

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001676-MR

DONALD RAY DAY

APPELLANT

v. APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE RON JOHNSON, JUDGE
ACTION NO. 00-0-1667A

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: GARDNER, HUDDLESTON AND KNOX, JUDGES.

GARDNER, JUDGE: Donald Ray Day (Day) appeals from an order of the Harlan Circuit Court denying his motion pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42, to vacate his sentence for murder. Day has raised numerous issues on appeal. After reviewing the issues raised by Day, the record below and the applicable law, this Court affirms.

In February 1976, Bobby Glenn Irvin (Irvin) was murdered in a remote area on Pine Mountain in Harlan County. Police subsequently arrested Day and his brothers for the murder. Day was indicted for the offense. Officials alleged that Day and his brothers drove Irvin to a remote area; Day struck Irvin in

the head with a rock, and then shot him in the back of the head with a shotgun.

Day at first pled not guilty, but in November 1976, Day appearing with counsel advised the trial court that he wished to plead guilty. The Commonwealth objected to Day's motion to change his plea. The court questioned Day about the circumstances surrounding his plea and the legal representation he had received. The court accepted Day's guilty plea and deferred sentencing until a later date. At the sentencing proceeding, the court again questioned Day to make certain that he still intended to plead guilty. The court sentenced Day to life imprisonment.

In October 1978, Day moved the trial court to provide him with a copy of the clerk's record and transcripts of the criminal indictment and to appoint him counsel in order to prepare and file a RCr 11.42 motion. The court denied Day's motion, because Day provided inadequate information regarding errors during the proceedings or regarding inadequate assistance by his counsel. The court noted that Day's motion constituted an excuse to explore the record at the taxpayer's expense. Day did not appeal from the trial court's order.

In September 1997, Day filed a motion with the circuit court seeking relief pursuant to RCr 11.42. Day simultaneously moved the court to hold his RCr 11.42 motion in abeyance until he could file a supplemental motion. He filed his supplemental

motion in March 1998.¹ In a June 18, 1998 order, the circuit court denied Day's motion and supplemental motion for RCr 11.42 relief. Day subsequently has appealed the circuit court's order denying his motions for RCr 11.42 relief.

Day first argues that his plea was not entered knowingly, intelligently or voluntarily, because neither the trial court nor counsel explained to him the charges against him, the collateral consequences of his act, or the law relating to the specific facts of his case. He specifically argues that the trial court, in violation of Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), did not advise him that he had a right to confront and cross-examine his accusers and that he had a privilege protecting him from self-incrimination.

Guilty pleas 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); Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726 (1986). A guilty plea waives three important constitutional rights: the privilege against compulsory self-incrimination, the right to a jury trial and the right to confront one's accusers. Boykin v. Alabama, 89 S.Ct. at 1712. A court cannot presume the waiver of these rights from a silent record. Id.; Hartsock v. Commonwealth, Ky., 505 S.W.2d 172, 173 (1974). A guilty plea cannot be voluntary unless a defendant

¹In June 1998, Day filed with this Court an undated petition for a writ of mandamus asking that this Court direct the circuit court to enter a final disposition regarding his RCr 11.42 motion.

received real notice of the true nature of the charge. Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253, 2257, 49 L.Ed.2d 108 (1976). The validity of a guilty plea is determined from considering the totality of circumstances surrounding the plea. Kotas v. Commonwealth, Ky., 565 S.W.2d 445, 447 (1978).

In United States v. Stead, 746 F.2d 355, 356 (6th Cir. 1984), the court held that the trial court's omission of advising the defendant of his rights against self-incrimination or his right to confront and cross-examine witnesses, was not sufficient to require vacation of the trial court's judgment. Since the record indicated that the defendant intelligently and voluntarily entered his plea, the court's omission constituted harmless error pursuant to federal rules. Id. "A defendant is not entitled to have a conviction suppressed simply because the record is silent on Boykin matters when neither he nor anyone else has testified under oath that the Boykin requirements were not explained to him and that he did not understand his constitutional rights before the entry of the plea." Conklin v. Commonwealth, Ky., 799 S.W.2d 582, 584 (1990).

In the case at bar, the record reflects that Day voluntarily and intelligently entered his guilty plea. While the record does not show whether the trial court explained the right of cross-examination and the privilege against self-incrimination to him, Day has not shown that his Boykin rights were not explained to him and that he did not understand his constitutional rights before entering his guilty plea. The record clearly shows that the court explained the nature of the

charge, including elements of the charge and possible maximum penalties, to Day.

Additionally, in the instant case, the doctrine of laches applies to Day's claims. RCr 11.42(10)(b) provides that nothing in the rule shall preclude the Commonwealth from relying upon the defense of laches to bar a motion upon grounds of unreasonable delay in filing when the delay has prejudiced the Commonwealth's opportunity to present relevant evidence to contradict or impeach the movant's evidence. Laches applies where one neglects or omits to assert one's rights within a reasonable period of time, causing prejudice, injury, disadvantage or a change of position to the other party. Brumley v. Seabold, Ky. App., 885 S.W.2d 954, 956 (1994), quoting Chapman v. Bradshaw, Ky., 536 S.W.2d 447 (1976). See also Huffaker v. Twyford, Ky., 445 S.W.2d 124 (1969); Fightmaster v. Leffler, Ky. App., 556 S.W.2d 180 (1977). Such undue delay will bar enforcement of the movant's rights. Brumley v. Seabold, 885 S.W.2d at 956. Each case must be determined on its own facts. Id. Fightmaster v. Leffler, 556 S.W.2d at 183. "Whether the proceeding is an RCr 11.42 motion or a petition for writ of habeas corpus, the principle is the same: the prisoner cannot be allowed to sit on a claim of right while the evidence available to the Commonwealth to support the action taken disintegrates." Brumley v. Seabold, 885 S.W.2d at 957. A defendant has a duty "to bestir himself to some extent to protect his rights and remedies." Hayes v. Commonwealth, Ky. App., 837 S.W.2d 902, 905

(1992), quoting Adams v. Commonwealth, Ky. App., 551 S.W.2d 249 (1977). A rule of reasonableness applies. Id.

In the case at bar, Day was convicted in 1976. In 1978, he moved the trial court to provide him with a copy of the clerk's record and transcripts in his case. The court denied the motion, and he did not appeal. He then waited until September 1997 to file a RCr 11.42 motion. The record reveals that one of the attorneys who represented him in 1976 is dead while the other is retired and suffers from health problems. The long delay in this case has prejudiced the Commonwealth. This case is not unlike Hayes v. Commonwealth, supra, where the court noted that laches should apply where the movant waited twenty-three years to bring his motion.

Day also argues that the trial court lacked authority under RCr 9.84(2) to sentence him to life imprisonment without the approval of and intervention by a jury. He maintains this is so, because the death penalty was a possibility in this case. The record reflects that life imprisonment was the severest penalty that he could receive at that time. He has shown nothing in the record nor any law that indicates he could have received the death penalty.

He further contends that his sentence should be vacated, because he was not required to sign a written guilty plea agreement. He also maintains as part of this argument that he was not told of the intent element of his crime and that he was led to believe he would receive a twenty-year sentence. First, he has shown no law which supports his argument regarding

a written plea. Second, the record refutes his contentions as it shows the Commonwealth objected to the plea, the court explained the charge to him, and the court told him of the maximum sentence he could receive.

Day next argues that the trial court violated his due process rights as well as Kentucky Revised Statute (KRS) 504.100(3) by failing to conduct a competency hearing to determine whether or not he was mentally incompetent to stand trial or plead guilty. The record shows that the court ordered an evaluation of Day by a psychiatrist and that the court received no report of incompetency or an inability to proceed with a guilty plea. Further the provisions of KRS 504.100(3), cited by Day, did not become effective until July 1982.

Day additionally maintains that the trial court erred to his substantial prejudice and denied him due process by failing to order and consider at sentencing, a presentence investigative report. He maintains that the court could not waive this mandatory prerequisite to the entry of a valid judgment. He cites KRS 532.050 and Brewer v. Commonwealth, Ky., 550 S.W.2d 474 (1977).

The record indicates that the court delayed the sentencing so that it could review the presentencing report. The report however does not appear in the record, and the report was not mentioned at the sentencing. While the record does not reveal technical compliance with Brewer v. Commonwealth, supra, the doctrine of laches again applies. Based upon the record and

the unavailability of key witnesses, as well as a report, a hearing on the matter would be unproductive.

Finally, Day asserts that he must be returned to the trial court for re-sentencing and other appropriate procedures, because the court allegedly failed to afford him his right of allocution prior to sentencing. The record reflects that the court offered Day and his counsel an opportunity to speak during his guilty plea proceedings regarding the crime and sentencing. While the court may not have specifically asked Day at sentencing to speak, it went through an entire colloquy with Day, and Day again noted that he was voluntarily pleading guilty and was ready for sentencing. Day has shown no prejudice.

For the foregoing reasons, this Court affirms the order of the Harlan Circuit Court.

KNOX, JUDGE, CONCURS.

HUDDLESTON, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

HUDDLESTON, JUDGE, CONCURRING IN PART AND DISSENTING IN PART. I concur in the result reached by the majority and with all of its opinion except that portion dealing with the doctrine of laches.

It is true, as the majority points out, that Kentucky Rule of Criminal Procedure (RCr) 11.42(10)(b) provides that nothing in RCr 11.42 precludes the Commonwealth from relying upon the defense of laches to bar a motion to vacate, set aside or correct a sentence upon the ground of unreasonable delay of filing when the delay has prejudiced the Commonwealth's

opportunity to present relevant evidence to contradict or impeach the movant's evidence.

Although the defense of laches was available to the Commonwealth in this case, it chose not to rely on it. The Commonwealth did not file or serve on the movant, Donald Ray Day, and "answer" to his motion as provided in RCr 11.42 (4). The Civil Rules are applicable to criminal cases, except where superseded by or inconsistent with the Criminal Rules. RCr 13.04. Kentucky Rule of Civil Procedure (CR) 8.03 provides that in pleading to a preceding pleading a party shall set forth affirmatively laches (amongst other defenses) as an affirmative defense. The "answer" for which provision is made in RCr 11.42 (4) is a "pleading." CR 7.01. Having failed to raise the defense of laches, the Commonwealth may not now benefit from its application.

Furthermore, the Commonwealth did not even suggest to the court below, much less prove, that Day's delay in filing his RCr 11.42 motion prejudiced its opportunity to present relevant evidence or contradict or impeach the evidence Day proposed to present in support of his motion; and the circuit court did not consider or rule on the laches defense. Finally, the Commonwealth did not address the laches defense in its brief to this Court, so that Day had no opportunity to counter the defense.

As a consequence, I do not believe that this is an issue that should even be discussed by this Court, much less relied on as a basis for denying Day's motion.

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