

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001953-MR

JON BOOKER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 03-CR-000725

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** ** * ** * ** *

BEFORE: CAPERTON AND WINE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

CAPERTON, JUDGE: Jon Booker appeals from the denial of his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion without an evidentiary hearing by the Jefferson Circuit Court. After a review of the parties' arguments, the record, and the applicable law, we agree that Booker was entitled to an evidentiary hearing on

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

three issues raised in his RCr 11.42 motion and, accordingly, affirm in part, reverse in part, and remand this matter to the trial court for further proceedings.

On February 11, 2003, Jermaine Smith was murdered in an apparent home invasion which led to the arrest of four defendants. One defendant, Maurice Gasaway, told the police that Booker was the “trigger man.” Gasaway later entered a plea agreement with the Commonwealth whereby he asserted that his statement to the police was the truth and agreed to testify against Booker. A second defendant, Thomas Board, entered a plea agreement with the Commonwealth, which contained a factual account of Booker shooting the victim. The third defendant, Shaunt Gasaway² likewise entered a plea agreement with the Commonwealth and agreed to testify against Booker. Faced with the likely testimony of his three codefendants, Booker agreed to plead guilty instead of proceeding to trial in a capital murder case.

Booker pled guilty and was sentenced to twenty years for murder, five years for burglary in the third degree (amended), and five years for criminal mischief (amended). All sentences were to run consecutively for a total of thirty years; however, the sentences for burglary and criminal mischief were to be probated after the maximum serve out for murder.

Thereafter, Booker filed a pro se RCr 11.42 motion which was later supplemented by the Kentucky Department of Public Advocacy. On September 14, 2007, the trial court entered its opinion and order denying Booker’s RCr 11.42

² Maurice Gasaway’s son.

motion without an evidentiary hearing. In denying Booker's motion, the court reasoned that Booker did not indicate what testimony the witnesses would have given as required by RCr 11.42; that defense counsel undertook an adequate investigation; that Booker did not demonstrate any behavior before the court to question his mental state, especially as he asked a number of pertinent questions during the proceedings as evidenced by the plea colloquy on the record; and because he signed AOC form 491.1, which evidences that his plea was knowingly and intelligently made. It is from this order that Booker now appeals.

On appeal, Booker presents three arguments. First, that his guilty plea was not knowing or voluntary for three reasons: 1) ineffective assistance of counsel for failure to interview multiple witnesses; 2) that faced with the possibility of the death penalty he became depressed and paranoid; 3) he was misadvised about his parole eligibility date, and if he had been properly advised he would not have entered his guilty plea. Secondly, Booker argues that the cumulative errors of trial counsel warrant reversal. Third, Booker argues that he was entitled to an evidentiary hearing because he alleged material issues of fact which cannot be conclusively resolved by the record. The Commonwealth argues that the trial court did not err in denying Booker's RCr 11.42 motion without an evidentiary hearing. With these arguments in mind, we turn to the applicable law.

At the outset, we note that a valid guilty plea is often said to waive all defenses other than the indictment charges no offense. *Quarles v. Commonwealth*, 456 S.W.2d 693 (Ky. 1970). The plea must represent a voluntary and intelligent

choice among the alternative courses of action open to the defendant. *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky.App. 1986), citing *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). “There must be an affirmative showing in the record that the plea was intelligently and voluntarily made.” *Sparks* at 727, citing *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 1711, 23 L. Ed. 2d 274 (1969). “[T]he validity of a guilty plea is determined not reference to some magic incantation recited at the time it is taken but from the totality of the circumstances.” *Sparks* at 727, citing *Kotas v. Commonwealth*, 565 S.W.2d 445, 447 (Ky. 1978).

In *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the U.S. Supreme Court set the seminal standard for assessing ineffective assistance of counsel. The second prong of *Strickland*, i.e., prejudice, was refined in *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985), when assessing ineffective assistance of counsel claims when a guilty plea has been entered. In *Hill*, the Court determined that a defendant was required to 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.” *Id.* 474 U.S. 52, 102 S. Ct. 366 at 367.

Our Kentucky Supreme Court in *Sparks, supra* at 727-728, set forth the proper standard to be used when a defendant challenges the effectiveness of his counsel’s advice after a guilty plea has been entered as:

A showing that counsel's assistance was ineffective in enabling a defendant to intelligently weigh his legal alternatives in deciding to plead guilty [and such showing] has two components: (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. *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 370, 80 *sic* 88 L.Ed.2d 203 (1985). *Cf.*, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Id. at 727-728. *See also Hill*, 474 U.S. 52, 106 S. Ct. 366 at 367, “[when a] defendant enters a guilty plea upon counsel's advice, the voluntariness of the plea depends on whether the advice was within the range of competence demanded of attorneys in criminal cases.” The voluntariness of an unconditional guilty plea is important and competent advice from counsel is necessary for a defendant to enter such a plea because the entry of such a plea waives almost all of a defendant’s rights.

On the issue of whether an evidentiary hearing was proper, *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001), is controlling. Under *Fraser*, a hearing on the issues raised in an RCr 11.42 motion 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. *Id.* at 452. With these standards in mind we turn to the parties’ arguments.

Booker first argues that his guilty plea was not knowing or voluntary due to ineffective assistance of counsel for failure to interview multiple witnesses. Those witnesses included codefendant Maurice Gasaway, who recanted his police statement; two other witnesses, Desean Dickey and Aaron Jones, who both reported hearing gunshots but did not see the shooter; and the lessee of the apartment, Virginia Brewer.

In the attached affidavit to the pro se RCr 11.42 motion, Brewer stated that Booker was an occasional resident at her home, and had access and permission to stay at and use the apartment where the murder occurred.³ Booker alleges that trial counsel failed to investigate and properly advise him that, based on the permission given by Brewer, Booker would not have faced the statutory aggravator of burglary and, thus, he would not have plead guilty.⁴ The Commonwealth does not address the issues raised by Brewer's affidavit. Additionally, the trial court's order does not address Brewer's affidavit.⁵ Given Brewer's affidavit, we agree with Booker that the issue concerning the burglary charge and its use as an aggravator⁶ in a capital murder case requires an evidentiary hearing. A material issue has been raised that cannot be conclusively resolved by an examination of the record.

³ We note that the victim was not a resident of the apartment.

⁴ Booker cites *Robey v. Commonwealth*, 943 S.W.2d 616 (Ky. 1997), in support thereof.

⁵ Upon remand the trial court will have to address the broken door in light of whether Booker possessed a key to the apartment given the burglary charge.

⁶ See KRS 532.025.

Accordingly, we reverse and remand this matter to the trial court for further proceedings.

We also agree with Booker that he was entitled to an evidentiary hearing concerning Maurice Gasaway. Gasaway recanted his earlier statements prior to the court's ruling on Booker's RCr 11.42 motion. On appeal, Booker argues that, if his counsel had interviewed Gasaway and counsel learned that Gasaway's statement had been coerced, it would have affected Booker's decision on whether to plead guilty. This matter cannot be resolved by the record and, as such, Booker was entitled to an evidentiary hearing. Accordingly, we reverse and remand this matter to the trial court for further proceedings.

As to the remainder of the witnesses, we agree with the Commonwealth that the failure to interview them does not merit an evidentiary hearing. Desean Dickey and Aaron Jones reported hearing gunshots but did not see who fired the weapon. We fail to see how declining to include such witnesses at trial would constitute ineffective assistance of counsel. Accordingly, the trial court did not err in denying Booker an evidentiary hearing for Dickey and Jones.

Turning now to Booker's second argument as to why his guilty plea was not knowingly and voluntarily made, namely, that faced with the possibility of the death penalty he became depressed and paranoid, we note that the trial court found that Booker exhibited no questionable behavior before the court that would call into question his mental capacity to plead guilty. Indeed, the court found that the plea colloquy evidenced Booker asking pertinent questions and that Booker

indicated at the time that he was not under the care of a mental professional. The court concluded that in light of the record and RCr 8.06,⁷ trial counsel did not err in failing to request a competency hearing.

After our review of the record, we agree with the trial court that the record establishes that Booker was competent to plead guilty when faced with the death penalty. Moreover, a plea does not become involuntary simply because the fear of a death sentence played a role in the defendant's decision. *See Brady v. United States*, 397 U.S. 742, 747, 90 S. Ct. 1463, 1468, 25 L. Ed. 2d 747 (1970). Accordingly, the trial court did not err in denying Booker an evidentiary hearing on this issue.

We now turn to Booker's third argument as to why his guilty plea was not knowingly and voluntarily made, namely, that he was misadvised about his parole eligibility date, and if he had been properly advised he would not have entered his guilty plea. The trial court and the Commonwealth rely on the videotaped plea colloquy to deny Booker an evidentiary hearing on this issue. We note that a guilty plea entered by a defendant of his own free will does not become invalid because he did not know all the possible consequences of the plea or all the possible alternative courses of action. *Turner v. Commonwealth*, 647 S.W.2d 500,

⁷ RCr 8.06 states:

If upon arraignment or during the proceedings there are reasonable grounds to believe that the defendant lacks the capacity to appreciate the nature and consequences of the proceedings against him or her, or to participate rationally in his or her defense, all proceedings shall be postponed until the issue of incapacity is determined as provided by KRS 504.100.

501 (Ky.App. 1982).⁸ Even if Booker could establish that counsel performed deficiently by failing to fully advise him of parole eligibility, he cannot show that, but for counsel's deficient performance, he would not have entered a guilty plea, but rather would have proceeded to trial, which is required to establish an ineffective assistance of counsel claim. *Bronk v. Commonwealth*, 58 S.W.3d 482, 486-87 (Ky. 2001). Booker cannot show that he would have proceeded to trial when faced with the possibility of serving more than twenty years, including as much as a life sentence. Consequently, Booker's ineffective assistance of counsel claim as to parole eligibility lacks merit and the trial court did not err in denying Booker an evidentiary hearing on this ground.

Last, Booker argues that the cumulative errors of trial counsel warrant reversal. It is not appropriate for this Court to decide the validity of this argument in light of our reversal for an evidentiary hearing. As such, we decline to address this argument.

In light of the foregoing, we affirm in part, reverse in part, and remand this matter to the trial court for further proceedings not inconsistent this opinion.

LAMBERT, SENIOR JUDGE, CONCURS.

WINE, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

WINE, JUDGE, CONCURRING IN PART AND DISSENTING IN

PART: I agree that the affidavits of Maurice Gasaway and Virginia Brewer raise

⁸ While *Commonwealth v. Fuartado*, 170 S.W.3d 384, 386 (Ky. 2005), abrogated by *Padilla v. Kentucky*, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (U.S. 2010), relied upon *Turner*, we believe that the recent decision of *Padilla*, *supra* limited its holding to matters involving deportation and did not disturb the validity of *Turner*.

issues which cannot be resolved from the face of the record. Likewise, neither were addressed by the trial court in its September 14, 2007, opinion and order. As noted in the majority's opinion, Brewer states in her affidavit that Booker had access and permission to stay in her apartment.⁹ Gasaway claims that his pretrial testimony was coerced and the trial court lacked the benefit of any countervailing testimony challenging his allegations. The credibility of these allegations is best addressed in an evidentiary hearing.

Respectfully, I dissent from that portion of the majority's opinion which reverses based on the claim that counsel was ineffective for failure to fully advise Booker of the parole or probation consequences of the sentence he would receive. A guilty plea entered by a defendant of his own free will does not become invalid because he did not know all the possible consequences of the plea or all the possible alternative courses of action. *Turner v. Commonwealth*, 647 S.W.2d 500, 501 (Ky.App. 1982).

Even if Booker could establish that counsel performed deficiently by failing to fully advise him of parole eligibility, he cannot show that, but for counsel's deficient performance, he would not have entered a guilty plea, but rather would have proceeded to trial, which is required to establish an ineffective

⁹ Recently, in *Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010), the Kentucky Supreme Court again recognized that, under certain circumstances, one may enter a dwelling with permission and, upon committing a crime, have that permission revoked, giving rise to a burglary charge. "For the principle to apply, the defendant must first perpetrate a crime (or other act) thereby bringing about, by obvious implication, the revocation of his license to remain in the dwelling or building. He must thereafter remain on the premises with the intention to commit a crime, which may be the completion of the robbery of any other crime. Only then are the elements of burglary satisfied under the principle." *Id.* at 325.

assistance of counsel claim. *Bronk v. Commonwealth*, 58 S.W.3d 482, 486-87 (Ky. 2001). Booker cannot show that he would have proceeded to trial when faced with the possibility of serving more than twenty years, including as much as a life sentence. Consequently, Booker's ineffective assistance of counsel claim as to parole eligibility lacks merit.

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