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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001645-MR

ROBERT K. THORNTON APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES L. CUNNINGHAM JR, JUDGE
ACTION NO. 08-CR-03866

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, J. LAMBERT AND NICKELL, JUDGES.

COMBS, JUDGE: Appellant, Robert Keith Thornton (Thornton), appeals from an Order of the Jefferson Circuit Court that denied his motion for relief pursuant to RCr[1] 11.42. Finding no error, we affirm.

Thornton was charged with 47 counts of first-degree robbery and one count each of fleeing or evading police, being a second-degree persistent felony

[1] Kentucky Rules of Criminal Procedure.

offender (PFO), and violating a protective order. Ultimately, the Commonwealth dropped the latter charge and one of the robbery charges. The trial court granted Thornton's motion to sever in part so that he was only tried for 12 of the first-degree robbery charges (those within the same year) and for being a second-degree PFO. The jury convicted Thornton on seven of the 12 robbery charges and acquitted him of the other five and the PFO charge.

The trial court sentenced Thornton to a total of twenty-four-years' imprisonment in accordance with the jury's recommendation of 19 years on each robbery conviction to run concurrently and five years on the fleeing or evading to run consecutively. Thornton appealed and contended that the trial court erred in three respects: (1) in concluding that he lacked standing to challenge the warrantless global positioning system (GPS) tracking of an automobile that he drove, (2) in denying his motion for a directed verdict as to some of the charges, and (3) in granting his motion to sever only in part. Our Supreme Court affirmed Thornton's convictions and corresponding sentences in *Thornton v. Commonwealth*, 2014-SC-000224-MR, 2015 WL 10376169, at *1 (Ky. Oct. 29, 2015).

On July 27, 2016, Thornton, *pro se,* filed a motion for post-conviction relief pursuant to RCr 11.42. By Order entered August 10, 2016, the trial court determined as follows:

> [I]t is clear, even without an evidentiary hearing, that the motion must be and therefore hereby is, DENIED.
>
> The memorandum … endlessly reiterat[es] boilerplate legal standards …. However, aside from attacking the credibility of some of the Commonwealth's witnesses, the memorandum is devoid of any plausible suggestion that better lawyering would have resulted in a better outcome. …
>
> [Thornton] was captured after fleeing from the last armed robbery at a Wendy's. The police had been watching him after placing a tracking device (legally) on the co-defendant's vehicle. Mr. Thornton was in that car after a long chase recorded on a dash-cam video. The car contained the materials (*e.g.* significant cash in a Wendy's bag) taken during the robbery. … The sentence he received for that robbery was the same as the others and was run concurrently by the jury. Thus, even if a better defense would have resulted in a not guilty on the other counts, the sentence wouldn't have been shorter! Finally, Mr. Denison [Thornton's attorney] managed to get a "not guilty" on the PFO when the law and the facts would seem to have mandated Mr. Thornton be found guilty (and his sentence enhanced). Mr. Denison did not just do an adequate job for Mr. Thornton, he did an extraordinary job.
>
> On August 29, 2016, Thornton filed a Notice of Appeal to this Court.

He first contends that the trial court erred in failing to grant an evidentiary hearing on his RCr 11.42 motion.

In *Brewster v. Commonwealth*, 723 S.W.2d 863, 864–65 (Ky. App. 1986), this Court explained:

> *Strickland*[2] recites the mandates of the Sixth Amendment to the United States Constitution of the right of effective assistance of counsel for all defendants. The underlying question … is whether trial counsel's conduct has so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. The Kentucky Supreme Court has adopted *Strickland* in *Gall v. Commonwealth,* Ky., 702 S.W.2d 37 (1985).
>
> An appellant who asserts an ineffectiveness claim must prove to the satisfaction of the trial court that the performance of the trial counsel was deficient and, then, that that deficiency resulted in actual prejudice so as to deprive the appellant of a fair trial. If trial counsel's performance was determined to be deficient, but it appears the end result would have been the same, the appellant is not entitled to relief under RCr 11.42.
>
> Prejudice is defined in *Strickland* as proof by the defendant that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different.
>
> The trial court is permitted to examine the question of prejudice *before* it determines whether there have been errors in counsel's performance. In making its decision on *actual* prejudice, the trial court obviously may and should consider the totality of the evidence presented to the trier of fact. If this may be accomplished from a review of the record the defendant is not entitled to an evidentiary hearing.

Where the trial court properly denies an RCr 11.42 motion on grounds of prejudice, it is error for this Court to remand for a worthless, *pro forma,* or "nugatory" hearing to determine whether trial counsel's conduct was the result of

[2] *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

deficient performance or trial strategy. *Commonwealth v. Searight,* 423 S.W.3d 226, 231 (Ky. 2014).

We are not persuaded that the circuit court erred in denying Thornton's motion. Thornton again recites boiler-plate legal standards followed by a conclusory statement that were it not for counsel's deficient performance, there is a reasonable probability that the outcome would have been different. In his reply brief, Thornton relies upon *Phillips v. White*, 851 F.3d 567 (6th Cir. 2017), which is distinguishable from the case before us. In *Phillips*, the defendant was convicted of two counts of first-degree murder and was sentenced to life imprisonment without the possibility of parole for twenty-five years as recommended by the jury. The court held that counsel's failure to mount a defense during capital sentencing effectively deprived the defendant of counsel throughout a critical stage at trial. Thus, prejudice was presumed under *United States v. Cronic*, 466 U.S. 648, 658, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). *Id.* at 571. In addition, the defendant was prejudiced under *Strickland* because the sentence which the jury recommended was unreliable where defense counsel had "failed to clarify that life imprisonment (with the possibility of parole before twenty-five years) and twenty-to-fifty years were available after the Commonwealth implied that an aggravating factor barred the jury from considering them." *Phillips* at 571. No such misleading occurred in this case.

We agree with the circuit court that there is no "plausible suggestion that better lawyering would have resulted in a better outcome." Accordingly, we affirm the August 10, 2016 Order of the Jefferson Circuit Court denying Thornton's motion for relief pursuant to RCr 11.42.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert K. Thornton, *pro se*
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BRIEF FOR APPELLEE:

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