

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-001555-MR

JOSEPH MARK BOURNE

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 04-CR-00053

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

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

BUCKINGHAM, SENIOR JUDGE: Joseph Mark Bourne, *pro se*, appeals from an order of the Boyle Circuit Court denying, without an evidentiary hearing, his Kentucky Rule of Criminal Procedure (RCr) 11.42 motion to vacate or set aside a judgment sentencing him to six years in prison following his guilty pleas to various crimes. We affirm.

On April 14, 2004, Bourne was indicted on one count of second-degree

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.850.

unlawful transaction with a minor, one count of possession of a firearm by a convicted felon, one count of first-degree sodomy, one count of misdemeanor possession of drug paraphernalia, and one count of trafficking in marijuana within 1000 yards of a school.² The charges stemmed from an incident on March 16, 2004, wherein Bourne allegedly committed sexual assault against a juvenile. Based upon the victim's statements, law enforcement officers obtained a search warrant for Bourne's apartment on March 18, 2004. Inside the apartment, the officers found a handgun, rolling papers, scales, a rolling machine, baggies, a calculator, a police scanner, scissors, a pipe, and a roach clip.

Pursuant to a plea agreement with the Commonwealth, Bourne entered guilty pleas to all charges. In exchange for the guilty pleas, the Commonwealth recommended that the first-degree sodomy charge be amended to second-degree sodomy with Bourne to receive a five-year sentence, that he be sentenced to five years for unlawful transaction with a minor, that he be sentenced to five years for trafficking in marijuana within 1000 yards of a school, that he be sentenced to twelve months for possession of drug paraphernalia, and that he be sentenced to six years for possession of a handgun by a convicted felon. The Commonwealth further recommended that all sentences run concurrently. On May 4, 2005, the Boyle Circuit Court entered its final judgment and sentenced Bourne to six years in accordance with the plea agreement.

On January 20, 2006, Bourne filed a motion to vacate or set aside the judgment pursuant to RCr 11.42 and a motion for an evidentiary hearing. On March 6,

² See Kentucky Revised Statutes (KRS) 520.065(1), KRS 527.040, KRS 510.070, KRS 218A.500, and KRS 218A.1411, respectively.

2006, the court entered an order denying both motions. Bourne filed a second RCr 11.42 motion on June 19, 2006, arguing ineffective assistance of counsel. On June 26, 2006, the court denied the second motion stating that Bourne failed to present any grounds for relief that were not known and could not have reasonably been presented in the previous RCr 11.42 motion. This appeal followed.

RCr 11.42(3) provides that a defendant is required to “state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding.” This rule promotes judicial efficiency by preventing a court from expending time and resources in rehearing arguments that could have been brought in a previous motion. *Case v. Commonwealth*, 467 S.W.2d 367, 369 (Ky. 1971). *See also McQueen v. Commonwealth*, 949 S.W.2d 70, 71 (Ky. 1997).

Bourne argues that his constitutional and due process rights were violated as a result of ineffective assistance of counsel and that he was entitled to an evidentiary hearing. We agree with the circuit court that Bourne has failed to state any grounds for relief that were not known or could not reasonably have been presented in his previous RCr 11.42 motion. Thus, Bourne is precluded by RCr 11.42(3) from raising this successive motion. Nevertheless, we will briefly address the issues raised by Bourne upon the merits.

Bourne first argues that his constitutional rights were violated as a result of ineffective assistance of counsel. Specifically, he contends that his court appointed attorney failed to fully inform him of the consequences of his guilty pleas and entered the plea agreement without his consent. Bourne also argues that his attorney failed to conduct any pretrial investigation so as to establish a defense.

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the U.S. 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.

Applying this standard to the present case, Bourne provides no grounds for post-conviction relief under RCr 11.42 due to ineffective assistance of counsel. Bourne's argument that his court appointed counsel failed to fully inform him of the consequences of a guilty plea is refuted by the record. The record discloses that Bourne signed a form entitled "Commonwealth's Offer on a Plea of Guilty" on March 30, 2005, that fully described the terms of the plea bargain. Bourne also signed a "Motion to Enter Guilty Plea" on the same day that stated he had reviewed the indictment, told his attorney the facts of the case, and understood the charges against him as well as any possible defenses to the charges. The form further states that the plea was freely, knowingly, and voluntarily entered. Bourne's signature on the forms indicates that he fully understood the consequences of entering the plea agreement and that his attorney fully informed him of these consequences.

Bourne also claims that his attorney failed to prepare a defense or conduct

any pretrial investigation so as to establish a defense. However, Bourne has not specifically identified any exculpatory evidence that would have been discovered by additional investigation. Nor has he shown how any such failure prejudiced his case. Absent evidence of specific instances of trial counsel's failure to investigate his case or prepare a defense and the prejudicial effect thereof, Bourne cannot meet the standard as set forth in *Strickland* required to show ineffective assistance of counsel.

Bourne's argument that his attorney's failure and/or refusal to file a motion to suppress evidence concerning the statements of the alleged victim constituted ineffective assistance of counsel likewise falls short under the *Strickland* test. Bourne fails to set forth sufficient information to show that, had the motion been made, there would have been a different outcome or that he would not have pled guilty but, instead, would have insisted upon going to trial.

Bourne next argues that it was error for the trial court to refuse to conduct an evidentiary hearing on his RCr 11.42 motion. We disagree.

A defendant is entitled to an evidentiary hearing on an RCr 11.42 motion only if the issues raised in the motion reasonably require such a hearing for determination. On the other hand, a hearing is not required if the motion, on its face, does not allege facts that would entitle the defendant to a new trial even if true or if the allegations are refuted by the record itself. *Maggard v. Commonwealth*, 394 S.W.2d 893, 894 (Ky. 1965).

Applying these principles to the facts of the present case, we find no error

in the circuit court's order. As the court found, each of Bourne's claims of ineffective assistance of counsel was refuted on the record and, therefore, no evidentiary hearing was required. At any rate, as we have noted, Bourne's motion was properly denied without a hearing pursuant to RCr 11.42(3) as an improper successive motion.

The order of the Boyle Circuit Court is affirmed.

ALL CONCUR.

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