

RENDERED: DECEMBER 21, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002015-MR

ARDETH FINLEY, III

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE V, JUDGE
INDICTMENT NO. 01-CR-00311

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND LAMBERT, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.

ROSENBLUM, SENIOR JUDGE: Ardeth Finley, III, *pro se*, appeals from an order of the Campbell Circuit Court denying his Kentucky Rule of Criminal Procedure (RCr) 11.42 motion to vacate his sentence. Finding no error, we affirm.

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

On August 16, 2001, the Campbell County Grand Jury returned a two (2) count indictment charging Finley with one (1) count of Assault in the First Degree² and one (1) count of Persistent Felony Offender in the Second Degree.³ The charges stemmed from an incident on July 14, 2001, wherein Finley was arrested by Newport City Police after he admitted to shaking and striking a three month old infant that Finley was babysitting.

On March 13, 2002, the trial court held a competency hearing at which time it found Finley competent, which was consistent with the competency report. On June 24, 2002, pursuant to a plea agreement, Finley entered a plea of guilty to the assault charge pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). The plea agreement also provided that the Commonwealth agreed to dismiss the persistent felony offender charge and recommend a sentence of 18 years imprisonment. In accordance with the plea agreement, on August 13, 2002, the trial court entered judgment against Finley and sentenced him to 18 years.

On September 1, 2004, Finley filed a RCr 11.42 motion to vacate the conviction and sentence alleging ineffective assistance of counsel. Finley also requested an evidentiary hearing on the motion. On September 7, 2006, the court entered an order denying the RCr 11.42 motion without an evidentiary hearing. This appeal followed.

² Kentucky Revised Statutes (KRS) 508.010.

³ KRS 532.080.

Finley argues that the trial court erred when it denied his motion.

Specifically, Finley asserts that (1) his trial counsel was ineffective for recommending that he plead guilty, (2) his guilty plea was not knowing, voluntary and intelligent, (3) he was actually innocent of the charges because someone else injured the infant, and (4) his post-conviction relief counsel was ineffective by failing to address these issues. We disagree.

Finley argues that his counsel rendered ineffective assistance based upon various allegations, including recommending to Finley that he accept the guilty plea rather than seeking a continuance because three of his alleged witnesses did not appear before trial. Upon review of the record, we conclude, as did the trial court, that Finley's allegations were refuted by the record.

To prevail on a claim of ineffective assistance of counsel on a guilty plea, the defendant must show that his counsel's performance was deficient relative to current professional standards and that but for the deficient performance, the defendant would not have pleaded guilty but would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). *See also Sparks v. Commonwealth*, 721 S.W.2d 726, 727-28 (Ky.App. 1986).

“Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won.” *Haight v. Commonwealth*, 41 S.W.3d 436, 441 (Ky. 2001), *quoting from United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992). As the *Haight* court further

stated, the critical issue is not whether counsel made errors but whether such errors caused “defeat [to be] snatched from the hands of probable victory.” *Id.* Such was not the case here.

Contrary to Finley's assertions otherwise, the record establishes that his counsel's actions were proper under the facts of this case. Finley essentially contends that but for the failure of his three witnesses to appear for trial, he would not have pleaded guilty. The record refutes the allegation that his defense counsel was ineffective because his attorney properly subpoenaed the alleged three witnesses to appear at trial. Finley himself supplied the addresses for his alleged witnesses prior to trial. Moreover, Finley failed to provide signed affidavits from his potential witnesses setting forth their alleged testimony. In addition to these three witnesses was a witness for the Commonwealth, Paul Smith, the person Finley alleges was the true perpetrator of the crime. Consequently, Smith would have been subject to examination by both the Commonwealth and the defense. As noted by the trial court, the “entry of the plea resulted in the dismissal of a Second Degree Persistent Felony Offender charge which would have exposed [Finley] to a sentence to twenty (20) years to life, and, the Commonwealth's Offer on a Plea of Guilty made it quite clear as did the Commonwealth at the plea hearing that the eighteen (18) years . . . was the recommended sentence.”

We agree with the trial court that:

the record clearly refutes [Finley's] claim that he would have proceeded to trial had his three (3) witnesses appeared and if his attorney had not advised him to plead guilty as a

consequence. [Finley] received a tangible, understandable benefit by pleading guilty, that is, the dismissal of [the persistent felony offender] charge which would have increased his exposure to twenty (20) years to life. He also received a sentence that was less than the maximum that he could have received on the negotiated plea.

Finally, it is well established that advising a client to plead guilty in order to obtain a lesser sentence is not ineffective assistance of counsel. *See, e.g., Commonwealth v. Campbell*, 415 S.W.2d 614 (Ky. 1967).

The record also clearly refutes Finley's contention that his guilty plea was not knowing, voluntary, and intelligent. A review of the record, including the videotape of the plea hearing, shows that Finley stated that he had a sufficient amount of time to consult with his attorney prior to deciding on the plea. Finley also acknowledged that he was entering the plea willingly, freely, voluntarily and without any threats or promises. Additionally, Finley was given further opportunities at the plea hearing to ask his attorney questions prior to entering the guilty plea.

Perhaps the most telling of Finley's knowing, voluntary, and intelligently entered guilty plea is his motion to enter guilty plea pursuant to *North Carolina v. Alford* and the Commonwealth's offer on a plea of guilty. Finley's constitutional rights, including the right to produce any evidence including the attendance of witnesses in his favor, are boldly highlighted on the front page of the motion. Further, also boldly highlighted is the statement "I understand that if I plead 'GUILTY,' I waive these rights." During his guilty plea, Finley was asked if he had read the form or had it read to him and

if he understood what was explained to him on the form. Finley's unequivocal response was that he had read it and understood it. Moreover, Finley acknowledged that the signature on the document was his. The trial court properly determined that Finley's plea was knowingly, voluntarily, and intelligently entered.

The record also refutes Finley's argument that he was not mentally competent to enter the guilty plea. Prior to trial, Finley's counsel moved for a psychiatric or psychological examination to determine Finley's competence to stand trial and assist in his own defense. The motion was granted and Finley was examined by Dr. James J. Esmail, a licensed clinical psychologist, and his detailed report was submitted to the court. The court conducted a competency hearing and received testimony from Dr. Esmail, reviewed the competency evaluation report, and the entire record prior to concluding that Finley was competent to stand trial and aid his attorney in his defense.

Finley's next argument concerning his allegation that he was innocent and that someone else injured the infant is also clearly refuted on the record. While such an allegation would obviously be a defense to the charges against him, Finley's guilty plea waived all defenses except that the indictment failed to charge a public offense. *See, e.g., Hughes v. Commonwealth*, 875 S.W.2d 99 (Ky. 1994). Further, an insufficiency of evidence claim is not a proper ground for relief under RCr 11.42 following a guilty plea. *See Boles v. Commonwealth*, 406 S.W.2d 853 (Ky. 1966); *Johnson v. Commonwealth*, 103 S.W.3d 687 (Ky. 2003).

Finally, Finley's assertion that he was entitled to effective assistance of counsel during the post-conviction relief proceeding is without merit. In *Coleman v. Thompson*, 501 U.S. 722, 752, 111 S.Ct. 2546, 2566, 115 L.Ed.2d 640 (1991), the United States Supreme Court held that “[t]here is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.” (citations omitted); *see also Murray v. Giarratano*, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989).

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Ardeth C. Finley, III
West Liberty, Kentucky

BRIEF FOR APPELLEES:

Gregory D. Stumbo
Attorney General of Kentucky

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky