RENDERED: NOVEMBER 6, 2026; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2025-CA-0852-MR

BRETT A. SMITH — APPELLANT

v.

APPEAL FROM HENRY CIRCUIT COURT
HONORABLE JERRY CROSBY, II, JUDGE
ACTION NO. 14-CR-00015

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART
REVERSING AND REMANDING IN PART

** ** ** ** **

BEFORE: CALDWELL, A. JONES, AND MCNEILL, JUDGES.

CALDWELL, JUDGE: Brett Smith appeals the order of the Henry Circuit Court that denied his motion for relief pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. Following careful examination of the record and the law, we affirm in part and reverse and remand in part.

Recitation of the salacious facts underlying Smith's crimes is not necessary for our review. On February 25, 2020, a jury convicted Smith of one

count of first-degree sodomy and three counts of first-degree sexual abuse of a victim under twelve years of age. He received an aggregate sentence of twenty-five years' imprisonment. The Kentucky Supreme Court affirmed the conviction and sentence on December 16, 2021.

On January 5, 2025, Smith filed a motion asking the Henry Circuit Court to vacate his sentence pursuant to RCr 11.42. He claimed that he was entitled to a new trial because he had received ineffective assistance of counsel. The circuit court denied the motion on June 4, 2025. This appeal followed.

As a preliminary matter, the Commonwealth urges us to strike Smith's brief for non-compliance with the Kentucky Rules of Appellate Procedure (RAP). This Court has three options when a brief is in violation of the RAP: 1) ignore the deficiencies and conduct review; 2) strike the brief or portions of it; or 3) review for manifest justice when the error is a lack of preservation statements. *Swan v. Gatewood*, 678 S.W.3d 462, 463 (Ky. App. 2023).

The first error the Commonwealth points to is Smith's failure to cite to "specific location[s] in the record supporting each of the statements contained in the summary" in accordance with RAP 32(A)(3). That Rule is intended to eliminate the need for this Court to "scour a vast record." *Walker v. Commonwealth*, 503 S.W.3d 165, 171 (Ky. App. 2016). In this case, while the record is long, it cannot be characterized as vast. Only key select facts are

necessary for purposes of this review. Smith's brief refers to the overarching procedural history which is easily accessible.

The Commonwealth also complains that Smith did not include statements of preservation which are required by RAP 32(A)(3). While counsel should take caution in the future, in this case, the circuit court wrote a thorough order which indicates that Smith's issues were properly preserved.

In further support of its suggestion that we strike Smith's brief, the Commonwealth contends that Smith's failure to serve the Commonwealth's Attorney and his reference to an unpublished case are "not trivial violations." As it is the Attorney General's Office and not the Commonwealth's Attorney representing the Commonwealth on appeal, lack of service, which has been corrected by Smith, is not likely to be fatal to an appeal. Likewise, Smith's reference to an unpublished case followed the signal *see also*. Smith primarily relied on published case law. While Smith's brief does not completely conform with the Rules, "the deviation from the rules is largely technical and does not significantly impede our review. Therefore, we conclude that the deficiencies in [Smith's] brief do not merit any sanctions" and will proceed with review. *Swan*, 678 S.W.3d at 469.

STANDARD OF REVIEW

RCr 11.42 is a vehicle for relief from a conviction that resulted from ineffective assistance of counsel. To succeed on a claim of ineffective assistance of counsel, an appellant must prove that trial counsel's assistance was ineffective, which resulted in actual prejudice. *Strickland v. Washington*, 466 U.S. 668, 692-93 (1984). "A motion made under RCr 11.42 must state facts to support it." *Sharp v. Commonwealth*, 385 S.W.2d 317 (Ky. 1964).

This Court reviews a denial of an RCr 11.42 motion to determine whether the trial court abused its discretion. *Bowling v. Commonwealth*, 981 S.W.2d 545, 548 (Ky. 1998). "The test for abuse of discretion is whether the trial [court's] decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

ANALYSIS

Smith's most critical argument is that the trial court should have held an evidentiary hearing to determine whether counsel properly communicated plea offers before trial.

An evidentiary hearing is only necessary when a defendant presents "a material issue of fact that cannot be determined on the face of the record." *Cawl v. Commonwealth*, 423 S.W.3d 214, 218 (Ky. 2014) (citations omitted). "The trial judge may not simply disbelieve factual allegations in the absence of evidence in

the record refuting them." *Fraser v. Commonwealth*, 59 S.W.3d 448, 452-53 (Ky. 2001). The alleged material fact must be "sufficient to invalidate the conviction" for a court to be compelled to conduct a hearing. *Cawl*, 423 S.W.3d at 218.

Plea negotiations are arguably the most critical stage of criminal proceedings and "where the learning and experience of legal counsel can prove most vital." *Stone v. Commonwealth*, 217 S.W.3d 233, 239 (Ky. 2007). The law is clear that "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Missouri v. Frye*, 566 U.S. 134, 145 (2012)). This Court has articulated that if an offer might result in a lighter sentence for the defendant than what might result from a trial, it is proper to influence the defendant to accept it. *Osborne v. Commonwealth*, 992 S.W.2d 860, 864 (Ky. 1998).

In this case, the record does not indicate whether the Commonwealth extended an offer. Smith's claim cannot be refuted by the record. Therefore, he is entitled to an evidentiary hearing to determine whether "(1) trial counsel's representation was less than objectively reasonable; and, (2) he suffered prejudice as a result of the defective representation in that the maximum sentence he could possibly receive under any of the plea offers was significantly less than that imposed through trial." *Id.* at 865.

While we do not express an opinion regarding the merits of Smith's claims, we must provide guidance regarding the correct remedy should the circuit court find that Smith's counsel was ineffective. This Court has held that the original plea offer must remain intact. *Id.* at 864. "Indeed, the only way to neutralize the constitutional deprivation suffered by a defendant would seem to be to provide [him] with an opportunity to consider the Commonwealth's initial plea offer with the effective assistance of counsel." *Id*. If the Commonwealth withdraws the offer, it must overcome the rebuttable presumption of vindication. *Id*. at 866.

Smith also claims that his counsel was ineffective because they did not request an additional review of the victim's psychotherapy records. The victim received extensive psychotherapy treatment for the harm caused by her mother[1] and Smith. Prior to trial, Smith requested a *Barroso* review of the treatment records. In *Commonwealth v. Barroso*, 122 S.W.3d 554 (Ky. 2003), our Supreme Court set forth a procedure for protecting a witness's confidentiality interests while still allowing the discovery of exculpatory evidence. When there is "evidence sufficient to establish a reasonable belief that the records contain exculpatory evidence," it is proper for the trial court to conduct an *in camera* inspection of the

[1] The victim's mother was Smith's co-defendant. They were tried separately.

records and make the determination of whether they hold exculpatory evidence. *Id*. at 564.

In this case, the trial court examined voluminous records from the victim's treatment providers. It did not discover any exculpatory evidence. Likewise, in the course of Smith's direct appeal, the Kentucky Supreme Court also conducted an *in camera* inspection and confirmed the absence of exculpatory evidence. *Smith v. Commonwealth*, 636 S.W.3d 421, 439 (Ky. 2021).

At trial, the victim testified that there were differences between her testimony and her statements in 2013 in part due to repressed memories that had surfaced in therapy. Smith now claims that his counsel should have asked for new records for another *Barroso* review. However, Smith does not articulate what the new records would be.

RCr 11.42(2) requires a movant to "specifically [state] the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds." Smith merely speculates that something exculpatory might be in unidentified records. "Conclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of discovery." *Haight v. Commonwealth*, 41 S.W.3d 426, 442 (Ky. 2001), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

Furthermore, Smith did not suffer prejudice from a lack of additional psychotherapy records. The victim testified that new memories surfaced over the course of years of treatment, and Smith conducted a lengthy cross-examination of the victim. The jury found the victim credible.

Smith finally argues that his counsel should have asserted his right to a speedy trial more vigorously. The Kentucky Supreme Court addressed this issue in Smith's direct appeal. It acknowledged that six years from time of indictment to trial was excessive. It applied the factors that the Supreme Court of the United States provided in *Barker v. Wingo*, 407 U.S. 514 (1972), and concluded that Smith was not prejudiced by the delay. This Court will not conduct a second review. "An issue raised and rejected upon direct appeal may not be relitigated in an RCr 11.42 motion by claiming that it amounts to ineffective assistance of counsel." *Mills v. Commonwealth*, 170 S.W.3d 310, 326 (Ky. 2005), *overruled on other grounds by Leonard*, *supra*.

In conclusion, we remand to the circuit court to hold an evidentiary hearing regarding the issue of plea negotiations only. We affirm the circuit court with respect to all other grounds.

ALL CONCUR.

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