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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000199-MR

JOHNNY D. ALLEN — APPELLANT

v.

APPEAL FROM CASEY CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 00-CR-00031

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE, DIXON AND VANMETER, JUDGES.

DIXON, JUDGE: Appellant, Johnny D. Allen, appeals as a matter of right from the Casey Circuit Court's denial of his motion for RCr 11.42 post-conviction relief. Finding no error, we affirm.

In July 2000, Appellant was indicted in the Casey Circuit Court for murder and first-degree arson, following his confession to shooting his wife and then setting her residence on fire. The Commonwealth thereafter filed a notice of aggravating

circumstances and its intent to seek the death penalty. On January 4, 2002, Appellant appeared in open court with his counsel and entered a plea of guilty to both the murder and arson charges. In exchange for his guilty plea, the Commonwealth recommended a sentence of life imprisonment for murder, and twenty years imprisonment for arson, with said sentences to run concurrently. On February 25, 2002, Appellant again appeared with his attorney and was questioned as to his desire to plead guilty in exchange for the Commonwealth's recommended sentence. The trial court entered judgment on March 6, 2002.

On March 8, 2002, Appellant, acting *pro se*, wrote a letter to the court seeking to withdraw his guilty plea on the grounds that he had been misadvised by trial counsel.[1] At Appellant's request, an attorney was appointed to represent him and to determine if an evidentiary hearing was warranted. On May 13, 2002, Appellant appeared with appointed counsel and was advised by the trial court that he would be afforded an evidentiary hearing on his motion to withdraw his guilty plea. However, after consultation with his counsel, Appellant stated that he was, in fact, satisfied with both his plea and sentence and that he no longer wished to withdraw his guilty plea.

On February 28, 2005, Appellant filed the instant *pro se* motion to vacate judgment pursuant to RCr 11.42, alleging that his guilty plea was not knowing and voluntary, but was rather the product of his trial counsel's deficient performance. By order entered August 29, 2005, the trial court denied Appellant's motion, noting:

[1] Appellant had first sent a letter to the trial court on February 22, 2002, "to obtain information and assistance in filing a motion pursuant to RCr 11.42."

> The defendant's motion pursuant to RCr 11.42 sets out the same grounds as was alleged by the defendant in his motion to withdraw his guilty plea. The Court appointed counsel to represent the defendant and was prepared to hold an Evidentiary Hearing. The defendant, in open court, stated he was satisfied with his sentence and did not want to withdraw his guilty plea.
>
> The Court presided in the proceedings involving the defendant and is personally familiar with all of the proceedings, including the defendant's plea of guilty. The allegations now made by the defendant have absolutely no merit. The allegations are rebutted by the record.

Appellant thereafter appealed to this Court.[2]

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), sets forth the standard for determining ineffective assistance of counsel, and requires a showing that (1) counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The two-part *Strickland* test also applies to guilty pleas based on ineffective assistance of counsel. *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985).

A criminal defendant may demonstrate that his guilty plea was involuntary by showing that it was the result of ineffective assistance of counsel. In such a case, the trial court is to "consider the totality of the circumstances surrounding the guilty plea and juxtapose the presumption of voluntariness inherent in a proper plea colloquy with a

[2] Apparently, after Appellant filed his pro se notice of appeal, counsel was appointed to represent him. However, On April 18, 2006, DPA filed a motion in this Court to withdraw on the grounds that "this action does not appear to be a 'proceeding that a reasonable person with adequate means would be willing to bring at his own expense.'" (Quoting KRS 113.110(2)(c)). This Court granted DPA's motion to withdraw by order dated May 31, 2006.

Strickland v. Washington inquiry into the performance of counsel." *Rigdon v. Commonwealth*, 144 S.W.3d 283, 288 (Ky. App. 2004)(*Quoting Bronk v. Commonwealth*, 58 S.W.3d 482, 486 (Ky. 2001)(footnotes omitted)). However, advising a defendant to plead guilty is not, by itself, sufficient to demonstrate any degree of ineffective assistance of counsel. *Beecham v. Commonwealth,* 657 S.W.2d 234, 236-7 (Ky. 1983). Rather, the defendant must show (1) "that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance;" and (2) "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 pleaded guilty, but would have insisted on going to trial." *Sparks v. Commonwealth*, 721 S.W.2d 726, 727-28 (Ky. App. 1986). *See also Rigdon, supra.*

In light of the overwhelming evidence of guilt, including Appellant's confession to the charged crimes, as well as the possible sentence that he faced on the capital murder charge, it is highly unlikely that he would have rejected the plea agreement on the remote possibility that he might have been acquitted. As for his argument that he was "coached" into pleading guilty by his counsel, we agree with the trial court that the record refutes this allegation. The "Motion to Enter Guilty Plea" that Appellant signed states that his plea was "freely, knowingly, intelligently and voluntarily made." Also, the trial court noted in its order that he questioned Appellant as to voluntariness of his plea and Appellant stated that he wanted to plead guilty to both charges. Finally, when he appeared before the court on his motion to withdraw his plea,

Appellant specifically rejected the offer of an evidentiary hearing, and confirmed that he was satisfied with his guilty plea and resulting sentence.

We conclude that the trial court properly denied Appellant's RCr 11.42 motion without an evidentiary hearing. RCr 11.42(5). *See also Haight v. Commonwealth*, 41 S.W.3d 436 (Ky. 2001), *cert. denied*, 534 U.S. 998 (2001); *Fraser v. Commonwealth,* 23 S.W.3d 619 (Ky. 2001).

ALL CONCUR.

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