

RENDERED: JANUARY 5, 2018; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2016-CA-001666-MR

AARON CAMPBELL

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE PAMELA R. GOODWINE, JUDGE  
ACTION NOS. 10-CR-001585-001 & 11-CR-00639

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, STUMBO,<sup>1</sup> AND THOMPSON, JUDGES.

CLAYTON, JUDGE: Aaron Rashad Campbell appeals from a Fayette Circuit Court opinion and order denying his motion for recusal of the trial judge and his motion for relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42.

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<sup>1</sup> Judge Janet Stumbo concurred in this opinion prior to retiring from the Kentucky Court of Appeals effective December 31, 2017. Release of this opinion was delayed by administrative handling.

Campbell raises numerous claims of ineffective assistance of trial and post-conviction counsel, but has not raised the recusal issue in this appeal. Having reviewed the parties' briefs, the record, and applicable law, we affirm.

Campbell was charged under two separate indictments for robberies he and an accomplice committed against the same victim in 2009 (Indictment No. 11-CR-639) and 2010 (Indictment No. 10-CR-1585). He ultimately entered pleas of guilty to charges under both indictments, conditioned on his right to appeal the denial of his motion to suppress evidence. On direct appeal, the Kentucky Supreme Court summarized the facts and procedural history of his case:

In August 2009, intruders entered David Norris's home, tied him up, hit him in the head, and robbed him of \$70,000. A police investigation failed to produce any suspects for over a year.

Norris was robbed at home again in October 2010. This time, two men entered his home, tied him up, and made off with his credit card. Police began another investigation, aided in this instance by surveillance videos of individuals using credit cards at local stores and by Crimestoppers. Within a short time, Michael Washington emerged as a suspect.

Washington eventually confessed to the crime and implicated Campbell, his cousin, as the other participant. After arresting Campbell, police questioned him about the robbery multiple times. Ultimately, Campbell confessed to being involved. In light of the information gained from Campbell's statement, police became suspicious that Washington and Campbell were involved in the earlier robbery of Norris's home. Forensic

evidence verified this suspicion. Campbell eventually confessed to the second robbery, as well.

Campbell was separately indicted for each robbery of Norris's home. Before trial, Campbell filed a motion to suppress both of his confessions on grounds that police made promises of leniency and coerced him into confessing. The trial court denied Campbell's motions following a hearing. As a result, Campbell entered a conditional guilty plea, reserving the right to appeal the trial court's decision. For the 2010 robbery, Campbell pleaded guilty to second-degree robbery and was sentenced to ten years' imprisonment. And for the 2009 robbery, Campbell pleaded guilty to first-degree robbery and being a second-degree Persistent Felony Offender (PFO 2) and, accordingly, was sentenced to twenty years' imprisonment. Campbell's sentences were ordered to run consecutively.

*Campbell v. Commonwealth*, No. 2014-SC-000140-MR, 2015 WL 5652016, at \*1 (Ky. Sept. 24, 2015).

The sole issue addressed on direct appeal was whether the trial court correctly determined that Campbell's confessions to participating in the two robberies were not coerced. The Kentucky Supreme Court held that Campbell's will was not overborne during his discussions with the police and affirmed the final judgment. *Id.* at \*5.

Campbell filed a motion to vacate judgment pursuant to RCr 11.42 in both cases, alleging ineffective assistance of counsel. He requested the appointment of counsel and an evidentiary hearing. The trial court appointed the Department of Public Advocacy to represent Campbell. Campbell's appointed

counsel made a motion to withdraw after determining that it was “not a proceeding that a reasonable person with adequate means would be willing to bring at his or her own expense[.]” Kentucky Revised Statutes (KRS) 31.110(2)(c). Campbell filed a motion in rebuttal. The trial court granted the withdrawal motion.

Campbell then supplemented his RCr 11.42 motion to argue that his postconviction counsel was ineffective for not filing an *Anders* brief on his behalf. *See Anders v. State of California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967); *Fraser v. Commonwealth*, 59 S.W.3d 448, 454 (Ky. 2001).

The trial court entered an opinion and order denying the RCr 11.42 motion in both appeals without a hearing. This appeal by Campbell from followed.

As an initial matter, the Commonwealth objects to Campbell appealing only in circuit court case No. 10-CR-01585. The Commonwealth argues that he should not be allowed to bring an appeal in only one of the cases because the amendment of the charge from first-degree to second-degree robbery in No. 11-CR-00639 was contingent on the agreement in No. 10-CR-01585. Because we have determined that Campbell’s claims are without merit, we need not address this argument.

Campbell argues firstly that his trial counsel was ineffective in the suppression proceedings for (a) not claiming a *Miranda* violation, (b) not arguing that Campbell’s conversations with the police violated Kentucky Rules of

Evidence (KRE) 410(4), and (c) failing to challenge the competency of Detective Bowles to testify under KRE 601. Secondly, he argues that his post-conviction counsel was ineffective for withdrawing without filing an *Anders* brief. Thirdly, he argues that his trial counsel was ineffective for not moving to withdraw Campbell's guilty plea because the trial court's final sentencing was not in accordance with Campbell's understanding of the plea agreement.

“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.” *Sparks v. Commonwealth*, 721 S.W.2d 726, 727–28 (Ky. App. 1986) (citing *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 370, 80 L.Ed.2d 203 (1985); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970)).

“[B]oth parts of the *Strickland* test for ineffective assistance of counsel involve mixed questions of law and fact, [but] the reviewing court must

defer to the determination of facts and credibility made by the trial court.” *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008) (citing *McQueen v. Commonwealth*, 721 S.W.2d 694, 698 (Ky.1986)). “Ultimately however, if the findings of the trial judge are clearly erroneous, the reviewing court may set aside those fact determinations.” *Id.* (citing Kentucky Rules of Civil Procedure (CR) 52.01). The final review regarding whether counsel’s performance was deficient and the defendant suffered prejudice as a result is made *de novo* by the appellate court. *Id.* (citations omitted).

Campbell argues that his trial counsel was ineffective for failing to argue as grounds for suppression that his *Miranda* rights were violated during his interrogation by the police. This argument is refuted by the record which shows that Campbell’s attorney did raise the *Miranda* issue, both in his written suppression motion and verbally before the trial court during the suppression proceedings. The motion to suppress filed by his trial attorney alleged that Campbell’s Sixth Amendment rights were violated and that he made statements without the presence of counsel. At the hearing on August 21, 2013, his counsel argued before the trial court that Campbell’s *Miranda* rights were not read to him. Specifically, he contended that the recording of the conversation with the police did not show that his rights were read to him, and argued extensively about the inadequacy of any warning and his client’s understanding of his rights. At the

continuation of the hearing on September 11, 2013, his attorney again argued that Campbell was not properly apprised of his *Miranda* rights. Just because counsel's *Miranda* arguments were unsuccessful does not equate to ineffective assistance of counsel.

Next, Campbell argues that his counsel was ineffective for not arguing that his conversation with police violated KRE 410(4) which renders inadmissible “[a]ny statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.”

[T]o be inadmissible at trial on the basis of KRE 410(4), the statements must have been made in the course of ‘plea discussions’ and those discussions must be ‘with an attorney for the prosecuting authority.’ As to the first requirement, a conversation constitutes ‘plea discussions’ when (1) the accused exhibits an actual subjective expectation to negotiate a plea at the time of the discussion and (2) the accused’s expectation is reasonable given the totality of the objective circumstances. As to the second requirement, plea discussions ‘with an attorney for the prosecuting authority’ include discussions with the prosecutor as well as discussions with law enforcement officials who are either acting with the express authority of the prosecutor or who state they are acting with such authority.

*Clutter v. Commonwealth*, 364 S.W.3d 135, 138 (Ky. 2012) (internal citations omitted).

Although Campbell may have believed he was engaged in plea discussions with the prosecuting authority, that expectation was not reasonable under the circumstances. There is absolutely no evidence that the detectives who interviewed him were acting with the express authority of the prosecutor. In describing Campbell's conversations with the police, the Kentucky Supreme Court emphasized that the police never represented that they were acting with the prosecutor's authority: "[The] [p]olice offered to assist Campbell, do everything in their power, or talk to the prosecutor on his behalf; but, for the majority of his discussions with police, Campbell was in control. . . . [The] police stopped short of ever truly promising Campbell anything, outside of simply offering to talk to the prosecutor and present Campbell's side of the situation. There was no guarantee of leniency, and we are unconvinced Campbell believed leniency was forthcoming." *Campbell*, 2015 WL 5652016, at \*4–5. Under the factual circumstances of Campbell's conversations with the police, Campbell's trial counsel was not ineffective for not raising a KRE 410(4) violation as it would have had virtually no chance of success. "It is not ineffective assistance of counsel to fail to perform a futile act." *Bowling v. Commonwealth*, 80 S.W.3d 405, 415 (Ky. 2002).

Next, he argues that his trial attorney was ineffective for failing to challenge Detective Bowles's competency to testify under KRE 601. The Rule provides in pertinent part that "[a] person is disqualified to testify as a witness if



the trial court determines that he . . . [l]acks the capacity to understand the obligation of a witness to tell the truth.” KRE 601(b)(4).

Campbell claims that Detective Bowles was an incompetent witness because he lied about Campbell being informed of his *Miranda* rights during the police interview about the 2010 robbery. Thus, Campbell’s claim is premised on the detective’s alleged intentional dishonesty, not on the detective’s lack of capacity to understand his obligation to tell the truth. “Pursuant to KRE 601, a witness is competent to testify if she is able to perceive accurately that about which she is to testify, can recall the facts, can express herself intelligibly, and can understand the need to tell the truth.” *Pendleton v. Commonwealth*, 83 S.W.3d 522, 525 (Ky. 2002). The detective’s veracity was appropriately tested when he was vigorously cross-examined by defense counsel at the suppression hearing on August 21, 2013. Campbell’s attorney acted entirely appropriately in attempting to undermine the detective’s credibility. *Id.* A challenge to the detective’s competency under KRE 601 was not called for and not warranted by the evidence.

Next, Campbell argues that the attorney appointed to represent him in his post-conviction proceedings under RCr 11.42 was ineffective for withdrawing without submitting an *Anders* brief. “In *Anders*, the United States Supreme Court addressed ‘the extent of the duty of a court-appointed appellate counsel to prosecute a first appeal from a criminal conviction, after that attorney has

conscientiously determined that there is no merit to the indigent's appeal.” *A.C. v. Cabinet for Health & Family Servs.*, 362 S.W.3d 361, 364 (Ky. App. 2012) (quoting *Anders*, 386 U.S. at 739, 87 S.Ct. at 1397). Under these circumstances, in order to preserve the criminal appellant's constitutional right to counsel, the attorney is required to advise the court and request permission to withdraw, but the request must be accompanied by a brief referring to anything in the record that might arguably support the appeal. *Id.*

The *Anders* decision was limited to criminal cases in which the Sixth Amendment right to counsel applies. *Id.* The Sixth Amendment right to counsel does not attach to post-conviction proceedings. *Bowling v. Commonwealth*, 981 S.W.2d 545, 552 (Ky. 1998) (citing *Coleman v. Thompson*, 501 U.S. 722, 752, 111 S.Ct. 2546, 2566, 115 L.Ed.2d 640 (1991); *Murray v. Giarratano*, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989)). Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings. *Id.* Consequently, the attorney who was appointed to assist Campbell in his post-conviction proceedings was not required to file an *Anders* brief when requesting permission to withdraw from the case.

Finally, Campbell argues that his trial counsel was ineffective for not moving to withdraw his conditional guilty plea because the trial court did not sentence him in accordance with his understanding of the plea agreement.

According to Campbell, his trial counsel advised him, under indictment 10-CR-1585, to accept a sentence of ten years for the charge of robbery in the first degree enhanced to twenty years by the charge of PFO in the second degree. He claims his counsel told him that the 85 percent eligibility requirement for violent offenses, pertaining to the first-degree robbery charge, *see* KRS 439.3401(1)(m) and (3)(a)), would only apply to the ten-year sentence, making him parole eligible after serving 8.5 years. He claims he was also told by his attorney that this sentence would be run concurrently with his sentence in 11-CR-0639 and another sentence from a Jefferson County case.

This argument is refuted by the record. The written plea offer from the Commonwealth dated November 29, 2012, specifies that the Commonwealth requests the sentences to run consecutively but acknowledges they can run concurrently by law. At the time of the entry of his guilty plea, the trial court referred specifically to the Commonwealth's sentencing "recommendations," and, as Campbell acknowledges, did not specify whether the sentences would be run concurrently or consecutively or whether the 85 percent eligibility rule would apply to the entire twenty-year sentence.

After the entry of the plea and prior to final sentencing, Campbell's attorney filed a motion requesting the sentences to be imposed concurrently and for the 85 percent rule to apply to the ten-year sentence only. Campbell also filed a

*pro se* motion requesting concurrent sentencing. He did not claim that he believed his plea agreement provided for concurrent sentences. Neither Campbell nor his attorney would have felt the need to file such motions if they believed that a concurrent sentencing arrangement was binding on the trial court.

Campbell argues that the court was bound to afford him the opportunity to withdraw his plea because the final sentence deviated from the plea agreement. *Kennedy v. Commonwealth*, 962 S.W.2d 880, 882 (Ky. 1997). But there is no indication, nor does Campbell allege, that he ever told his attorney he wanted to withdraw the plea. “The reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions. Counsel’s actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant.” *Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066. Campbell’s counsel cannot be deemed ineffective for failing to act on his client’s behalf to withdraw the plea if his client never informed him that he wished to do so.

For the foregoing reasons, the opinion and order of the Fayette Circuit Court denying Campbell’s RCr 11.42 motion is affirmed.

ALL CONCUR.

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