

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-002118-MR

ROY DALE RICHARDSON

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE JOHN KNOX MILLS, JUDGE
ACTION NO. 08-CR-00240

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS AND THOMPSON, JUDGES; LAMBERT,¹ SENIOR
JUDGE.

COMBS, JUDGE: Roy Dale Richardson appeals from an order of the Laurel
Circuit Court denying his motion, filed *pro se*, for post-conviction relief. After our
review, we affirm.

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.

On September 19, 2008, the Laurel County Grand Jury returned an indictment charging Richardson with: second-degree trafficking in a controlled substance; possession of marijuana; possession of drug paraphernalia; and being a persistent felony offender in the first degree. He pled not guilty to all of the charges.

On April 29, 2009, Richardson filed a motion to suppress evidence, which was denied by the trial court. Richardson then withdrew his previous plea of not guilty and pled guilty to trafficking in a controlled substance, second degree. Pursuant to the parties' plea agreement, the Commonwealth recommended a sentence of ten (10) years to serve. The court sentenced him to ten-years' imprisonment per the terms of the plea agreement.

On September 19, 2011, Richardson, *pro se*, filed a motion for post-conviction relief pursuant to Kentucky Rule[s] of Criminal Procedure (RCr) 11.42 in which he argued that he had received ineffective assistance of trial counsel. He alleged that his trial counsel was ineffective for failing to investigate the prosecution's case against him; for failing to file a proper motion to suppress; and for failing to present a "stalking horse" argument to the court for consideration. No evidentiary hearing was held on the motion. In an order entered October 18, 2011, the trial court denied the motion. This appeal followed.

A party filing a motion pursuant to RCr 11.42 has the burden "to establish convincingly that he was deprived of some substantial right which would justify

the extraordinary relief afforded by the post-conviction proceedings provided in RCr 11.42.” *Dorton v. Commonwealth*, 433 S.W.2d 117 (Ky.1968). We review the judgment of a trial court on an RCr 11.42 motion under the standard of abuse of discretion. *Bowling v. Commonwealth*, 981 S.W.2d 545 (Ky.1998).

Kentucky has adopted the two-prong test for establishing ineffective assistance of counsel as set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky.1985). Under that test, as applied to guilty pleas, the claimant must show:

- (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, 486-487 (Ky. 2001), citing *Sparks v. Commonwealth*, 721 S.W.2d 726, 727-728 (Ky. 1986). The claimant bears the burden of establishing ineffective assistance of counsel. *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066.

On appeal, Richardson argues that the trial court erred when it denied his request for an evidentiary hearing. We disagree.

The provisions of RCr 11.42 require an evidentiary hearing only “if the answer raises a material issue of fact 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 by *Stanford v. Kentucky*, 510 U.S. 1049, 114 S.Ct. 703, 126 L.Ed.2d

669 (1994). There is no need for an evidentiary hearing where the record on its face refutes the claims of error or when the allegations, even if true, would not be sufficient to invalidate the conviction. *Id.*; *Brewster v. Commonwealth*, 723 S.W.2d 863 (Ky.App.1986). In its order denying Richardson an evidentiary hearing, the trial court determined that the record conclusively resolved his claims.

Richardson argues first that trial counsel was ineffective since he neglected to request discovery and otherwise failed to investigate the case against him. However, the record clearly refutes Richardson's claims that trial counsel failed to adequately investigate his case. Richardson has conceded that the Commonwealth provided "open file" discovery. Consequently, there was no need for counsel to request any additional discovery. Additionally, the record shows that trial counsel investigated the facts of the case and was able to secure the documents necessary to support his motion to suppress.

Next, Richardson asserts that counsel erred by filing an "inept" motion to suppress. He contends that trial counsel should have emphasized to the court that the police officer had no probable cause to arrest him because the officer was operating under a mistaken belief that Richardson was on parole at the time of his arrest. In fact, Richardson had been discharged from parole. Issued on June 19, 2008, a certificate signed by the chairperson of the Kentucky Parole Board indicated that Richardson was discharged from parole effective February 16, 2008. This certificate was attached to the motion to suppress and was used to support counsel's contention that the arresting officers lacked probable cause to arrest

Richardson in May 2008. Thus, contrary to Richardson's assertion, the record confirms that counsel adequately presented the arguments now advanced by Richardson in his collateral attack and, additionally, that counsel meticulously presented records from the parole board to the court in an effort to bolster that motion. Although his motion was ultimately unsuccessful, counsel's failure to achieve a favorable result does not render his assistance ineffective under the standards established by *Strickland*.

Finally, Richardson contends that trial counsel was ineffective for failing to assert a "stalking horse" argument with respect to the illegal search of his premises. We disagree.

Richardson explains that a search is patently unlawful where a parole officer's visit is but a ruse or a pretext (*i.e.*, a "stalking horse") for a full-scale criminal investigation. He argues that counsel should have advanced this theory to the court. However, the "stalking horse" argument asserted by Richardson in this collateral proceeding is no longer viable in the wake of the holding of the United States Supreme Court in *United States v. Knights*, 534 U.S. 112, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001). In *Knights*, the Court held that the subjective motivation of any individual officer cannot be the basis of a Fourth Amendment challenge to a search and seizure. Counsel did not err by failing to advance a baseless argument. *Bowling v. Commonwealth*, 80 S.W.3d 405 (Ky.2002). On the contrary, counsel acted wholly in accordance with professional standards by not misrepresenting case law on this issue.

Richardson has failed to cite to any material issue of fact that could not be determined on the face of the record. Thus, we can find no error in the trial court's denial of an evidentiary hearing.

We affirm the order of the Laurel Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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