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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000211-MR

MERRILL BRANDON MARTIN — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DAVID TAPP, JUDGE
ACTION NO. 11-CR-00247

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, DIXON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Merrill Brandon Martin, *pro se*, appeals the March 21, 2014, order of the Pulaski Circuit Court denying his motion to vacate, set aside, or correct his sentence made pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. We affirm.

On December 22, 2011, Martin pleaded guilty to first-degree arson and being a persistent felony offender (PFO) in the first degree. He also entered an

Alford plea to second-degree burglary. In conformance with the plea agreement, the trial court sentenced Martin to twenty years' imprisonment for first-degree arson, and twenty years' imprisonment for second-degree burglary, as enhanced by his being a persistent felony offender. The sentences were ordered to run consecutively. At the sentencing hearing, the trial court revoked Martin's probation in another case and ordered the ten-year sentence in that case run consecutive with the forty years he received in the present case.

Before the trial court accepted Martin's guilty plea, it engaged in an extensive plea colloquy with Martin during which Martin stated that he was satisfied with his counsel, that he did not have any complaints regarding his counsel's services, and that he fully discussed his constitutional rights with his counsel. He later signed a Motion to Enter Guilty Plea form and a Motion to Enter Guilty Plea Pursuant to *North Carolina v. Alford* form.[1]

On November 15, 2013, Martin moved the trial court to vacate his sentence pursuant to RCr 11.42. In his motion, Martin argued that his counsel was ineffective for 1) coercing him to plead guilty, 2) misleading him into accepting the maximum sentence, 3) failing to investigate and tricking him into pleading guilty, 4) failing to challenge the PFO I and allowing an illegal sentence, and 5) failing to investigate a possible alibi.

[1] A guilty plea made pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), allows a defendant to consummate a plea bargain while maintaining his claims of innocence.

On March 21, 2015, the Pulaski Circuit Court entered an order summarily denying Martin's RCr 11.42 motion, noting that all of Martin's issues could be refuted using the record. Martin now appeals as a matter of right the denial of his motion.

The test for proving ineffective assistance of counsel is set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The *Strickland* test requires the movant to show that trial counsel's performance was deficient, and that this deficient performance prejudiced his defense. *Id.*, *accord Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). In the guilty plea context, the test is slightly different. As the Supreme Court of Kentucky explained:

> A showing that counsel's assistance was ineffective in enabling a defendant to intelligently weigh his legal alternatives in deciding to plead guilty has two components: (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 pleaded guilty, but would have insisted on going to trial.

Bronk v. Commonwealth, 58 S.W.3d 482, 486-87 (Ky. 2001). On review, we examine counsel's performance and any resulting deficiencies *de novo*. *Brown v. Commonwealth*, 253 S.W.3d 490 (Ky. 2008).

On appeal, Martin asserts that the trial court erred when it refused to hold an evidentiary hearing on his RCr 11.42 motion. When an evidentiary

hearing on an RCr 11.42 motion is not held, "[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). A hearing is not required if we find that the record refutes the claim of error or if "the allegations, even if true, would not be sufficient to invalidate the conviction." *Harper v. Commonwealth*, 978 S.W.2d 311, 314 (Ky. 1998).

After reviewing the record and the briefs, along with the trial court's thorough analysis of the facts and applicable law, we agree with the trial court that Martin failed to provide adequate facts to support his contentions. "[W]ithout a minimum of factual basis, contained in the verified RCr 11.42 motion, the motion should be summarily overruled. In such instances, a movant clearly would not be entitled to an evidentiary hearing." *Mills v. Commonwealth*, 170 S.W.3d 310, 327 (Ky. 2005), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009) (quotation marks and citation omitted).

Regarding Martin's first three arguments, Martin failed to present on appeal any factual basis supporting a deficiency on the part of his trial attorney. He claimed that he was induced, misled, and tricked into pleading guilty, yet provided no factual basis on how trial counsel induced, misled, or tricked him. Martin also claimed that counsel failed to adequately investigate or interview potential alibi witnesses, but he did not offer any specifics regarding what counsel would have discovered had he "adequately investigated." We have consistently

held that "vague allegations, including those of failure to investigate, do not warrant an evidentiary hearing and warrant summary dismissal of the RCr 11.42 motion." *Mills*, 170 S.W.3d at 330.

Moreover, Martin acknowledged during his guilty plea colloquy that he was satisfied with counsel, that no one forced or threatened him to plead guilty, and that his guilty plea was being knowingly, intelligently, and voluntarily made.[2] "Solemn declarations in open court carry a strong presumption of verity." *Centers v. Commonwealth*, 799 S.W.2d 51, 54 (Ky. App. 1990). Martin's vague assertions that he was induced, misled, and tricked into pleading guilty, coupled with the plea colloquy's direct refutation of those assertions, precluded the need for the trial court to hold an evidentiary hearing on those claims.

Martin also argues that his trial counsel was ineffective for failing to challenge the PFO I charge because Martin did not have two prior felonies as required by Kentucky Revised Statute (KRS) 532.080. The trial court held that Martin's counsel's performance was not deficient under Strickland's first prong because Martin indeed qualified as a first-degree persistent felony offender.

The record refutes Martin's claim because he pleaded guilty to being a first-degree persistent felony offender, thus acknowledging having been convicted of two prior felonies. Additionally, the trial court took judicial notice of the

[2] The certified record on appeal does not contain the video recording of Martin's plea colloquy. It was Merrill Brandon Martin's burden to ensure that the record was complete. Therefore, we construe the record to support the holding of the trial court. *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985) (holding that "it has long been held that, when the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court").

Pulaski County record in Action No. 02-CR-00320-001, in which Martin was convicted of third-degree burglary – a Class D felony, and Action No. 10-CR-00396, in which Martin was convicted of complicity to traffic in a controlled substance (first offense) – a Class C felony. A hearing was not necessary for the trial court to determine that Martin's claim regarding his PFO status was without merit.

Martin has failed to establish that his counsel's performance below was deficient in any manner. As a result, Martin cannot establish that he was prejudiced during the plea process.

For the reasons stated above, the order of the Pulaski Circuit Court denying Martin's motion to vacate, set aside, or correct sentence is affirmed.

ALL CONCUR.

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