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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001620-MR

DOUGLAS E. BAKER, JR. — APPELLANT

v.

APPEAL FROM BRACKEN CIRCUIT COURT
HONORABLE JOHN W. MCNEILL, III, JUDGE
INDICTMENT NO. 02-CR-00001-002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, TAYLOR, and WINE, JUDGES.

LAMBERT, JUDGE: Douglas Baker appeals from a judgment of the Bracken Circuit Court that sentenced him to life without the possibility of parole for twenty-five years after his entry of a guilty plea. Baker filed a RCr 11.42 motion seeking to vacate his sentence based on the allegation that ineffective assistance of counsel led him to enter an involuntary guilty plea. After our review, we affirm.

Baker was indicted on two counts of murder and four counts of tampering with physical evidence. After he was notified that the Commonwealth intended to seek

the death penalty, Baker pleaded guilty on all counts in return for the Commonwealth recommending a sentence of life without the possibility of parole for twenty-five years.

Baker and his defense counsel appeared before Bracken Circuit Court to allow Baker to have his guilty plea formally entered. During the hearing, Baker and the trial court judge engaged in a lengthy and detailed colloquy regarding Baker's mental state, his understanding of the proceedings and the Commonwealth's offer on a guilty plea, his satisfaction with his counsel, and his understanding that he could be sentenced to life imprisonment without the possibility of parole for twenty-five years. More specifically, when asked whether he was satisfied with the advice of his counsel, Baker responded, "very much so." The judge accordingly made an explicit finding of fact that Baker knowingly, intelligently, and voluntary entered his guilty plea.

The trial court followed the plea recommendation and on May 8, 2002, sentenced Baker to a total of life without the possibility of parole for twenty-five years on the charges contained in the plea agreement.

On April 11, 2005, Baker, *pro se*, filed a RCr 11.42 motion seeking to vacate his sentence. He alleged that ineffective assistance of counsel led him to enter an involuntary guilty plea. Baker argued that his trial counsel was ineffective in that:

> [H]is failure to present [Baker's] mental instability, failure to present evidence of mental incapacity due to drugs and alcohol at the times of the crimes alleged, failed to file a motion to suppress [Baker's] and co-defendant's statements, failure to challenge the lack of evidence against [Baker], and the fact that the counsel acted on behalf of the Prosecution instead of [Baker], to coerce the Plea Bargain.

Subsequently, the court granted Baker leave to proceed on his RCr 11.42 motion *in forma pauperis*. In the same order, the court appointed Department of Public Advocacy, Frankfort Post-Conviction Section to represent Baker. After extensive review of Baker's case, counsel filed a motion to submit movant's case on the pleading and for a ruling. In the motion, counsel notified the court that after his thorough review that he would not be filing supplementary materials to Baker's *pro se* pleading.

On June 26, 2006, the Commonwealth filed a response and opposition to defendant's motion under RCr 11.42. In the response, the Commonwealth evidenced how the record "clearly refuted the defendant's contentions." Thus, no hearing was held on the motion, and the court issued an order denying Baker's RCr 11.42 motion. In the order, the court adopted the rationale provided by the Commonwealth as its opinion. This appeal followed.

Baker argues that he was given ineffective assistance of counsel both at trial and during this 11.42 motion. He specifically asserts that the ineffective assistance he has received through the 11.42 motion is the fault of the court for appointing the Department of Public Advocacy to represent him when they were the same party to give him ineffective assistance of counsel at the trial level. We disagree.

When challenging a guilty plea based on ineffective assistance of counsel, the United States Supreme Court has modified the *Strickland* standard so that the appellant must show both that counsel (i) made serious errors outside the wide range of professionally competent assistance and (ii) that the deficient performance so seriously

affected the outcome of the plea process that but for the errors of counsel there is a reasonable probability that the appellant would not have pleaded guilty but would have instead insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *Sparks v. Commonwealth*, 721 S.W.2d 726, 727-28 (Ky.App. 1986).

It is also well-established that the advice by a lawyer for a client to plead guilty is not an indication of any degree of ineffective assistance. *Beecham v. Commonwealth*, 657 S.W.2d 234, 236-37 (Ky. 1983). Due to the difficulties inherent in making a fair assessment of trial counsel's performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable assistance . . . ." *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed. 2D 674 (1984); *Baze v. Commonwealth*, 23 S.W.3d 619, 625 (Ky. 2000) ("The test for effective assistance of counsel is not what the best attorney would have done, but whether a reasonable attorney would have acted, under the circumstances, as defense counsel did at trial.") As a result, an appellant challenging a guilty plea based on ineffective assistance of counsel "must overcome the presumption that, under the circumstance, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689.

Originally, in his RCr 11.42 motion, Baker maintained his guilty plea was not voluntarily and knowingly entered due to ineffective assistance of counsel. The trial court properly denied this motion based on the standards set forth above. Now Baker argues the propriety of the trial court's denial of appointed counsel and failure to hold an evidentiary hearing on his motion.

The Kentucky Supreme Court recently outlined the process by which a trial court should determine whether an RCr 11.42 motion merits counsel and a hearing. In *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2003), the Supreme Court described the steps that should be taken as follows:

> 1. The trial judge shall examine the motion to see if its properly signed and verified and whether it specifies grounds and supporting facts that, if true, would warrant relief. If not, the motion may be summarily dismissed. *Odewahn v. Ropke*, 385 S.W.2d 163, 164 (Ky. 1964).
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> 2. After the answer is filed, the trial judge shall determine whether the allegations in the motion can be resolved on the face of the record, in which event an evidentiary hearing is not required. A hearing 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. *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993).
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> . . . .
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> 4. If an evidentiary hearing is not required, counsel need not be appointed . . . . *Hemphill v. Commonwealth*, 448 S.W.2d 60, 63 (Ky. 1969).

Fraser, at 452-53.

Baker's contention that he was entitled to an evidentiary hearing is unfounded. It was within the sound discretion of the court to determine whether the claims could be resolved on the face of the record. Furthermore, we find Baker's argument that he was denied effective representation because the Department of Public Advocacy was appointed to represent him both at the trial and appellate level without

merit. The record is clear that a different attorney represented Baker at each level. Moreover, since no hearing was necessary, Baker was not even entitled to appointment of counsel to represent his RCr 11.42 motion. *See Fraser*, at 448. Therefore, we find no reversible error.

Baker also alleges that the trial court made no findings but simply denied his RCr 11.42 motion. The court, however, did address all his claims by adopting the Commonwealth's opinion, which completely refuted all claims made by Baker with respect to his motion. Therefore, we again find no error.

Accordingly, the judgment of the Bracken Circuit Court is affirmed.

ALL CONCUR.

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