

RENDERED: FEBRUARY 23, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-000004-MR

JOHNNY L. BURCHETT

APPELLANT

v. APPEAL FROM CUMBERLAND CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NOS. 04-CR-00035 & 04-CR-00043

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: ABRAMSON AND DIXON, JUDGES; HOWARD,¹ SPECIAL JUDGE.

DIXON, JUDGE: Johnny L. Burchett, *pro se*, appeals the order of Cumberland Circuit

Court denying post-conviction relief pursuant to Kentucky Rules of Criminal Procedure

(RCr) 11.42. We affirm.

¹ Special Judge James I. Howard concurred in this opinion prior to the expiration of his Special Judge assignment effective February 9, 2007. Release of the opinion was delayed by administrative handling.

On May 22, 2004, Burkesville police officers were advised two men had purchased suspicious quantities of pseudoephedrine tablets at two local general stores. After confirming the description of the suspects, police stopped the vehicle leaving the IGA grocery store. The driver, Larry Wallace, consented to a search of the vehicle, and police found nine boxes of pseudoephedrine tablets. Wallace and his two passengers, Burchett and Sandra Wallace, were arrested.

On June 24, 2004, a Cumberland County grand jury indicted Burchett for unlawful possession of a methamphetamine precursor.² Two months later Burchett was indicted for being a persistent felony offender (PFO) in the second degree.³ Burchett was appointed a public defender, Sandra Downs.

On January 5, 2005, a jury convicted Burchett of possession of a methamphetamine precursor, and during the penalty phase found him guilty of being a persistent felony offender. The jury recommended a sentence of eight years' imprisonment on the PFO enhancement. On January 20, 2005, the trial court sentenced Burchett according to the jury's recommendation.

In November 2005, Burchett filed a motion to vacate his conviction and set aside his sentence pursuant to RCr 11.42 alleging he was denied a fair trial due to ineffective assistance of counsel. The trial court denied Burchett's motion without an evidentiary hearing, but drafted an order explaining the reasons for its ruling. Burchett now appeals to this Court.

² Kentucky Revised Statutes (KRS) 218A.1437. Indictment number 04-CR-00035.

³ KRS 532.080(2). Indictment number 04-CR-00043.

Burchett now claims the trial court erred by failing to hold an evidentiary hearing on his RCr 11.42 motion. Burchett alleges five claims of ineffective assistance of counsel: 1) failure to request a competency hearing, 2) failure to inform Burchett of his right to testify on his own behalf, 3) failure to conduct pretrial investigation, 4) failure to prepare a defense, and 5) failure to inform Burchett of his right to a direct appeal.

An evidentiary hearing is warranted only when “the [RCr 11.42] motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction.” *Baze v. Commonwealth*, 23 S.W.3d 619, 622 (Ky. 2000) (quoting *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967)).

Furthermore, a hearing is not required where a movant makes only conclusory assertions rather than allegations based on specific facts. *Wedding v. Commonwealth*, 468 S.W.2d 273, 274 (Ky. 1971). In this case, a review of the record clearly disproves Burchett's claims; consequently, an evidentiary hearing was unnecessary.

To support his contention of error, Burchett claims ineffective assistance of counsel. The standard of review for such a claim is twofold:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Gall v. Commonwealth, 702 S.W.2d 37, 39 (Ky. 1985), (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984)).

Burchett contends that counsel's failure to request a competency hearing constituted ineffective assistance. During his arraignment, Burchett's attorney requested a mental health evaluation for him at the Kentucky Correctional Psychiatric Center (KCPC). The trial court subsequently entered an order granting counsel's request. Thereafter Burchett sent at least three letters to the trial judge explaining that he did not want an evaluation. Burchett stated he did not need or want to go to KCPC because he was competent to stand trial. He opined his attorney tendered the motion for an evaluation without his permission and against his wishes. Indeed, in these letters Burchett appeared lucid and cognizant of the legal process, even explaining the elements of his offenses. Burchett further asked the trial judge to withdraw the order for evaluation and set a trial date. This correspondence culminated with Burchett's attorney filing a motion to revoke the trial court's order for an evaluation; the motion was granted by the trial court without objection from the Commonwealth.

Consequently, Burchett now alleges his attorney rendered ineffective assistance by moving to withdraw the KCPC evaluation and failing to pursue a competency hearing. Burchett relies on *Mills v. Commonwealth*, 996 S.W.2d 473 (Ky. 1999), for the proposition that a trial court must hold an evidentiary hearing when a defendant's competency is brought into question. *Id.* at 486. While this is a correct statement of law, *Mills, supra*, is inapplicable to the case at bar, as Burchett's competency was never truly in question before the trial court. Under Kentucky law, the test for legal

competence is, “whether [the defendant] has substantial capacity to comprehend the nature and consequences of the proceeding pending against him and to participate rationally in his defense.” *Commonwealth v. Strickland*, 375 S.W.2d 701, 703 (Ky. 1964). The record is devoid of any evidence that Burchett was mentally ill, incompetent, or unable to participate in the proceedings. The letters written by Burchett demonstrated that he could appreciate the nature of the offenses and the potential penalties. Burchett insisted that he did not need to go to KCPC and succeeded in persuading the trial court and his attorney to move forward to trial without an evaluation.

Furthermore, our standard of review where a trial court did not conduct a competency hearing is, “[w]hether a reasonable judge, situated as was the trial court judge whose failure to conduct an evidentiary hearing is being reviewed, should have experienced doubt with respect to competency to stand trial.” *Mills*, 996 S.W.2d at 486, (quoting *Williams v. Bordenkircher*, 696 F.2d 464, 467 (6th Cir.1983)). It is clear from the record that, aside from counsel's initial request for an evaluation, no other concerns as to Burchett's competency were brought to the trial court's attention. Likewise, Burchett displayed no erratic or irrational behavior that would have encouraged the trial court to *sua sponte* order a competency hearing.

We conclude it is evident that Burchett did not want a mental health evaluation, and his attorney ultimately acquiesced to his request. Additionally, there is no evidence that Burchett was unable to comprehend the legal process or assist in his defense warranting a competency hearing. Accordingly, counsel merely responded to her

client's requests to set a trial date and forgo the KCPC evaluation; consequently, Burchett fails to establish an error so serious that it prejudiced his defense.

Burchett next claims that he suffered prejudice because counsel failed to inform him of his right to testify on his own behalf at trial. This contention is refuted by the record. During a break in the trial, while the jury was out of the courtroom, defense counsel informed the trial judge that she had discussed the right to testify with Burchett, and he declined to do so. The trial judge then addressed Burchett, who reiterated that he did not want to testify on his own behalf. Accordingly, counsel did not render ineffective assistance in this regard.

Burchett next claims his attorney failed to conduct sufficient pretrial investigation of his case. He points out that, while counsel encouraged him to accept a plea agreement offered by the Commonwealth, she never told him what evidence the prosecution planned to use against him at trial. Specifically, Burchett contends counsel failed to tell him that Wallace, his co-defendant, was going to testify as a prosecution witness.

We must disagree with Burchett's allegations. The trial video shows that, after jury questioning began, an in-chambers hearing took place with Burchett, his attorney, the Commonwealth, and the trial judge. Burchett's attorney explained to the trial judge that she and her client disagreed as to whether he should accept the Commonwealth's plea agreement. Indeed, it was a favorable offer of a two-year sentence and an agreement not to indict Burchett on other pending charges. However, Burchett told the trial judge that he did not want to enter a guilty plea, and he wanted to move

forward with trial. Also during this hearing, counsel stated the Commonwealth gave notice that Wallace would be a material witness for the prosecution, and as such, Burchett had the option of continuing the trial to another date. Again, Burchett said he did not want a continuance, but wanted to proceed with trial that day as scheduled. The record shows that Burchett was fully informed about his options to proceed with trial. He does not raise any specific claims about other avenues counsel should have investigated to aid his defense. Consequently, Burchett has not shown counsel committed any error with regard to pretrial investigation which prejudiced his defense.

The next argument advanced by Burchett is that counsel failed to prepare a defense. This allegation is vague and conclusory. Burchett offers no specific facts explaining how counsel failed to put on a defense. He merely reiterates that he should have been allowed to testify to tell the jury his side of the story. Furthermore, the trial video shows that counsel undertook a zealous defense in the cross-examination of the prosecution's witnesses. Again, we find no ineffective assistance of counsel.

Finally, Burchett alleges counsel was ineffective for failing to advise him of his right to direct appeal.⁴ This claim is also refuted by the record. At Burchett's sentencing hearing, his attorney advised the trial court that Burchett did not want to appeal the conviction and that he instructed her not to file a notice of appeal on his behalf. The trial court then addressed Burchett regarding his right to appeal. Burchett

⁴ In his appellate brief, Burchett claims there was an error in the jury's sentencing verdict which he could have raised on direct appeal had he been properly advised. Burchett, however, concedes that this alleged error, unpreserved, would be deemed harmless, procedural error pursuant to *Montgomery v. Commonwealth*, 819 S.W.2d 713, 720 (Ky. 1991).

told the trial court he did not want to appeal and that he was happy with his attorney's performance. As a result, we find that Burchett did not receive ineffective assistance of counsel, and the trial court properly denied relief without an evidentiary hearing.

For the reasons stated herein, the order of Cumberland Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Johnny L. Burchett, *Pro Se*
Central City, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Clint E. Watson
Assistant Attorney General
Frankfort, Kentucky