RENDERED: JULY 20, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001048-MR

THOMAS EDWARD VICKERY — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE EDWIN M. WHITE, JUDGE
ACTION NO. 98-CR-00449

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER, DYCHE, AND JOHNSON, JUDGES.

BARBER, JUDGE. Thomas Edward Vickery ("Vickery") appeals from an order of the Christian Circuit Court denying his motion to vacate his guilty plea and ten-year sentence for first-degree manslaughter. Vickery contends that he was incompetent to enter the plea; that his plea was not knowingly, intelligently, or voluntarily entered; that he should have been convicted for reckless homicide instead of first-degree manslaughter; and that he received ineffective assistance of counsel in conjunction with his entry of the guilty plea. We affirm.

On February 5, 1998, Vickery was arrested and charged with the murder of his roommate, Bill Delaney. Upon motion of

trial counsel, the trial court entered an order, on February 6, 1998, directing that Vickery submit to psychiatric testing at the Kentucky Correctional Psychiatric Center (KCPC) in LaGrange, Kentucky for a competency evaluation. On May 20, 1998, KCPC filed a report concluding that Vickery was competent to stand trial. For reasons not entirely clear from the record, on June 1, 1998, the trial court entered an order directing that Vickery again be admitted to KCPC and to submit to further psychiatric evaluations. On August 5, 1998, the KCPC issued a report consistent with its May 20th report. On October 30, 1998, Vickery was indicted for the murder of Bill Delaney. (KRS 507.020).

On July 22, 1999, Vickery filed a motion to enter a plea of guilty in return for the Commonwealth's offer to amend the charge to first-degree manslaughter (KRS 507.030) and to recommend a sentence of ten years. On July 28, 1999, the trial court entered judgment and sentence consistent with the plea agreement.

On March 20, 2000, Vickery filed a motion to vacate his judgment and sentence pursuant to the Kentucky Rules of Criminal Procedure (RCr) 11.42. On April 18, 2000, the trial court entered an order denying Vickery's motion. This appeal followed.

First, Vickery contends that his judgment and sentence should be vacated on the basis that the trial court accepted his guilty plea notwithstanding that the court knew Vickery was incompetent to enter such a plea. Specifically, Vickery contends that the trial court was well aware of his past history of mental

instability, his mental state at the time of the plea, the medication he was taking at the time of the plea, and based upon this knowledge, the trial court should not have accepted the plea. We disagree.

On two occasions the trial court ordered that Vickery be admitted to KCPC for psychiatric testing. The results of the tests confirmed that Vickery was aware of the nature of the charges against him and that he was competent to stand trial. In addition, prior to accepting Vickery's plea, the trial court personally engaged in a colloquy with Vickery for the purposes of assuring itself that Vickery was, at the time of the plea, mentally capable of entering into a plea agreement and that he was not rendered mentally incompetent to enter a plea as a result of the drugs that had been prescribed by KCPC. In summary, the trial court's knowledge of Vickery's mental history and present medical treatment was not a bar to its acceptance of his guilty plea.

Second, Vickery contends that his plea of guilty was not entered or made knowingly, intelligently, or voluntarily as required by Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) and Lewis v. Commonwealth, Ky., 472 S.W.2d 65 (1971). Specifically, Vickery contends that his plea was not knowingly, intelligently, and voluntarily entered because of his mental condition and his psychiatric medication.

The test for determining the validity of a guilty plea is whether the plea 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, 164, 27 L.Ed.2d 162 (1970). There must be an affirmative showing in the record that the plea was intelligently and voluntarily made. Boykin v. Alabama, supra. "[T]he validity of a guilty plea is determined not by reference to some magic incantation recited at the time it is taken but from the totality of the circumstances surrounding it." Kotas v. Commonwealth, Ky., 565 S.W.2d 445, 447 (1978) (citing Brady v. United States, 397 U.S. 742, 749, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747 (1970)); Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726, 727 (1986).

The record indicates that, in his motion to enter a guilty plea, Vickery acknowledged that he understood the charges against him, he described all of the facts surrounding the case to his attorney, and his attorney counseled him at length as to the nature and cause of each accusation against him. The motion stated that trial counsel had informed Vickery of any possible defenses that he may have had. The motion explained that Vickery understood his right to plead not guilty; his right to a speedy and public trial; his right to see, hear, and confront all witnesses called against him; and the right to compel the production of any evidence in his favor. The motion further acknowledges that Vickery's decision to enter a guilty plea was made freely, voluntarily and of Vickery's own accord.

Before accepting Vickery's guilty plea, at the July 22, 1999 hearing, the trial court engaged in a lengthy colloquy to insure that Vickery understood the nature of the plea. The trial court advised Vickery of his constitutional rights and that by

pleading guilty he would be waiving those rights. Vickery stated that he understood and still desired to plead guilty. While Vickery stated that in the past he had suffered from mental disease and defect and was on medication, he acknowledged under oath that his condition did not affect his thinking. Further, Vickery acknowledged that he knew where he was and why he was there. Vickery stated under oath that he was pleading guilty willingly, freely, voluntarily and without any promise or pressure to induce him to so plead. Vickery's conduct and demeanor at the plea hearing confirms his sworn statement that his plea was entered willingly, freely, voluntarily and that he was not acting under the influence of a mental defect or medication. Vickery's statements occurred in open court under oath. Solemn declarations in open court carry a strong presumption of verity. Centers v. Commonwealth, Ky. App., 799 S.W.2d 51, 54 (1990). We are persuaded that Vickery's guilty plea was knowing, intelligent, and voluntary.

Vickery contends that, based upon the factual allegations surrounding the shooting, his conviction should have been limited to reckless homicide (KRS 507.050). Specifically, Vickery contends that because he did not actually intend to cause the death of his roommate, the crime did not satisfy the mens rea element of first-degree manslaughter; therefore, his plea of guilty was improper. KRS 507.030 provides that

> (1) A person is guilty of manslaughter in the first degree when:
>
> (a) With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or

(b) With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in subsection (1)(a) of KRS 507.020.

"Extreme emotional disturbance is a temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or malicious purposes." McClellan v. Commonwealth, Ky., 715 S.W.2d 464, 468 - 469 (1986). Merely suffering from a mental illness or substance abuse is insufficient to warrant an instruction upon extreme emotional disturbance. Stanford v. Commonwealth, Ky. 793 S.W.2d 112, 115 (1990).

The record shows that Vickery killed Bill Delaney by shooting him in the head with a shotgun while under the influence of drugs and alcohol. In his brief, Vickery states,

> [o]n the date of the alleged offense the appellant and his best friend [sic] the victim in this case [sic] were drinking, taken [sic] cocaine, and smoking marijuana.
>
> The combination of the seroguel, prozac, vistaril, cocaine, alcohol, and marijuana, [sic] created, [sic] a mental instability that triggered off an uncontrollable rage that the appellant was not consciously aware of at the time.

We are persuaded that Vickery's description of his mental state at the time of the killing, that he was suffering from an uncontrollable rage, complies with the definition of an extreme emotional disturbance as set forth in McClellan v. Commonwealth. Accordingly, a conviction for first-degree

manslaughter under KRS 507.030(b) is supported by the appellate record.

Finally, Vickery contends that he received ineffective assistance of counsel in conjunction with his guilty plea. Specifically, Vickery contends that trial counsel failed to investigate the facts and circumstances surrounding the case. Vickery contends that if trial counsel had investigated she would have learned that Vickery was mentally incapable of committing the crime, that the incident was an accident and not intentional, and that he had a long history of mental illness.

In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing 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); 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). Where an appellant challenges a guilty plea based on ineffective assistance of counsel, he must show both that counsel made serious errors outside the wide range of professionally competent assistance, McMann v. Richardson, 397 U.S. 759, 771; 90 S.Ct. 1441, 1449; 25 L.Ed.2d 763 (1970), and 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 pled guilty but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985); Sparks v.

Commonwealth, Ky. App., 721 S.W.2d 726, 727-28 (1986). The burden of proof is upon the appellant to demonstrate that both prongs of Strickland have been met. Osborne v. Commonwealth, Ky. App., 992 S.W.2d 860, 863 (1998). The simple fact that counsel advises or permits a defendant to plead "guilty" does not constitute ineffective assistance of counsel. Beecham v. Commonwealth, Ky., 657 S.W.2d 234, 237 (1983).

We do not agree with Vickery's claim that trial counsel failed to investigate the case regarding his mental problems. Based upon motions by trial counsel, Vickery was twice admitted to KCPC for psychological evaluations and two psychiatric reports were filed into the record. Further, trial counsel filed notice of her intent to introduce evidence at trial of Vickery's mental illness and/or insanity. These facts demonstrate proper investigation by trial counsel of Vickery's mental problems.

Trial counsel's advice to accept the guilty plea was not deficient performance. Vickery was charged with a Capital Offense, carrying a possible sentence of 20 years to life or life without parole for 25 years (KRS 532.030).[1] Further, it is uncontested that Vickery shot and killed Bill Delaney. As a result of the guilty plea, Vickery was able to plead out of the original capital murder charge in exchange for a Class B felony and the minimum ten-year sentence. In view of the risks of proceeding to trial, we are persuaded that Vickery, in obtaining this deal, received effective assistance of counsel.

[1] It does not appear that there were aggravating factors associated with the killing which would have permitted the Commonwealth to seek the death penalty.

For the foregoing reasons, the judgment of the Christian Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas Edward Vickery, Pro Se
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General
Frankfort, Kentucky

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky