RENDERED: APRIL 25, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001037-MR

DOUGLAS RANK — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 10-CR-00186

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DIXON, NICKELL AND TAYLOR, JUDGES.

DIXON, JUDGE: Appellant, Douglas Rank, appeals *pro se* from an order of the Kenton Circuit Court denying his motion for post-conviction relief pursuant to RCr 11.42.

On February 21, 2010, Appellant was arrested and charged with first-degree assault following a domestic dispute with his girlfriend, Misty Luke, during which

he stabbed her with a sword. Until his arrest, Appellant was a practicing psychiatrist in Covington, Kentucky, and Luke had been one of his patients. Appellant claimed that on the day prior to the incident, he and Luke had repeatedly argued. On the evening in question, Appellant stated that both he and Luke were in his residence, she in one room and he in another adjacent room usually inhabited by one of his tenants, Larry Hamilton. Apparently, the couple was arguing back and forth through text messages when Luke texted that she was ending the relationship. Appellant claims he went "berserk," grabbing a sword owned by Hamilton and assaulting Luke.

On February 23, 2010, Appellant met with attorney Robert Gettys at the suggestion of a mutual friend, attorney Patrick Hickey. At this initial meeting Gettys sought a retainer for $23,500 for representation on the assault charge. At the same time, Appellant claims that he asked Gettys to get him released on bond, which was set at $50,000. In response, Gettys inquired as to the extent of Appellant's assets and thereafter advised him that it would not be a good idea to post bond because such would create the perception that he was wealthy and could "buy his way out of justice." Instead, Gettys suggested that Appellant remain in jail and sign a power of attorney in favor of Gettys giving him full power over Appellant's assets. Appellant alleges that Hickey, who was present at the meeting, concurred with the suggestion and assured him that he would look out for Appellant's interests.

On March 18, 2010, the grand jury returned an indictment against Appellant for attempted murder. Gettys thereafter increased his retainer fee to $50,000, even though the indictment charged the same class of felony with the same penalty range as first-degree assault. In addition, Appellant signed a contract to pay $75,000, for a purported attorney's lien against his house to protect it from damages in a civil suit by Luke that Gettys told him was sure to follow. According to Appellant's unrefuted claims, Gettys thereafter, and unbeknownst to Appellant, liquidated Appellant's various investment accounts, as well as permitted both of his properties to be foreclosed upon and sold at auction while he remained in jail.

On April 6, 2010, the trial court ordered that Appellant be evaluated for competency at the Kentucky Correctional Psychiatric Center. Thereafter, in June 2010, the trial court held a competency hearing wherein a report by staff psychiatrist Dr. Timothy Allen finding that Appellant was competent to stand trial was stipulated by the defense and entered into evidence in lieu of testimony. No other evidence was presented and the trial court ruled Appellant competent to stand trial.

On October 20, 2010, Appellant appeared in open court and entered a plea of guilty to an amended charge of first-degree assault. In exchange for the plea, the Commonwealth recommended a sentence of fifteen years' imprisonment. On December 20, 2010, Appellant again appeared for a formal sentencing hearing. Therein, the defense presented the testimony of Dr. Bobby Miller, a board certified

forensic psychiatrist, who was allegedly retained to evaluate Appellant's mental status and any possible legal defenses he might have had. However, the substance of Dr. Miller's testimony concerned his concurrence with Dr. Allen that Appellant was competent to stand trial. Dr. Miller testified that Appellant was not insane, but did suffer from a schizotypal personality disorder. The defense then called Appellant's rabbi, as well as a former associate, and questioned them about Appellant's obsessive compulsive tendencies. At the close of the hearing, Appellant was sentenced to fifteen years' imprisonment in accordance with the plea agreement.

On December 20, 2011, Appellant filed an RCr 11.42 asserting ineffective assistance of counsel. Specifically, Appellant claimed that Gettys failed to: (1) file a motion for discovery; (2) investigate or prepare any defenses, in particular extreme emotional disturbance; (3) assist him in posting bond; (4) follow proper criminal practice and procedure; (5) fulfill his fiduciary duty to his client; and (6) present any mitigating evidence at the sentencing hearing. Appellant argued that as a result, he was unable to make a knowingly, voluntary and intelligent decision to enter his guilty plea. Appellant also filed a motion for an evidentiary hearing.

On May 23, 2012, the trial court entered an order denying Appellant's RCr motion without a hearing. Therein, the trial court commented that Appellant's motion "sets forth many allegations which are troubling and concern this Court as to the professional and ethical conduct of Defendant's attorneys." However, the trial court nevertheless concluded:

> The Defendant opted to plead guilty to a 15-year sentence rather than proceed to trial where he could have received a maximum sentence of 20 years. Given the totality of circumstances, this Court finds that Defendant has failed to establish that, but for the performance of his counsel, it is probable that he would have insisted on going to trial. While his counsel's performance may well have fallen outside the range of professionally competent and ethical assistance, he has failed to establish that he would have proceeded to trial in this case.

Appellant thereafter appealed to this Court.

Appellant argues herein that the trial court erred in denying him an evidentiary hearing on his claims of ineffective assistance of counsel. Appellant alleges that it cannot be determined from the face of the record whether (1) trial counsel was ineffective for failing to investigate an EED defense; (2) whether a conflict of self-interest and breach of fiduciary duty existed with Attorney Gettys' representation; and (3) whether a conflict existed with Attorney Hickey's involvement and/or representation because he also represented the victim in a civil case. Appellant claims that because of trial counsel's ineffective representation, his guilty plea was not knowing and voluntary.

In an RCr 11.42 proceeding, the movant has the burden to establish convincingly that he was deprived of substantial rights that would justify the extraordinary relief afforded by the post-conviction proceeding. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). An evidentiary hearing is warranted only "if there is an issue of fact which cannot be determined on the face of the record." *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993),

cert. denied, 510 U.S. 1049 (1994); RCr 11.42(5). *See also Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001); *Bowling v. Commonwealth*, 981 S.W.2d 545, 549 (Ky. 1998), *cert. denied*, 527 U.S. 1026 (1999). "Conclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of a discovery deposition." *Sanders v. Commonwealth*, 89 S.W.3d 380, 385 (Ky. 2002), *cert. denied*, 540 U.S. 838 (2003), *overruled on other grounds in Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

Since Appellant entered a guilty plea, a claim that he was afforded ineffective assistance of counsel requires him to show: (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) 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 defendant would not have pled guilty, but would have insisted on going to trial. *Bronk v. Commonwealth*, 58 S.W.3d 482, 486-87 (Ky. 2001). *See also Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

A criminal defendant may demonstrate that his guilty plea was involuntary by showing that it was the result of ineffective assistance of counsel. In such a case, the trial court is to "consider the totality of the circumstances surrounding the guilty plea and juxtapose the presumption of voluntariness inherent in a proper

plea colloquy with a *Strickland v. Washington* inquiry into the performance of counsel." *Rigdon v. Commonwealth*, 144 S.W.3d 283, 288 (Ky. App. 2004) (*Quoting Bronk*, 58 S.W.3d at 486. (footnotes omitted)). A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render reasonably effective assistance. *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997), *cert. denied*, 521 U.S. 1130 (1997). The Supreme Court in *Strickland* noted that a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. However, advising a defendant to plead guilty is not, by itself, sufficient to demonstrate any degree of ineffective assistance of counsel. *Beecham v. Commonwealth*, 657 S.W.2d 234, 236-7 (Ky. 1983).

There can be no dispute that the trial court herein engaged in a thorough and proper colloquy with Appellant regarding his guilty plea, which clearly implies a presumption of voluntariness. See *Rigdon v. Commonwealth*, 144 S.W.3d at 288. Nevertheless, we are deeply concerned about Gettys' actions leading up to the guilty plea and we are not convinced from the record that such conduct did not materially affect Appellant's decision to plead guilty.

Gettys retained Dr. Miller to purportedly evaluate possible defenses or mitigating factors. However, during the one three-hour interview, Appellant claims that Dr. Miller did not ask a single question bearing directly upon the assault, and specifically did not explore whether Appellant could have been acting

under EED at the time. Moreover, during the hearing, Gettys elicited from Dr. Miller that Appellant had a schizotypal personality disorder that portrayed him as being eccentric, unremorseful and dangerous. Interestingly, Dr. Miller testified that he concurred with Dr. Allen's opinion regarding Appellant's criminal responsibility, despite the fact that Dr. Allen's report was limited solely to Appellant's competency to stand trial. Further, Dr. Miller stated that he had previously informed Gettys that it was highly unlikely he could assist in Appellant's mental health defense. Such begs the questions of why Gettys did not inform Dr. Miller that Dr. Allen had not evaluated Appellant for criminal responsibility or why Gettys would even call Dr. Miller as a witness after learning he could not assist the defense.

Appellant claimed that upon receiving the text from Luke that she was ending the relationship, he went "berserk," grabbed the sword and stabbed her. While this Court renders no opinion as to whether the facts herein would have justified an instruction on EED had the case gone to trial, it is apparent from the record that not only did Gettys fail to investigate the defense, but that the expert he retained did more harm than good. Further, we certainly must agree with Appellant that the testimony presented at the sentencing hearing was anything but mitigating.

We similarly conclude that the record does not resolve the numerous other claims raised by Appellant. From advising Appellant not to post bond, to failing to file a discovery order, to allegedly disposing of his assets, Appellant's allegations,

if true, could lead one to conclude that it was Gettys' intention for Appellant to remain incarcerated; and we discern nothing from the face of the record to refute such disturbing claims. Furthermore, we believe a question exists as to Hickey's role in the case. The Commonwealth affirmatively states that at no time was Hickey representing Appellant. Although there is nothing to confirm that Hickey was counsel of record,[1] he was present at the first meeting between Appellant and Gettys, met with Appellant in jail several times thereafter, was present at counsel table during the hearing, and notably, was referred to as one of Appellant's attorneys by the trial court.

The trial court concluded that none of the allegations contained in Appellant's RCr 11.42 motion had a bearing on whether his plea was voluntary or whether he would have instead chosen to go to trial. We must disagree. As previously

noted, Appellant has the burden of proving (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) 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 defendant would not have pled guilty, but would have insisted on going to trial. *Bronk,* 58 S.W.3d at 486-87. The trial court found that although Appellant satisfied the first prong, he failed in proving the second prong. We

[1] We would note that attached to Appellant's reply brief is a signed copy of an "Employment Contract and Fee Agreement" authorizing Hickey to, in part, "work in concert with Client's Attorney to preserve Client's assets."

conclude, however, that resolution of the second prong hinges upon "issues of fact which cannot be determined on the face of the record." *Stanford*, 854 S.W.2d at 743-44. As such Appellant was entitled to an evidentiary hearing on the merits of his RCr 11.42 motion.

The order of the Kenton Circuit Court denying Appellant's motion for post-conviction relief pursuant to RCr 11.42 is reversed and this matter is remanded for an evidentiary hearing consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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