RENDERED: NOVEMBER 4, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001657-MR

DAVID DUNAWAY — APPELLANT

v.

APPEAL FROM LEE CIRCUIT COURT
HONORABLE THOMAS P. JONES, JUDGE
ACTION NO. 07-CR-00016

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

TAYLOR, CHIEF JUDGE: David Dunaway brings this appeal from an August 31, 2010, Order of the Lee Circuit Court denying a Kentucky Rules of Criminal Procedure (RCr) 11.42 motion. We affirm.

Appellant was indicted upon the offenses of murder, tampering with physical evidence, and abuse of a corpse. The charges stemmed from the death of

Billy Deaton at appellant's home. Deaton died as a result of appellant beating him with a hammer and stabbing him repeatedly with a knife.

Eventually, appellant entered into a plea agreement with the Commonwealth. In exchange for appellant pleading guilty, the Commonwealth agreed to amend the murder charge to first-degree manslaughter and to recommend a total sentence of twenty-years' imprisonment. In accordance with the plea agreement, appellant pleaded guilty to first-degree manslaughter, tampering with physical evidence and abuse of a corpse. He was sentenced to a total of twenty-years' imprisonment.

Thereafter, appellant filed the instant RCr 11.42 motion arguing that his guilty plea was the result of ineffective assistance of trial counsel and was involuntarily entered. An evidentiary hearing ensued. By order entered August 31, 2010, the circuit court denied the RCr 11.42 motion. This appeal follows.

Appellant contends that the circuit court erred by denying his RCr 11.42 motion to vacate his sentence of imprisonment. Appellant argues that his guilty plea was not knowingly entered due to ineffective assistance of trial counsel.

To prevail, appellant must demonstrate that trial counsel rendered deficient performance and that in absence of such deficient performance, appellant would not have pleaded guilty but would have insisted upon a jury trial. *See Sparks v. Com.*, 721 S.W.2d 726 (Ky. App. 1986); *Kiser v. Com.*, 829 S.W.2d 432 (Ky. App. 1992).

Appellant essentially asserts that the evidence demonstrated he acted in self-defense after Deaton allegedly broke into his home and trial counsel should have advised him to proceed to trial in view of his likely acquittal. In his brief, appellant points out evidence amassed in support of his self-defense theory and that certain pretrial motions before the court would have been resolved favorably to him. Thus, appellant believes that trial counsel's advice to enter the guilty plea was deficient.

In its order, the trial court made the following observations:

> [T]he Defendant was involved in a brutal killing in which he was going to claim self defense, but he told no one. Had he initially called the police after the death of Mr. Deaton and told them that he had killed Mr. Deaton in self defense, and Mr. Nelson had then pressured him into pleading guilty, he would perhaps have had more merit in some arguments. Instead, the Defendant moved the body, disposed of the weapons, and then (as the Court recalls and pointed out to the Defendant on the stand) placed the blame on the mythical individual "Sonny James," whom no one in this small community knew, when the investigating officers began questioning him when he was not a suspect. The Defendant told the officers that Mr. Deaton and Sonny James were in a scuffle. In the Court's mind, this would have been a hard sell for a jury to understand why the Defendant who had a self defense argument had removed the body and the murder weapons and was blaming someone else who evidently did not exist since no one knew him before and no one has seen him since. He was facing very severe charges considering the nature of that evidence and had effectively disposed of any legitimate defense which he now claims he has, and he, in effect, backed Mr. Nelson into a corner legally, and Mr. Nelson worked out the best deal he could possibly work out on the day of trial.
>
> . . . .

> At that time, he was very satisfied with the excellent job his lawyer had done, and every effort was made to make him fully informed of everything that was going on in the case. . . .
>
> In conclusion, the Court sees no errors on the part of defense counsel but in fact sees a tremendous effort by him. Based on the severity of the charge under which the Defendant was facing life imprisonment and the nature of the evidence in which he had blamed a third party whom no one in this small community knew and had removed the evidence and did not tell the police, one cannot reasonably believe that the Defendant would have chosen to plead guilty but proceed to trial. This Court does not seriously think that the Defendant would have done anything with any other counsel other than exactly what he did on the day of the trial based on the evidentiary trial he had left for whatever lawyer would take his case. . . .

Considering the evidence amassed against appellant, the likelihood of conviction, and the possibility that appellant could have received life imprisonment, we conclude that trial counsel's advice to plead guilty pursuant to the plea agreement for a lesser sentence was reasonable advice. *See Sparks*, 721 S.W.2d 726.

Appellant also asserts that his guilty plea was entered involuntarily and unknowingly because of "psychoactive drugs" he was taking at that time. Appellant, however, fails to specifically identify these psychoactive drugs. Consequently, it is impossible to discern the medications that appellant was taking at the time of the guilty plea or the effect of said medications on appellant's decision to plead guilty. In the absence thereof, we cannot conclude that

appellant's guilty plea was rendered involuntarily or unknowingly. *See Newsome v. Com.*, 456 S.W.2d 686 (Ky. 1970).

Appellant further argues that he was entitled to RCr 11.42 relief because he did not commit the crime for which he is currently incarcerated. The insufficiency of evidence to support a criminal conviction may not be challenged through an RCr 11.42 proceeding. *Henry v. Com.*, 391 S.W.2d 355 (Ky. 1965). And, it must be emphasized that appellant entered a guilty plea. We, thus, reject the above argument.

For the foregoing reasons, the Order of the Lee Circuit Court is affirmed.

ALL CONCUR.

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