Further, the Commonwealth provided jail phone records in which Coleman is heard telling his sister that he has been meeting with his attorney since 8:00 a.m. When Coleman tells his sister that he has been meeting with his attorney since 8:00, she indicates excitedly that it is now 8:45 p.m.[1] Thus, according to Coleman's own statements, at least one consultation with his attorney lasted over 20 minutes as Coleman now contends in his post-conviction motions. While there is no specific time an attorney must spend with his client in order for his consultation to be considered effective, we find nothing in the record indicating that counsel was ineffective by spending insufficient time with Coleman. Further, it is apparent trial counsel made late night visits to speak with Coleman.

Coleman next asserts that his counsel was ineffective because he did not interview three witnesses, Dewone Burnett, Kendra Coleman (Coleman's girlfriend), and Benita Burnett-Coleman (Coleman's sister), during his investigation. But then, Coleman's responses to the court during his plea refute his allegations. When asked by the court if he was pleased with the performance of his trial counsel, he responded that he was satisfied. Also, Coleman indicated that he and his counsel had reviewed the

[1] While the call time indicated on the jail recording is 7:42 p.m., or 1942, it is clear from other recorded calls and the time referred to by other callers, that the recorded time is off by 60 minutes.

evidence together prior to the plea and he was satisfied with his decision to go forward with the plea. If Coleman was really displeased that his counsel had not pursued the affiants to his satisfaction, he would have indicated it at his plea instead of telling the court that he was completely satisfied with his counsel's performance. Coleman's assertion today is clearly controverted by the record.

Further, the recorded conversations not only clearly refute his allegations but demonstrate Coleman is trying to persuade the witness to change her testimony.

Counsel is required to make a reasonable investigation. *See Baze v. Commonwealth*, 23 S.W.3d 619, 625 (Ky. 2000). *See also Wiggins v. Smith***,** 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). However, our Supreme Court has recognized that, "[d]ecisions relating to witness selection are normally left to counsel's judgment and this judgment will not be second-guessed by hindsight." *Foley v. Commonwealth*, 17 S.W.3d 878 (Ky. 2000),[2] *quoting Fretwell v. Norris*, 133 F.3d 621, 627 (8th Cir. 1998). We can find nothing in the record indicating that Coleman's attorney conducted a deficient investigation rendering his counsel insufficient.

The clear evidence of record indicates that Coleman's plea was knowingly, voluntarily and intelligently made. Coleman's responses during his guilty plea colloquy establish that he was satisfied with his trial counsel's performance, and he fails to present facially meritorious evidence showing that his trial counsel unreasonably failed to investigate possible defenses. Therefore, the trial court did not err by denying his RCr 11.42 motion without an evidentiary hearing.

[2] *Overruled on other grounds by Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005).

In his CR 60.02 motion, Coleman argues that the affidavits mentioned above constitute new evidence that justify setting aside his judgment. Specifically, Coleman asserts that these affidavits illustrate the proof necessary to show he was suffering from extreme emotional disturbance when he shot Eric Cowherd (Cowherd) on July 30, 2002. Coleman attached an affidavit from each of the individuals listed above all claiming to have witnessed the victim, Cowherd, physically and/or mentally abusing Coleman's sister which Coleman claims caused him the extreme emotional disturbance. Thus, had his counsel interviewed the affiants, Coleman argues that counsel would have learned that Coleman was acting under extreme emotional disturbance at the time of the shooting, which would have qualified him for no more than ten years in the penitentiary pursuant to KRS 508.040. Moreover, Coleman asserts that had the police and the prosecutors known about the abuse by Cowherd, they would have offered him a better plea deal. We strongly disagree.

CR 60.02 is an extraordinary remedy and the denial of such a motion will only be reversed where a clear abuse of discretion is shown. *Barnett v. Commonwealth*, 979 S.W.2d 98, 102 (Ky. 1998).

> CR 60.02 . . . authorizes relief from a final judgment based upon newly discovered evidence only if: (1) the evidence was discovered after entry of judgment; (2) the moving party was diligent in discovering the new evidence; (3) the newly discovered evidence is not merely cumulative or impeaching; (4) the newly discovered evidence is material; and (5) the evidence, if introduced, would probably result in a different outcome.

Hopkins v. Ratliff, 957 S.W.2d 300, 301-02 (Ky.App. 1997), *citing* 7 Kurt A. Philipps, Jr., *Kentucky Practice*, CR 60.02, cmt. 4.

The affidavits submitted by Coleman do not amount to new evidence that would justify relief under CR 60.02. In his affidavit, Dewone Burnett asserts that he has a child with Coleman's sister. He also claims that he heard that Cowherd was physically abusing Coleman's sister and that he had discussed the abuse with Coleman. Coleman's girlfriend, Kendra Coleman, states in her affidavit that she also lived in the apartment with Coleman, his sister and Cowherd. Kendra claims to have witnessed the abuse against Coleman's sister and told him about the abuse on several occasions. Finally, the third affidavit is that of Coleman's sister, Benita Burnett-Coleman, who asserts she never told Coleman she was being abused by Cowherd but was present when the two men got into the argument that led to the shooting. Coleman also submits an affidavit of his own where he contends that his attorney was only concerned with getting him to take the plea and not interested in reviewing Coleman's case.

The general rule is that post-conviction affidavits such as Coleman's and those of his friends and family are regarded with distrust and should be given little weight. *Hensley v. Commonwealth*, 488 S.W.2d 338 (Ky. 1972). In this case, the affidavits are even contradictory in that the affidavits themselves contradict one another as to whether Coleman knew his sister was being abused. As stated above, Coleman's sister indicates that she did not tell him of the abuse while his friends both purport to have discussed the matter with him. Moreover, the evidence in the affidavits is not

"new" for purposes of CR 60.02. As well noted by the Commonwealth, Coleman has put forth nothing that indicates he was unaware of the alleged abuse when he entered his plea of guilty. The affidavits were submitted by friends and family with whom, as the jail telephone conversations clearly show, Coleman maintained a relationship. The record clearly reflects that Coleman voluntarily chose to accept the Commonwealth's plea as a better option than the impending federal prosecution.

We give deference to the trial court's decision when CR 60.02 is at issue. In this case, the trial court evaluated the affidavits in light of Coleman's voluntary plea and determined that they were irrelevant at best and provided little basis from which a different decision could be reached. We cannot conclude that the trial court abused its discretion in reaching such a decision. Further, we find no error that would justify vacating Coleman's conviction because the trial court failed to hold an evidentiary hearing as there were no allegation of facts, if true, that would have justified such a ruling.

For the foregoing reasons, the order of the Jefferson Circuit Court denying the Appellant's motions pursuant to RCr 11.42 and CR 60.02 is affirmed.

ALL CONCUR.

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