

Commonwealth of Kentucky
Court of Appeals

NO. 2005-CA-002193-MR

JAMES HAWN

APPELLANT

v. APPEAL FROM OHIO CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 02-CR-00203

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART AND
REVERSING AND REMANDING IN PART

** ** * ** * ** *

BEFORE: KELLER AND WINE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

KELLER, JUDGE: James Hawn (Hawn) appeals from the Ohio Circuit Court's order denying his motion to vacate pursuant to Rules of Criminal Procedure (RCr) 11.42, to appoint counsel, and for an evidentiary hearing. Hawn argues that his trial counsel was ineffective and that the circuit court could not have made a

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

determination regarding counsel's effectiveness based solely on the record. The Commonwealth argues that the record is sufficient to support the circuit court's order and that its denial of Hawn's motions was appropriate. For the reasons set forth below, we affirm in part and reverse and remand in part.

FACTS

In October of 2002, the Kentucky State Police searched Hawn's residence, seized controlled substances and weapons, and arrested Hawn, his girlfriend, and several others. On December 5, 2002, a grand jury indicted Hawn on a number of charges related to the possession, manufacture, and trafficking of controlled substances enhanced by possession of a firearm and for being a persistent felony offender. Shortly thereafter, the court appointed Leigh A. Jackson (Jackson) to represent Hawn and several of his co-defendants. Jackson continued to represent Hawn until late 2003, when she withdrew, apparently due to a conflict with Hawn and/or a conflict that had developed between Hawn and his co-defendants. At that time, the court appointed John D. Austin (Austin) to take over Hawn's representation. The case proceeded to trial and, after the Commonwealth presented its case, Hawn pled guilty to several of the drug-related charges in exchange for dismissal of the majority of the firearms charges and the persistent felony offender charge. Pursuant to the plea agreement, the circuit court sentenced Hawn to thirty years' imprisonment. We note that Hawn was facing a possible sentence of life imprisonment if he had been convicted on all charges.

After unsuccessfully moving for shock probation, Hawn filed a motion to vacate, for appointment of counsel, and for a hearing pursuant to RCr 11.42. In his motion Hawn stated that both Jackson and Austin had provided ineffective assistance of counsel. As to Jackson, Hawn states the Commonwealth made a plea offer in the fall of 2003 that would have resulted in a term of ten years' imprisonment. Hawn alleges that Jackson did not communicate that plea offer to him and he only learned of it from his girlfriend and co-defendant. When he learned of the offer, Hawn allegedly attempted to contact Jackson to instruct her to accept it. However, Jackson did not return Hawn's calls and, when Austin replaced Jackson as counsel, he advised Hawn that the offer had been withdrawn. Hawn alleges that, because Jackson failed to communicate the plea offer to him and to accept the offer on his behalf, he was forced to accept a later plea offer that involved a sentence that was three times longer.

Hawn also alleges that, shortly after Austin began his representation, Austin advised him the Commonwealth had made a plea offer of twenty years' imprisonment in exchange for a guilty plea. Hawn gives two versions of what happened next. In one version, Hawn states he wanted to accept the plea offer but Austin advised him to take some time to think about it. When, at a later date, Hawn again advised Austin that he wanted to accept the plea offer, Austin stated the offer had been withdrawn. In the other version, Hawn states that Austin advised him to reject the offer and later advised Hawn the offer had been withdrawn. Under either version, Hawn argues he lost the opportunity to accept

the plea offer, which resulted in a sentence that is one-third longer than the one offered.

Hawn next alleges Austin had no theory of defense at trial, “having irresponsibly placed all the Defendant’s hopes on a suppression motion.” Because of this, Austin allegedly “was completely unaware of the true extent of the state’s case against the Defendant and was unprepared to mount a successful challenge to the evidence” offered by the Commonwealth. Finally, Hawn alleges that Austin failed “to conduct any investigation of the Defendants [sic] mental health history in preparation for the sentencing/penalty phase portion of the trial which Austin had to know would occur.”

The only evidence in the record of the two early plea offers is a letter from Austin to Hawn dated December 22, 2003. That letter reads as follows:

I [Austin] spoke with Tim Coleman [the Commonwealth attorney] today regarding your desire to plead guilty and accept his earlier ten (10) year recommendation. He said that he isn’t willing to do that if your co-defendants aren’t pleading too. I still believe this case can be settled but I think Tim is trying to hedge his bets by seeing what everyone else is going to do.

To support his allegations that Austin was not prepared, Hawn attached a copy of correspondence from Austin outlining the time he spent working on Hawn’s case, 33.25 hours.

The trial court, without conducting a hearing, overruled Hawn’s motions to vacate and for a hearing. It is from this order that Hawn appeals. Hawn’s primary argument on appeal is that the trial court was required to hold a

hearing because evidence outside the record supports his claim of ineffective assistance of counsel. We agree in part and, therefore, affirm in part and reverse and remand in part.

Before proceeding to our analysis of this appeal, we note that we do not have either a transcript or other record of the trial in this matter. Furthermore, we note that, other than Hawn's statements in his motion and memorandum and Austin's correspondence, we have no written or other record of any plea offers from the Commonwealth. However, the record does contain a copy of Hawn's Motion to Enter Guilty Plea and Waiver of Constitutional Rights and the Consent to Search signed by Hawn on March 12, 2003. Finally, we note the record does not contain any response by the Commonwealth to Hawn's motion.

STANDARD OF REVIEW

The trial court is only required to hold a hearing if the motion raises an issue that cannot be determined on the face of the record. RCr 11.42(5); *Stanford v. Commonwealth*, 854 S.W.2d 742 (Ky. 1993), *cert. denied*, 510 U.S. 1049, 114 S. Ct. 703, 126 L. Ed. 2d 669 (1994). However, “[c]onclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing” *Sanborn v. Commonwealth*, 975 S.W.2d 905, 909 (Ky. 1998).

On an appeal from an order overruling an RCr 11.42 motion without a hearing, “[o]ur review is confined to whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction.” *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967).

Based on the preceding, Hawn must overcome two hurdles to prevail on appeal. First, he must show that his motion states grounds for vacating his guilty plea that are not refuted by the record. Second, he must show those grounds would result in invalidation of that plea. Hawn argues his plea should be vacated because of ineffectiveness of counsel with regard to communication of plea offers and with regard to investigation/preparation. We will first address the issue of the alleged plea offers.

ANALYSIS

Hawn argues the trial court should have held a hearing before denying his RCr 11.42 motion. In support of his argument, Hawn states that counsel, on two occasions, failed to inform him of or to adequately inform him of plea offers from the Commonwealth. According to Hawn, but for counsel's dilatoriness, he would have entered a guilty plea earlier and received a much lighter sentence. The Commonwealth argues Hawn is required to point to those portions of the record that support his allegations. According to the Commonwealth, absent such specific citations, Hawn's motion must fail.

We believe the Commonwealth is over-reading the case law. When a defendant files an RCr 11.42 motion, the Commonwealth is given time to file an answer. However, if the Commonwealth fails to respond to a defendant's motion, the court is not required to automatically find for the defendant. The Commonwealth may still prevail if the record refutes the defendant's allegations. *Maggard v. Commonwealth*, 394 S.W.2d 893, 894 (Ky. 1965).

In this case, Hawn's primary allegation is that his counsel did not advise him or inadequately advised him of two plea offers. There is nothing in the record to refute those allegations. Furthermore, contrary to the Commonwealth's argument that there is no evidence of a plea offer, the letter from Austin to Hawn indicates that a plea offer of ten years' imprisonment was made. Therefore, we hold that the record does not refute Hawn's allegations, but, at least in part, supports those allegations.

However, in order to be entitled to a hearing, Hawn must also show that his counsel's failure to advise him of the plea would have made a difference sufficient to result in a reversal of his conviction.

The Commonwealth cites *Griffin v. United States*, 330 F.3d 733 (6th Cir. 2003) for the proposition that appellate courts should exercise caution when ordering a trial court to conduct a hearing when the primary issue involves counsel's failure to notify a defendant of a plea offer that the defendant says he would have accepted. However, as noted by the 6th Circuit, any such concern is mitigated because

[m]ost defense lawyers, like most lawyers in other branches of the profession, serve their clients and the judicial system with integrity. Deliberate ineffective assistance of counsel is not only unethical, but usually bad strategy as well. For these reasons and because incompetent lawyers risk disciplinary action, malpractice suits, and consequent loss of business, we refuse to presume that ineffective assistance of counsel is deliberate. Moreover, to the extent that petitioners and their trial counsel may jointly fabricate these claims later on, the district courts will have ample opportunity to

judge credibility at evidentiary hearings. *United States v. Day*, 969 F.2d 39, 46 n.9 (3rd Cir.1992).

Griffin, 330 F.3d at 739.

Although the 6th Circuit advises caution, it noted that, to prevail on a claim of ineffective assistance of counsel, a defendant “must establish two elements: (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for the deficiency, the outcome of the proceedings would have been different.” *Griffin*, at 736, citing to *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Using the *Strickland* standard, the 6th Circuit held that “[a] defense attorney's failure to notify his client of a prosecutor's plea offer constitutes ineffective assistance of counsel under the Sixth Amendment and satisfies the first element of the *Strickland* test.” *Griffin*, at 737. In determining whether the alleged failure to communicate a plea offer meets the second element of the *Strickland* test, the 6th Circuit looked to objective evidence in the record. In *Griffin*, as herein, there was a significant gap between the alleged plea offer and the ultimate sentence. The 6th Circuit held this factor alone could be sufficient to overcome the second hurdle of the *Strickland* test. In addition to this time factor, we note the evidence arrayed against Hawn was significant, which further indicates he might have accepted the earlier plea offers if he had been aware of them. Based on the above,

and the persuasive reasoning in *Griffin*, we hold that Hawn is entitled to a hearing on his RCr 11.42 claim. However, while we have noted possible indicia of ineffective assistance of counsel with regard to the alleged plea offers, we cannot and do not hold that any such ineffective assistance existed. That is a matter for the trial court to address following an evidentiary hearing.

Hawn also argues counsel was ineffective because he failed to fully investigate his mental state and what impact that would have had on sentencing. In evaluating whether counsel conducted a reasonable investigation, the court must undertake the following analysis: (1) whether a reasonable investigation should have uncovered a defense; (2) if so, whether the failure to raise the defense was a tactical choice by trial counsel; and (3) if the choice was not tactical but deficient performance, whether there was a reasonable probability that the result would have been different. *Hodge v. Commonwealth*, 68 S.W.3d 338, 344 (Ky. 2001). *See also Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

Hawn's mental state may have had an impact on any sentence imposed by a jury. However, Hawn was not sentenced by a jury. He knowingly entered a guilty plea in exchange for a specific term of imprisonment and he does not argue that his mental state had an impact on his ability to understand the plea offer or to knowingly accept it. Furthermore, he does not cite any facts indicating the Commonwealth, had it known of his mental state, would have made any different plea offers. Hawn cannot show how his mental state would have or could have had an impact on the plea offers; therefore, he is not entitled to an evidentiary

hearing on his claim that counsel was ineffective for failing to investigate his mental state.

Finally, Hawn argues that counsel was ineffective because he was not aware of the extent of the Commonwealth's case against him. However, the pre-trial motions filed on behalf of Hawn show counsel was aware of the evidence arrayed against Hawn. Therefore, this argument by Hawn is without merit.

CONCLUSION

Based on our review of the record and the preceding, the trial court's order denying Hawn's motion for an evidentiary hearing on the issue of ineffective assistance of counsel related to the alleged plea offers is reversed. This matter is remanded to the trial court with instructions to hold an evidentiary hearing on that issue.

However, the trial court is affirmed as to all other issues raised by Hawn. Therefore, the trial court is not required to hold an evidentiary hearing on Hawn's claims of ineffective assistance of counsel arising from counsel's alleged failure to fully investigate Hawn's mental state or counsel's alleged failure to adequately prepare for trial.

ALL CONCUR.

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