

RENDERED: July 23, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1996-CA-003017-MR

NED EUGENE DAVIS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE WILLIAM E. MCANULTY, JR., JUDGE
ACTION NO. 95-CR-734

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: HUDDLESTON, JOHNSON AND MILLER, JUDGES.

JOHNSON, JUDGE: Ned Eugene Davis (Davis) appeals from an order of the Jefferson Circuit Court entered on October 25, 1996, that denied him relief under his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to vacate sentence. We affirm.

Davis pled guilty on November 16, 1995, to trafficking in a controlled substance in the first degree (cocaine) in violation of Kentucky Revised Statutes (KRS) 218A.1412. On December 21, 1995, the trial court entered a judgment sentencing Davis to prison for a period of five years with the sentence to run

consecutively with another five-year sentence under indictment no. 95-CR-1387. On July 16, 1996, Davis, pro se, filed his RCr 11.42 motion claiming that he "either misunderstood the nature of the crime with which he was charged or failed to realize that his mere possession of cocaine was insufficient to establish his guilt for trafficking in the first degree" (emphasis added). On September 25, 1996, appointed counsel filed a supplement to Davis' RCr 11.42 motion and added as a ground for relief that Davis' trial counsel rendered ineffective assistance by failing to advise Davis "of the nature and elements of the offense that he was pleading guilty to."

By order entered on October 25, 1996, the trial court denied Davis' motion without an evidentiary hearing, and stated as follows:

In the instant case, Mr. Davis appeared at the plea proceeding with counsel. The court engaged in a thorough discussion with Mr. Davis regarding his guilty plea. The Court ascertained that Mr. Davis had never been treated for a mental illness and was not under the influence of alcohol or drugs. Mr. Davis told the Court that he had sufficient time to confer privately with his attorney and had no further questions for him. Furthermore, Mr. Davis stated that he had reviewed with his attorney and signed the Commonwealth's Offer on a Plea of Guilty and the Motion to Enter a Guilty Plea. The Court specifically asked Mr. Davis if he understood the facts as alleged in the indictment and if he engaged in said conduct. Mr. Davis answered in the affirmative.

This Court finds that Mr. Davis' plea was knowingly, intelligently, and voluntarily made. The Court notes that while giving a narrative description of his conduct to the Court, Mr. Davis admitted only to possessing

5.28 grams of cocaine and a certain amount of cash. However, Mr. Davis stated that he understood the crime to which he pled guilty and that he engaged in the conduct as alleged in the indictment, possession of a controlled substance with intent to sell. The Court finds that these statements, when considered in conjunction with the remainder of the record of the plea proceeding, indicate that Mr. Davis had a clear understanding of the crime to which he pled and the import of his plea.

This appeal followed.

Davis first claims that his sentence must be vacated because his guilty plea to the trafficking charge was not constitutionally entered. A guilty plea must represent a voluntary and intelligent choice among the alternative courses of action open to a defendant. North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970); Centers v. Commonwealth, Ky.App., 799 S.W.2d 51, 54 (1990); Sparks v. Commonwealth, Ky.App., 721 S.W.2d 726 (1986). The trial court must determine that a defendant's guilty plea is intelligent and voluntary, and this determination must be put in the record. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969); Centers, 799 S.W.2d at 54; Sparks, 721 S.W.2d at 727. The validity of a guilty plea must be determined from considering the totality of the circumstances surrounding it. Commonwealth v. Crawford, Ky., 789 S.W.2d 779, 780 (1990); Centers, 799 S.W.2d at 54; Kotas v. Commonwealth, Ky., 565 S.W.2d 445, 447 (1978). These circumstances include the accused's demeanor, background and experience, and whether the record reveals that the plea was

voluntarily made. Centers, 799 S.W.2d at 54; Sparks, 721 S.W.2d at 727; Littlefield v. Commonwealth, Ky.App., 554 S.W.2d 872 (1977). The trial court is in the best position to determine if there was any reluctance, misunderstanding, involuntariness, or incompetence to plead guilty. Centers, 799 S.W.2d at 54, (citing Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977)). An evidentiary hearing is not required in a RCr 11.42 case where the issues presented can be fairly determined on the face of the record. Glass v. Commonwealth, Ky., 456 S.W.2d 686, 687 (1970).

Davis contends that his trial counsel and the trial court both failed to advise him of the elements of trafficking in cocaine. He admits to possessing cocaine, but claims that he did not possess the cocaine with the "intent to distribute, manufacture, dispense, or sell" as required by KRS 218A.010(28). Davis points to the colloquy in the record from his hearing on his guilty plea wherein the trial judge asked him, "[W]ere you in possession of the drugs?", and he responded, "Yes". Davis claims that while he admitted to possessing the cocaine, he was never advised that the element of intent was required for him to be guilty of trafficking.

In its order denying relief, the trial court noted that Davis stated that he understood the crime to which he pled guilty and that he had engaged in the conduct as alleged in the indictment. Thus, the trial court concluded that considering the totality of the circumstances surrounding the plea, such as

Davis' demeanor, background and experience, as well as the record of the proceeding, that Davis' plea was knowingly, intelligently, and voluntarily made. In affirming the trial court, we conclude that "[t]he trial court complied with its duty to review the motion and to examine the record to determine whether the Court originally acted incorrectly." Beecham v. Commonwealth, Ky., 657 S.W.2d 234, 236 (1983) (citing Lynch v. Commonwealth, Ky.App., 610 S.W.2d 902 (1980)). Since the record supports the trial court's denial of relief, we affirm as to this issue.

Davis' second claim is that his trial counsel was ineffective by failing to advise him of the element of intent. In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing both that counsel's performance was deficient and that the deficiency resulted in actual prejudice affecting the outcome. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985) cert denied, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). In determining counsel's performance, the standard is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. Strickland, 466 U.S. at 688-89, 104 S.Ct. at 2064-65, 80 L.Ed.2d at 693-94; Wilson v. Commonwealth, Ky., 836 S.W.2d 872, 878 (1992), cert denied, 507 U.S. 1034, 113 S.Ct. 1857, 123 L.Ed.2d 479 (1993). A court must indulge in a strong presumption that counsel's conduct falls within the wide range of

reasonable professional assistance. Strickland, supra; Wilson, supra. The defendant bears the burden of identifying specific acts or omissions alleged to constitute deficient performance. Strickland, 466 U.S. at 690, 104 S.Ct. at 2066, 80 L.Ed.2d at 695. In measuring prejudice, the relevant inquiry is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698.

Since the trial court denied Davis an evidentiary hearing, there is no finding as to his allegation that trial counsel failed to advise him of the element of intent. However, the trial court did conclude from its review of the record that Davis' plea of guilty was entered knowingly, intelligently, and voluntarily. Of great importance in evaluating Davis' claim is the fact that a separate indictment of Davis as a persistent felony offender in the first degree (PFO I) was dismissed as a part of his plea agreement. If Davis had been convicted of PFO I, he faced a sentence of 10 to 20 years, with a minimum service of 10 years. KRS 532.080. Instead, Davis received the minimum five-year sentence for the trafficking conviction. Furthermore, the sentence range for the class D felony of possession of cocaine to which Davis readily admits was from one to five years. Thus, the five-year sentence that Davis received was the lowest

possible sentence for trafficking in cocaine and allowed him to avoid the risk of a 20-year sentence for a PFO I conviction.

Furthermore, the record supports the Commonwealth's claim that it had a winnable case against Davis on the charge of trafficking in cocaine. While Davis places the emphasis in his brief on his claim that he did not possess the cocaine with the "intent to sell", he ignores the fact that the Commonwealth was only required to prove that he possessed the cocaine with the "intent to manufacture, distribute, dispense or sell." KRS 218A.010(28). Evidence to support this charge included, (1) Davis possessed seven pieces of crack cocaine weighing a total 5.28 grams; (2) Davis, an indigent, possessed \$371 in cash; (3) Davis had a long criminal record including felony convictions; and (4) When Davis was arrested at 11:00 p.m., the police were investigating the report of a suspicious vehicle.

In light of the fact that Davis faced a sentence of one to five years for the offense of possession to which he readily admits his guilt, and in light of the fact that as a condition of Davis' plea of guilty a PFO I charge was dismissed, and in light of the evidence against Davis for trafficking in cocaine, we cannot conclude that trial counsel erred in advising him to accept the plea agreement and a five-year sentence for trafficking. "It is well established that the advice by a lawyer for a client to plead guilty is not an indication of any degree of ineffective assistance." Beecham, 657 S.W.2d at 236-37 (citation omitted). Under the circumstances of this case, even

if trial counsel did fail to advise Davis of the element of intent, we conclude that Davis has failed to meet the second prong of the Strickland test, i.e., he has failed to show how the deficiency resulted in actual prejudice to him.

For the foregoing reasons, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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Atty. General

Hon. David A. Sexton
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