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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-002047-MR

JESSICA NOBLE APPELLANT

v.

APPEAL FROM LINCOLN CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 10-CR-00001

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, NICKELL, AND VANMETER, JUDGES.

COMBS, JUDGE: Jessica Noble appeals the order of the Lincoln Circuit Court denying her motion to Vacate, Set Aside, or Correct Sentence pursuant to Kentucky Rule[s] of Criminal Procedure (RCr) 11.42. After our review, we affirm.

On January 2, 2010, Noble was indicted by the Lincoln County grand jury and was charged with murder and first-degree criminal abuse. The charges

stemmed from events that occurred on or about July 25, 2009, resulting in the death of Noble's four-year-old son, Nathaniel Knox. According to Noble, she and her boyfriend, Jason Napier, spent the day drinking and using drugs. At some point, Napier expressed his anger that Noble was devoting the bulk of her time and attention to Nathaniel. Although she knew of Napier's intoxication and his history of physical abuse involving her son, Noble nonetheless left Nathaniel in Napier's care while she went to the grocery store. When she returned home, she found Nathaniel naked and unresponsive with a large bite mark on his body. Nathaniel was taken to the hospital where he later died as a result of an injury caused by blunt force trauma to the back of his head.

On July 13, 2010, upon agreement with the Commonwealth Attorney, Noble filed a "Waiver of Further Proceedings with Petition to Enter Plea of Guilty" to amended charges of complicity to manslaughter in the second degree and criminal abuse in the second degree. She appeared in Lincoln Circuit Court on the same day to enter her plea of guilty. The trial court later accepted Noble's plea after finding it to have been entered knowingly, voluntarily, and intelligently. In exchange for her plea of guilty, Noble received consecutive sentences of five-years' and ten-years' imprisonment for a total of fifteen-years' incarceration.

As a condition of her plea agreement with the Commonwealth, Noble agreed to testify at the trial of her co-defendant, Napier. After a trial by jury, Napier was found guilty of manslaughter in the second degree and criminal abuse in the second degree. He also received ten-years' imprisonment for manslaughter

and five-years' imprisonment for criminal abuse. The sentences were ordered to run consecutively for a total sentence of fifteen-years' incarceration.

After learning of Napier's conviction and sentence, Noble filed a motion with the trial court for relief pursuant to RCr 11.42, alleging ineffective assistance of trial counsel. On October 18, 2013, without conducting an evidentiary hearing, the trial court entered an order denying Noble's motion, finding that she received reasonably effective representation. This appeal followed.

Noble requests that we reverse the trial court's ruling on the ground that her plea was not entered upon a knowing, intelligent, and voluntary waiver of rights guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and by Section 11 of the Kentucky Constitution. Specifically, she asserts that trial counsel failed to advise her of the possibility of a lesser-included instruction and coerced her into pleading guilty to second-degree manslaughter and second-degree criminal abuse. Additionally, she contends that the trial court erred by denying her petition without conducting an evidentiary hearing.

When evaluating claims of ineffective assistance of counsel on a guilty plea, we follow a two-prong test to determine whether the claim is meritorious. First, an appellant must show that counsel was deficient; *i.e.,* that counsel made errors so serious that his or her performance fell outside the wide range of professionally competent assistance. An appellant must then establish 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 pled guilty but would have insisted on going to trial. *Sparks v. Commonwealth*, 721 S.W.2d 726, 727-28 (Ky. App. 1986). In reviewing an RCr 11.42 ruling, we may not set aside a trial court's factual findings unless they are clearly erroneous. *Ivey v. Commonwealth,* 655 S.W.2d 506, 509 (Ky. App. 1983). Furthermore, if the record refutes the issues raised by a defendant in an RCr 11.42 motion, the trial court is not required to hold an evidentiary hearing. RCr 11.42(5); *Parrish v. Commonwealth*, 272 S.W.3d 161, 166 (Ky. 2008).

Noble first argues that her plea was not made intelligently and knowingly due to trial counsel's ineffective assistance. She contends that trial counsel failed to inform her of any lesser-included charges or more applicable offenses. She claims that trial counsel wrongly advised her to plead guilty to second-degree manslaughter when she was at most guilty of the lesser-included offense of reckless homicide. After our review, we have determined that Noble's assertions are directly contradicted by the record.

When a defendant argues that a guilty plea was rendered involuntary due to ineffective assistance of counsel, the trial court is required 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 *Strickland v. Washington,* 466 U .S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), inquiry into the performance of counsel." *Rigdon v. Commonwealth*, 144 S.W.3d 283, 288 (Ky. App. 2004). The general question involved in the analysis is "whether the

plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant," *North Carolina v. Alford,* 400 U.S. 25, 31, 91 S.Ct. 160, 164, 27 L.Ed.2d 162 (1970). We must also bear in mind that declarations made by a defendant in open court carry a strong presumption of verity. *Centers v. Commonwealth,* 799 S.W.2d 51, 54 (Ky. App. 1990).

Upon our review, it is clear that Noble's attorney advised her of the nature of her charges and the elements of any lesser-included offenses. Noble signed a "Waiver of Further Proceedings with Petition to Enter Plea of Guilty," acknowledging: (1) that her attorney explained the elements of the charged offenses and the elements of any lesser-included offense (2) and that she fully understood what facts the Commonwealth would have to prove beyond a reasonable doubt in order to convict her of murder.

Additionally, Noble engaged in a lengthy and detailed plea colloquy with the trial judge during which she affirmed to the court that her counsel had explained to her the nature of her charges, penalties, and any defenses in connection with the plea agreement. She also indicated that she fully read and comprehended the plea agreement before she signed it and that she was entering her plea because she believed it was in her best interest to do so.

The plea colloquy and signed plea agreement create a strong presumption that Noble's plea was knowing and intelligent and that it was entered with a complete understanding of the nature of the charges. Furthermore, we are not persuaded by Noble's contention that the evidence was insufficient to convict

her of second-degree manslaughter. We note that in Kentucky, a guilty plea waives any defenses—including the defense of insufficient evidence—that might be raised later. *See Johnson v. Commonwealth*, 103 S.W.3d 687, 696 (Ky. 2003). Nevertheless, a defendant is still entitled to collateral relief from her guilty plea if she can show that, but for ineffective assistance of counsel, a reasonable probability exists that she would not have pled guilty. *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 108 (1985); *Sparks v. Commonwealth*, 721 S.W.2d 726, 728 (Ky. App. 1986). Noble asserts that her attorney's advice to plead guilty to second-degree manslaughter constitutes ineffective assistance because she was not guilty of wanton conduct as defined by Kentucky Revised Statute[s] (KRS) 501.020(3) as follows:

> A person acts wantonly with respect to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

Wanton conduct is required for a conviction of second-degree manslaughter. KRS 507.040(1).

Our review of the record discloses that during the plea colloquy, Noble affirmed that she and Napier had drug addiction problems during their relationship and that she allowed Napier to physically abuse her son. Moreover, she informed the court that on the day of Nathaniel's death, she was under the

influence of drugs, which impaired her judgment, and that she left her son with a "violent drug addict." These admitted facts clearly indicate that Noble was aware of a substantial and unjustifiable risk of harm to Nathaniel and that she consciously disregarded that risk.

Based on her own admissions, we are convinced that there was indeed a sufficient factual basis for Noble to be found guilty of the charges to which she pled guilty. The elements of KRS 501.020(3) were satisfied. Moreover, since that the original charge of murder was amended to second-degree manslaughter, we cannot say counsel's advice to plead guilty was unreasonable. *See Commonwealth v. Campbell*, 415 S.W.2d 614 (Ky. 1967) (no ineffective assistance of counsel where defendant was advised to accept a reasonable plea agreement).

Noble next contends her plea was not voluntary because her will was overborne by her defense counsel through manipulation, scare tactics, and intimidation. She believes that absent this undue pressure from counsel, she would have opted to go to trial. We disagree with this contention.

Noble does not identify any particular instance of the manipulation that she alleges other than defense counsel's warning that a life sentence was a possibility if she proceeded to trial. However, it is not evidence of intimidation or manipulation for an attorney to inform a client of the consequences of proceeding to trial. "It is well established that the advice by a lawyer for a client to plead guilty is not an indication of any degree of ineffective assistance." *Beecham v. Commonwealth,* 657 S.W.2d 234, 236–37 (Ky. 1983). "It has remained the policy

in the Commonwealth that where a plea of guilty may result in a lighter sentence than might, otherwise, be imposed should the defendant proceed to trial, influencing a defendant to accept this alternative is proper." *Osborne v. Commonwealth*, 992 S.W.2d 860, 864 (Ky. App. 1998). "[A] defendant's plea of guilty motivated by the desire to escape possible greater punishment is not a basis for vacating the judgment...." *Glass v. Commonwealth,* 474 S.W.2d 400, 401 (Ky. 1971). Thus, we cannot accept Noble's contention that her attorney's warnings constitute evidence that she was coerced into pleading guilty.

Also undermining Noble's claims of coercion is the fact that the record clearly establishes that her guilty plea was voluntary. It is undisputed that the trial court conducted a proper and thorough plea colloquy with Noble that satisfied due process pursuant to *Boykin v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Moreover, Noble was given ample opportunity during her plea colloquy to inform the court if she had in any way been improperly coerced or intimidated into accepting the plea. The trial court accepted Noble's plea as voluntary, and it "is in the best position to determine if there was any reluctance, misunderstanding, involuntariness, or incompetence to plead guilty." *Bronk v. Commonwealth,* 58 S.W.3d 482, 487 (Ky. 2001).

As we have noted, when examining a plea agreement, we must afford a strong presumption of truth to solemn declarations made in open court, and "admissions made during a *Boykin* hearing can conclusively resolve a claim that the plea was involuntarily obtained." *Fraser v. Commonwealth*, 59 S.W.3d 448,

457 (Ky. 2001). Accordingly, we will summarily dismiss "conclusory allegations unsupported by specifics" and "contentions that in the face of the record are wholly incredible." *Edmonds v. Commonwealth,* 189 S.W.3d 558, 569 (Ky. 2006) (*citing Blackledge v. Allison,* 431 U.S. 63, 74, 97 S.Ct. 1621, 1629, 52 L.Ed.2d 136 (1977)).

Noble's claim that she was coerced into pleading guilty lacks any valid factual support. In addition, her current contentions are directly contrary to her written plea agreement and the statements that she made during her *Boykin* hearing. For these reasons, we conclude that the trial court properly rejected her claim of error.

Finally, we note that an evidentiary hearing is necessary only when material issues of fact cannot be resolved on the face of the record. *Fraser v. Commonwealth*, 59 S.W.3d at 452. Here, all of Noble's claims either lacked the specificity necessary to warrant an evidentiary hearing or were easily resolved on the face of the record. Therefore, a hearing was not required, and the request was properly denied.

We affirm the order of the Lincoln County Circuit Court.

ALL CONCUR.

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