

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-003247-MR

BRIAN DALE HALE

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
INDICTMENT NOS. 96-CR-00172 & 97-CR-00297

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BUCKINGHAM, DYCHE, AND GARDNER, JUDGES.

DYCHE, JUDGE: This is an appeal by Brian Hale from an order of the Daviess Circuit Court denying his petition pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42 for post-conviction relief. We affirm.

On May 7, 1996, in Case No. 96-CR-00172, Hale was indicted for first-degree burglary, KRS 511.020; second-degree assault, KRS 508.020; first-degree wanton endangerment, KRS 508.060; and first-degree criminal mischief, KRS 512.020. The criminal conduct underlying this indictment occurred on April 6, 1996. On August 5, 1997, in Case No. 97-CR-00297, Hale was indicted for murder, KRS 507.020; first-degree assault, KRS 508.010; and first-degree wanton endangerment, KRS 508.060. The

criminal conduct underlying this indictment occurred on July 2, 1997, when, while driving under the influence, Hale was involved in a car crash, which caused the death of his daughter and seriously injured the mother of the child.

On August 18, 1997, pursuant to an offer by the Commonwealth on a plea of guilty, Hale filed motions to enter guilty pleas on both indictments. Under the plea bargain, Hale agreed to plead guilty to all counts and, in return, the Commonwealth offered to recommend concurrent sentences resulting in a total of ten years to serve in Case No. 96-CR-00172 and concurrent sentences resulting in a total of ten years to serve in Case No. 97-CR-00297. The sentences under each indictment, however, were to be served consecutively, for a total of twenty years. The trial court accepted the plea agreement, and judgment and sentence were entered in both cases on September 15, 1997. On November 3, 1997, Hale filed a motion to set aside and vacate his sentences pursuant to RCr 11.42. Following a hearing, the trial court denied the motion. This appeal followed.

Hale argues that the trial court erred by denying his motion to set aside the guilty plea; he asserts that the plea was not made knowingly, voluntarily and intelligently. Specifically, appellant alleges that he was emotionally distraught over the death of his daughter only six weeks prior to the plea and could not possibly have understood the complexities and subtleties of the charges pending against him. In addition, appellant alleges that his trial counsel smelled of alcohol on the day of the plea and appeared to be under the influence.

A guilty plea is valid if it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). The record must reflect that the court questioned the accused and that he had a full understanding of what a guilty plea implied and of its consequences. Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 1712, 23 L. Ed. 2d 274, 279 (1969). The validity of a guilty plea must be determined by considering the totality of the circumstances surrounding the plea -- not by "reference to some magic incantation" recited at the time the plea is taken. Kotas v. Commonwealth, Ky., 565 S.W.2d 445, 447 (1978).

In the instant case, appellant signed a Motion to Enter a Guilty Plea, Administrative Office of the Courts Form AOC-491. This form specifically advised appellant of those constitutional rights which would be waived upon a plea of guilty. The form further included a certificate of counsel wherein his trial counsel attested that he had discussed this document with appellant, and, to the best of his knowledge and belief, appellant understood the documents and was entering his plea freely, knowingly, intelligently, and voluntarily.

Moreover, appellant signed the form only after being advised by the trial court that by signing the forms he was acknowledging that he had read the forms, understood the forms, agreed with the forms, and wanted to plead guilty because he was guilty. Further, appellant's counsel stated that he had

discussed matters with appellant and believed he understood his rights.

Prior to the trial court's acceptance of the plea, appellant acknowledged, in open court, that he had spoken with his attorney; that he had all the time to confer privately with his attorney that he felt was necessary; that he had no complaints of any kind as to the representation afforded by his attorney; and that he was fully satisfied with the services provided by his attorney. "Solemn declarations made in open court carry a strong presumption of verity." Blackledge v. Allison, 431 U.S. 63, 74, 97 S. Ct. 1621, 1629, 52 L. Ed. 2d 136, 147 (1977).

It is clear from the record that appellant was accorded due process throughout the course of entering his guilty plea, and that he was properly made aware of his rights so as to make a knowing, intelligent, and voluntary decision to plead guilty. Boykin v. Alabama, supra; Commonwealth v. Crawford, Ky., 789 S.W.2d 779 (1990).

Hale's second claim is that his trial counsel smelled of alcohol on the day of the plea and appeared to be under the influence. In its order denying appellant's motion, the trial court stated that it "finds nothing to support [appellant's] claim." In reviewing a circuit court's decision on an RCr 11.42 motion, its findings of fact made after a hearing are binding unless they are clearly erroneous. Bell v. Commonwealth, Ky., 395 S.W.2d 784, 785 (1965), cert. denied, 382 U.S. 1020, 86 S. Ct. 640, 15 L. Ed. 2d 535 (1966). See also Commonwealth v.

Payton, Ky., 945 S.W.2d 424, 425 (1997); CR 52.01. We have reviewed the tape of the plea hearing, and are unable to conclude that the finding of the trial court was clearly erroneous.

The judgment of the Daviess Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Albert W. Barber, Jr.
Owensboro, Kentucky

BRIEF FOR APPELLEE:

A. B. Chandler III
Attorney General

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky