

RENDERED: OCTOBER 30, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000769-MR

KEVIN JETT¹

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 05-CR-001759

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, DIXON, AND TAYLOR, JUDGES.

DIXON, JUDGE: Kevin Jett, *pro se*, appeals from a Jefferson Circuit Court order denying his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. We affirm.

In June 2005, a Jefferson County grand jury indicted Jett on charges of capital murder, burglary, robbery, and tampering with physical evidence. On

¹ There is a discrepancy as to the correct spelling of the Appellant's name. For convenience, the Court has elected to spell it the way the Appellant signed his brief.

June 27, 2005, the court granted Jett's motion for an ex parte order providing funds for Jett to be evaluated by a forensic psychologist. Following Jett's evaluation, the psychologist tendered a report finding Jett to have below average intelligence in the range of mental retardation. In light of the psychological report, Jett moved to exclude the death penalty from the potential range of punishment. On September 30, 2005, the court held a hearing on Jett's motion, but postponed ruling on the motion until the Commonwealth had an opportunity to respond. Shortly thereafter, the Commonwealth offered Jett a thirty-five year sentence in exchange for pleading guilty to the indicted offenses. On November 9, 2005, Jett appeared in Jefferson Circuit Court and pleaded guilty pursuant to the Commonwealth's offer, and the court sentenced him to thirty-five years' imprisonment.

In February 2008, Jett filed a *pro se* motion pursuant to RCr 11.42 seeking to vacate his guilty plea and sentence. Jett alleged the circuit court erred by failing to hold a hearing to determine whether he was competent to stand trial. On February 20, 2008, the court rendered an order denying Jett's motion without an evidentiary hearing. This appeal followed.

Jett contends 1) he had a statutory right to receive a competency hearing; 2) he had a potential defense of mental illness; 3) the court erred by accepting the plea without holding a competency hearing;² and 4) he was entitled to an evidentiary hearing on his RCr 11.42 motion.

² Although this is the third argument in Jett's brief, we will address it within the analysis of Jett's first argument.

Jett cites Kentucky Revised Statutes (KRS) 504.100, which addresses court-appointed psychological evaluations for determining competency. The statute states in relevant part:

(1) If upon arraignment, or during any stage of the proceedings, the court has reasonable grounds to believe the defendant is incompetent to stand trial, the court shall appoint at least one (1) psychologist or psychiatrist to examine, treat and report on the defendant's mental condition.

* * *

(3) After the filing of a report (or reports), the court shall hold a hearing to determine whether or not the defendant is competent to stand trial.

Jett asserts that the court was made aware of his alleged “mental problems” and was obligated to hold a competency hearing. We disagree.

Although the trial court appointed a psychologist to assist in the “effective representation” of Jett, at no time was Jett’s competency to stand trial placed before the court. The psychological evaluation focused on Jett’s IQ and social functioning. At the hearing on the motion to exclude the death penalty, defense counsel plainly advised the court that they were not raising the issue of Jett’s competence.

We note that the record on appeal does not include the videotape of Jett’s guilty plea and sentencing. Jett contends the court clerk informed him the tape “could not be found.” However, the record does not reveal that the tape was lost; rather, it appears Jett did not properly request that the video be included in the record. It is well settled, “[w]hen the record is incomplete, we assume the omitted

record supports the trial court's decision.” *Graves v. Commonwealth*, 283 S.W.3d 252, 255 (Ky. App. 2009) (citation omitted). Here, the trial court rendered a detailed opinion denying RCr 11.42 relief. The order states, in pertinent part:

[I]t is clear from a review of the videotaped proceedings in this matter that the Defendant’s competency was explored by the Court, counsel for the defense and the Defendant himself. The hearing, which was held on November 9, 2005, during which the Defendant’s plea of guilty was accepted by the Court, was lengthy and detailed. Defense counsel indicated that prior to the hearing he had an exhaustive discussion with the Defendant, and believed the Defendant had the capacity to make a knowing and voluntary plea. The Court asked the Defendant on the record about the evaluation of his IQ. Defense counsel indicated that the Defendant had “deficits” and “problems in formative behavior” during his youth. However, counsel reiterated the Defendant had the capacity to plead knowingly and voluntarily. Furthermore, defense counsel indicated his belief that the Defendant understood the Court proceedings and could participate rationally in his own defense. Defense counsel indicated Defendant’s competence in that regard was clear because the Defendant asked counsel just before the hearing on the guilty plea if he could “waive final sentencing.”

In addition to counsel’s inquiry and discussion, the Court conducted a thorough colloquy with the Defendant regarding his plea. The Defendant indicated that he was satisfied with his attorney’s advice and that he had had sufficient time to discuss the case, his rights and any defenses with counsel. The Court inquired into the Defendant’s prior mental illness, and the Defendant stated that those issues were resolved a “long, long time ago.” The Defendant testified that he was currently prescribed medication and that helped him and made him think clearly. The Defendant repeatedly stated that he understood everything with regard to his case. The Defendant testified that he had been convicted of several felonies in the past, as well as numerous misdemeanors,

and received sentences from Courts for those crimes. He testified that he had never been found incompetent by a Court or incapable of handling his own affairs. He said that he knew what he was doing, and he testified that he wanted to plead guilty pursuant to his own free will. He specifically testified that he understood he would receive a 35-year sentence from this Court for his plea. The Court entered a finding that the Defendant's plea [was] knowing and voluntary.

“When a trial court does not hold a competency hearing, ‘our standard of review is whether a reasonable judge, situated as was the trial court judge, should have experienced doubt in regard to the defendant's competency to stand trial.’” *Id.* at 256, *quoting Smith v. Commonwealth*, 244 S.W.3d 757, 760 (Ky. App. 2008). Based upon the findings by the trial court and our own review of the limited record before us, we are not persuaded that the trial court was obligated to hold a competency hearing *sua sponte*. Counsel informed the court that Jett's competence had not been raised, Jett coherently engaged the court during his plea colloquy, and he signed the formal documents to enter a guilty plea. Although Jett asserts he suffered “mental problems and issues in the past,” he has not otherwise demonstrated that “he lacked the ‘capacity to appreciate the nature and consequences of the proceedings against [him] or to participate rationally in [his] own defense.’” *Id.*, *quoting* KRS 504.060(4). After careful review, we find no error and conclude the court properly accepted Jett's guilty plea.

Jett next argues that the court erred by ignoring his alleged mental illnesses, including schizophrenia and depression, which could have excused his criminal conduct. Jett's argument implies that he would have relied on an extreme

emotional disturbance defense had he proceeded to trial. However, by pleading guilty, Jett waived “all defenses other than that the indictment charged no offense.” *Greer v. Commonwealth*, 713 S.W.2d 256 (Ky. App. 1986) (citation omitted).

Finally, we conclude the trial court did not err by failing to hold an evidentiary hearing on the RCr 11.42 motion. “A hearing is required if there is a material issue of fact that cannot be conclusively resolved, i.e., conclusively proved or disproved, by an examination of the record.” *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). We conclude that Jett’s allegations were resolved by examining the record, and an evidentiary hearing was not warranted.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

Kevin Jett, *pro se*
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Todd D. Ferguson
Assistant Attorney General
Frankfort, Kentucky