RENDERED: DECEMBER 16, 2005; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001287-MR

KEDREN SMITH APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. McKAY CHAUVIN, JUDGE
ACTION NOS. 01-CR-002443 & 01-CR-002261

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, JOHNSON, AND McANULTY, JUDGES.

JOHNSON, JUDGE: Kedren Smith, pro se, has appealed from the June 16, 2004, order of the Jefferson Circuit Court which denied his pro se motion to vacate or to correct the trial court's final judgment and sentence of imprisonment pursuant to RCr[1] 11.42, without holding an evidentiary hearing. Having concluded

[1] Kentucky Rules of Criminal Procedure.

that the trial court did not err in denying Smith's claims without holding an evidentiary hearing, we affirm.

On September 27, 2001, Smith was indicted[2] by a Jefferson County grand jury on one count of murder,[3] and three counts of wanton endangerment in the first degree.[4] The charges arose from an incident occurring on September 16, 2001, where Smith fired several shots from a .40 caliber handgun into a vehicle, killing one of the passengers.[5] The next day, Smith, accompanied by his attorney, turned himself in at the Louisville Police Department. Following his arraignment on the charges, a second indictment was issued against Smith on October 23, 2001,[6] charging him as a persistent felony offender in the first degree (PFO I).[7]

Pursuant to a plea agreement with the Commonwealth, dated April 17, 2003, Smith entered an Alford[8] plea to each count

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[2] Case No. 01-CR-002261.

[3] Kentucky Revised Statutes (KRS) 507.020.

[4] KRS 508.060.

[5] The other three passengers in the vehicle were not injured.

[6] Case No. 01-CR-002443.

[7] KRS 532.080(3).

[8] See North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). A defendant pleading guilty under Alford refuses to admit his guilt but acknowledges that the Commonwealth can present sufficient evidence to support a conviction. An Alford plea "is a guilty plea in all material respects." United States v. Tunning, 69 F.3d 107, 111 (6th Cir. 1995).

contained in both indictments.[9] In return for these guilty pleas, the Commonwealth agreed to recommend prison sentences of 20 years for murder, five years on each of the three counts of wanton endangerment, with all three sentences enhanced to 20 years by virtue of the PFO I conviction, with all four sentences running concurrently for a total of 20 years in prison. The trial court entered an order accepting Smith's guilty plea on May 1, 2003, and on May 29, 2003, the trial court sentenced him in accordance with the plea agreement.[10]

On June 1, 2004, Smith filed a pro se motion to vacate or to correct his sentence pursuant to RCr 11.42, as well as a motion for appointment of counsel, and a request for an evidentiary hearing.[11] The Commonwealth did not file a response to Smith's RCr 11.42 motion. On June 16, 2004, the trial court denied Smith's request for counsel, and denied his RCr 11.42 motion, without holding an evidentiary hearing. This appeal followed.

Smith argues on appeal (1) that his plea was not entered knowingly, intelligently, or voluntarily; (2) that trial

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[9] The motion to enter guilty plea was dated April 16, 2003.

[10] The trial court entered its order on June 9, 2003.

[11] In support of his motion for an evidentiary hearing, Smith states, "Movant believes that the Commonwealth will controvert movant as to his beliefs and claims which may need to go beyond the record, or through the testimony of trial counsel to controvert movant's own allegations as to ineffective assistance of counsel."

counsel was ineffective for advising him to accept a plea offer that included an enhancement to the charge of murder; (3) that trial counsel waived Smith's right to protection against self-incrimination by advising Smith to plead guilty to PFO I; (4) that trial counsel was ineffective for failing to investigate Smith's mental capacity to stand trial; (5) that trial counsel was ineffective for failing to provide a defense strategy; and (6) that trial counsel was ineffective for failing to hold the Commonwealth to its oral agreement that it would not seek a PFO I charge against Smith. In addition to challenging the trial court's rejection of his various claims, Smith contends the trial court erred in failing to conduct an evidentiary hearing on his RCr 11.42 motion.

In order to be constitutionally valid, a guilty plea must be entered knowingly, intelligently, and voluntarily.[12] RCr 8.08 requires a trial court to determine at the time of the guilty plea "that the plea is made voluntarily with understanding of the nature of the charge."[13] "[T]he

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[12] Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Tollett v. Henderson, 411 U.S. 258, 266-67, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973); Haight v. Commonwealth, 760 S.W.2d 84, 88 (Ky. 1988); Woodall v. Commonwealth, 63 S.W.3d 104, 132 (Ky. 2002).

[13] See James v. Cain, 56 F.3d 662, 666 (5th Cir. 1995)(stating that "[a] guilty plea is invalid if the defendant does not understand the nature of the constitutional protection that he is waiving or if he has such an incomplete understanding of the charges against him that his plea cannot stand as an admission of guilt" [citations omitted].). See also Bronk v. Commonwealth, 58 S.W.3d 482, 486 (Ky. 2001).

validity of a guilty plea is determined . . . from the totality of the circumstances surrounding it."[14]

We have reviewed the guilty plea colloquy, and the trial judge was very thorough in advising Smith of his constitutional rights and allowing Smith to speak. Additionally, the record contains a preprinted form styled "Motion to Enter Guilty Plea" and the subheading "Alford v. North Carolina" was added. Smith signed the form indicating his acknowledgement and understanding of the following statements: "Because I am guilty and make no claim of innocence, I wish to plead 'GUILTY' in reliance on the attached "Commonwealth's Offer on a Plea of Guilty[,] pursuant to Alford v. North Carolina"[15] and "I declare my plea of 'GUILTY' is freely, knowingly, intelligently and voluntarily made, that I have been represented by competent counsel, and that I understand the nature of this proceeding and all matters contained in this document."

On April 17, 2003, when Smith entered his plea of guilty pursuant to Alford, the trial court carefully reviewed with him and his attorney the charges for which he was indicted,

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[14] Kotas v. Commonwealth, 565 S.W.2d 445, 447 (Ky. 1978) (citing Brady v. United States, 397 U.S. 742, 749, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970)).

[15] The form Smith signed did not contain the same language as set forth on the specific form normally used for Alford pleas. The Alford plea form contains an extra paragraph which states: "In so pleading, I do not admit guilt, but I believe the evidence against me strongly indicates guilt and my interests are best served by a guilty plea." However, because the language "pursuant to Alford v. North Carolina" was handwritten on the form, we must assume that all parties involved were acknowledging this Alford standard.

the possible penalties he faced under those charges, and the sentences recommended by the Commonwealth. Smith participated in an exhaustive plea colloquy in which he assured the trial court that he had not been threatened, forced, or coerced to plead guilty. He also answered in the affirmative when he was asked if his attorney had kept him fully informed and if he understood the charges against him and the possible defenses. He acknowledged that he was aware of the constitutional rights he was giving up by pleading guilty. He also indicated that he understood the meaning of an Alford plea.

The United States Supreme Court set out the standard for ineffective assistance of counsel in Strickland v. Washington,[16] as follows:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

[16] 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

This standard also applies to the guilty plea process.[17] "[T]he voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases'" [citations omitted]."[18] When reviewing trial counsel's performance, this Court must be highly deferential and we should not usurp or second-guess counsel's trial strategy.[19] "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy'" [citations omitted].[20] "[I]n order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[21]

Smith argues that the PFO I conviction was used as an enhancement of his murder conviction and that trial counsel violated his right to protection against self-

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[17] Hill v. Lockhart, 474 U.S. 52, 57, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

[18] Hill, 474 U.S. at 56.

[19] Strickland, 466 U.S. at 689.

[20] Id.

[21] Hill, 474 U.S. at 59.

incrimination by advising him to plead guilty to PFO 1. We find these arguments to be without merit.

The record reveals that Smith entered a plea of guilty to the Commonwealth's recommendation, which stated as follows:

> Murder—twenty (20) years, WE I (3 CTS)—five(5) years each count enhanced to twenty (20) years each count by the PFO I, PFO I—enhance. All to run concurrently for a total of twenty (20) years to serve.

Furthermore, the trial court's final judgment and conviction stated as follows:

> COUNT 1: MURDER—20 years
> COUNT 2: WANTON ENDANGERMENT I (3 CTS)—five (5) years each count enhanced to 20 years
> COUNT 3: PERSISTENT FELONY OFFENDER I—enhance.
>
> All to run concurrent for a total of (20) years to serve.

While it is correct that our Supreme Court in Berry v. Commonwealth,[22] stated that "[m]urder is a capital offense and a murder conviction is not subject to PFO enhancement[,]" it is clear from the record in this case that the trial court did not enhance the murder sentence. However, Smith contends the PFO I charge was used to coerce him into pleading guilty because he believed "his punishment could be more severe had he [ ] gone to trial and [been] found guilty of murder pursuant to the provisions of KRS 507.020." Without some evidence to support

[22] 782 S.W.2d 625, 627 (Ky. 1990).

this claim, it is nothing more than a bare allegation which does not entitle Smith to an evidentiary hearing.[23]

Smith's next two arguments relate to his insistence that his counsel was ineffective for failing to investigate portions of his case and for failing to prepare a defense strategy. Specifically, he claims that trial counsel failed to determine whether he was mentally competent to stand trial. There is no evidence to support Smith's claim that his trial counsel was ineffective for failing to seek a determination of his competency, since every indication in the record is that Smith was lucid and capable of communicating with others. Further, there was no medical proof of any mental illness or evidence of bizarre behavior.[24]

Smith also argues that trial counsel was ineffective when counsel failed to force the Commonwealth to uphold a "non-prosecution" agreement with Smith in exchange for Smith's truthful polygraph examination. Again, Smith's argument is without merit. The trial court made specific findings regarding Smith's claim and found "that even if such an agreement existed, it is clear from the subsequent events that the defendant did

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[23] Brooks v. Commonwealth, 447 S.W.2d 614, 617 (Ky. 1969).

[24] Foley v. Commonwealth, 17 S.W.3d 878, 885-86. (Ky. 2000).

not provide truthful testimony during that examination and, as such, is not entitled to any relief."[25] We agree.

Despite the fact that his counsel obtained a minimum sentence on the murder charge, Smith continues to maintain that his guilty plea was coerced. Smith's claim that he would have proceeded to trial and faced the reality of a longer prison sentence rather than taking the bargain offered by the Commonwealth, which included no additional state or federal charges being filed against him in regards to the shooting, is not reasonable. Smith did benefit from his plea despite the fact that he did not give truthful testimony during the polygraph and did not uphold his end of the bargain.[26] Additionally, Smith has not cited to any specific facts which would show that he was influenced or deceived into pleading guilty. Mere conclusory allegations, unsupported by specific

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[25] There is no evidence in the record that the Commonwealth made a "deal" with Smith that it would not prosecute him for PFO I if he took a polygraph examination and passed. In any event, even if a "deal" existed, Smith did not uphold his end when he failed the polygraph examination, which would in turn mean the Commonwealth did not have to uphold any bargain it may have made with Smith. Subsequently, Smith now wants to argue that the Commonwealth should not have been allowed to welsh on its deal regardless of the outcome of the polygraph test. It would seem that Smith believed that if he was truthful about committing murder, the Commonwealth would not prosecute him.

[26] See Matheny v. Commonwealth, 37 S.W.3d 756, 758 (Ky. 2001) (stating that "[i]f a plea 'offer is made by the prosecution and accepted by the accused, either by entering a plea or taking action to his detriment in reliance on the offer, then the agreement becomes binding and enforceable'" (quoting Smith v. Commonwealth, 845 S.W.2d 534, 537 (Ky. 1993))).

facts, are insufficient to require the trial court to grant an evidentiary hearing on the issue.[27]

Finally, a movant is not entitled to an evidentiary hearing on an RCr 11.42 motion unless "there is an issue of fact which cannot be determined on the face of the record."[28] "Where the movant's allegations are refuted on the face of the record as a whole, no evidentiary hearing is required."[29]

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

Kedren Smith, Pro Se
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Robert E. Prather
Assistant Attorney General
Frankfort, Kentucky

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[27] See Sanders v. Commonwealth, 89 S.W.3d 380, 385 (Ky. 2002). See also Bowling v. Commonwealth, 981 S.W.2d 545, 549 (Ky. 1998).

[28] Stanford v. Commonwealth, 854 S.W.2d 742, 743-44 (Ky. 1993).

[29] Sparks v. Commonwealth, 721 S.W.2d 726, 727 (Ky.App. 1986) (citing Hopewell v. Commonwealth, 687 S.W.2d 153, 154 (Ky.App. 1985)).