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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2014-CA-000224-MR

JACOB BRANNON — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 09-CR-00436

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART, AND REMANDING

** ** ** ** **

BEFORE: JONES, J. LAMBERT, AND MAZE, JUDGES.

JONES, JUDGE: Appellant, Jacob Brannon, acting without the assistance of counsel, appeals the McCracken Circuit Court's denial of his RCr[1] 11.42 motion to vacate. Brannon maintains that the trial court erred when it denied his motion without first conducting an evidentiary hearing. Having reviewed the record as well as the applicable law, we agree, in part. Most of the claims Brannon

[1] Kentucky Rule of Criminal Procedure

presented were speculative or inconsequential and did not merit an evidentiary hearing. One such claim, however, is not so easily dismissed: Brannon's claim that his counsel failed to appreciate the significance of his Klinefelter Syndrome,[2] and therefore, did not advise him that it might provide him with a defense.

For these reasons, as more fully explained below, we AFFIRM IN PART, VACATE IN PART and REMAND to the trial court with instructions to conduct an evidentiary hearing with respect to Brannon's claim that his counsel was ineffective with respect to a possible defense based on Klinefelter Syndrome.

## I. BACKGROUND

This criminal appeal arises out of a domestic dispute between Brannon and his former girlfriend, Jessica Toon, which took place on August 22, 2009. In its Bill of Particulars, the Commonwealth described the events leading up to Brannon's arrest as follows:

> On or about August 22, 2008, Jessica Toon returned to her residence from work. Shortly thereafter, [Brannon] choked and smothered Toon while restraining her in the bedroom of the residence. Later that day, Brannon was told that he could not stay at Toon's residence, and that he would need to get a hotel room. Later, while Toon was alone at her residence, her dog started barking. Toon became fearful that [Brannon] was prowling outside her residence, and she made a phone call to her sister-in-law for advice of what to do. While she was on the phone, Brannon broke in by knocking a window out of a door.

[2] This is a condition in which males have two "X" chromosomes instead of one, *i.e*. their chromosomes are described as XXY instead of XY. The condition may result in variety of characteristics, including a youthful and sometimes effeminate appearance, language based disabilities, social skill deficits, depression and anxiety. Treatment may include counseling and hormone replacement.

> He took the phone from Toon and broke it. Then, he dragged her to the bedroom, assaulted her and choked and smothered her. While the assault was occurring, Amy Toon drove to the residence, knocked on the door, and called 911. Brannon ran from the residence when Amy Toon was on the phone with 911. Brannon was eventually arrested and detained in the McCracken County Jail. On August 28, 2009, he called Jessica Toon and instructed her to lie about the facts of the case in order to get his charges dropped. He specifically told her examples of false information that she needed to tell prosecutors in order to get the charges dropped.

(R. at 32-33).

On September 25, 2009, the Grand Jury returned an indictment charging Brannon with several offenses arising out of these events: 1-2) two counts of first-degree wanton endangerment; 3-4) two counts of first-degree unlawful imprisonment; 5) one count of second-degree burglary; 6) one count of fourth-degree assault/domestic violence; 7-8) two counts of third-degree criminal mischief; 9) one count of terroristic threatening; 10) one count of attempted third-degree criminal mischief; 11) alcohol intoxication in a public place; 12) tampering with a witness; and 13) second-degree persistent felony offender.

Assistant Public Advocate, Sarah Steele, was appointed to represent Brannon. Initially, Brannon entered a plea of not guilty on all charges. A jury trial was set for March 29, 2010. Four days before trial was scheduled to begin, Brannon moved the trial court to allow him to withdraw his plea of not guilty and enter a plea of guilty in exchange for the Commonwealth agreeing to dismiss the persistent felony offender charge and amending the second-degree burglary charge,

a class C felony, to a third-degree burglary charge, a class D felony. In exchange for Brannon's plea, the Commonwealth also agreed to recommend a concurrent sentence of three years.

As part of his guilty plea, Brannon swore in his motion to the court that he was not impaired, understood the charges against him, had discussed his case with his attorney, and understood the charges and possible defenses to them. The court questioned Brannon on his plea and the record indicates that he was given additional time in court to discuss the charges with his counsel before entering his plea. The Court set a sentencing hearing for June 2, 2010.

The day before the sentencing hearing, Brannon filed a motion for probation. At the hearing, the Court spoke directly to Brannon and instructed him that he had two options: 1) that in accordance with the plea agreement, the court would run his sentences concurrently for a total of three years of incarceration of which he had already served approximately 285 days; or 2) if Brannon wanted probation the court would grant it, but would run his sentences consecutive to one another for a total of 18 years. With respect to the second option, the court was very clear that if Brannon violated the terms of his probation, he would most likely be required to serve out the entire 18 years in prison. The court spoke to Brannon in very plain and clear terms, gave Brannon the opportunity to speak with his counsel, and again explained to him the risk of choosing probation. Brannon told the court he wanted to take the probation option. Before sentencing Brannon, the court again asked Brannon if he was sure that he wanted to "roll the dice" and risk

the possibility that he might violate the terms of his probation and have to serve out the 18 years in prison. Brannon responded that he was sure, and the court sentenced him accordingly.

In April of 2011, Brannon was arrested in Florida after violating the terms of his probation. He was extradited to Kentucky. After a hearing, the trial court found that Brannon had violated the terms of his probation. Thereafter, the trial court entered an order revoking Brannon's probation and ordering him to serve the remainder of his 18-year sentence. A short time later, Brannon sought shock probation, but the trial court denied his motion.

In June of 2013, Brannon filed a *pro se* motion pursuant to RCr 11.42. Therein, he argued that the trial court should vacate his sentence on the following grounds: 1) his guilty plea does not represent a reflection of his voluntary and intelligent choice; and 2) his counsel was ineffective in failing to conduct an independent examination of the facts, circumstances, pleadings and laws involved and failed to consult with him properly in regard to trial strategy and failed to present a defense. The trial court denied Brannon's motion without an evidentiary hearing.

This appeal followed.

## II. Standard of Review

Not every claim of ineffective assistance merits an evidentiary hearing. *Stanford v. Commonwealth*, 854 S.W.2d 742, 743 (Ky. 1993). The law on this issue is clear: the circuit court need only conduct an evidentiary hearing if

(i) the movant establishes that the error, if true, entitles him or her to relief under RCr 11.42; and (ii) the motion raises an issue of fact that "cannot be determined on the face of the record." *Parrish v. Commonwealth*, 272 S.W.3d 161, 166 (Ky. 2008). In other words, "an evidentiary hearing is not required when the record refutes the claim of error or when the allegations, even if true, would not be sufficient to invalidate the conviction." *Cawl v. Commonwealth*, 423 S.W.3d 214, 218 (Ky. 2014).

When the record fails either to prove or to refute a material issue of fact, a hearing is required. "The trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them." *Fraser v. Commonwealth,* 59 S.W.3d 448, 452 (Ky. 2001). "The hearing ensures a defendant the protections of due process in securing his right to effective assistance of trial counsel. To that end, he is permitted to call witnesses and present evidence in support of his motion, to cross-examine the witnesses for the Commonwealth, and to be represented by counsel." *Knuckles v. Commonwealth*, 421 S.W.3d 399, 401 (Ky. App. 2014).

## III. ANALYSIS

In order to succeed on a claim of ineffective assistance of counsel under RCr 11.42, a movant must satisfy both requirements of the two-prong test as outlined in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

*Id.* at 687, 104 S.Ct. at 2064. This "test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

Since Brannon entered a guilty plea, a claim that he was afforded ineffective assistance of counsel requires him to 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 pled guilty, but would have insisted on going to trial. *Bronk v. Commonwealth,* 58 S.W.3d 482, 486–87 (Ky. 2001). *See also Hill v. Lockhart,* 474 U.S. 52 (1985).

In other words, "to obtain relief [on an ineffective assistance claim] a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Stiger v. Commonwealth*, 381 S.W.3d 230, 237

(Ky. 2012) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 372, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010)) (alteration in original).

To be valid, a guilty plea must represent 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, 270 L.Ed.2d 162 (1970); *Sparks,* 721 S.W.2d at 727. "Whether a guilty plea is voluntarily given is to be determined from the totality of the circumstances surrounding it." *Rigdon v. Commonwealth*, 144 S.W.3d 283, 287 (Ky. App. 2004). Defense counsel's alleged ineffectiveness in failing to investigate and prepare a defense for trial is part of the totality of the circumstances surrounding the alleged involuntary plea. *Commonwealth v. Tigue*, 459 S.W.3d 372, 393 (Ky. 2015).

### *A. Klinefelter Syndrome*

As part of his motion, Brannon produced medical records to the trial court showing that he has been diagnosed as suffering from Klinefelter Syndrome. Those records further establish that Klinefelter Syndrome commonly causes "behavioral problems and personality disturbances," and that Brannon had been diagnosed as suffering from such problems, including "lack of respect for authority, short temper, and actually hitting people." He was prescribed medications to treat these behavioral disturbances, but it seems from the record that he may not have been taking them at the time of the alleged incidents. The record also indicates that trial counsel knew about Brannon's condition and its previous

affect on his behavior (she commented on it at sentencing). What is unclear is whether counsel investigated the viability of a defense based on Klinefelter Syndrome or advised Brannon that it might offer a possible defense. It is also unclear how successful such a defense might have been under these circumstances.

The Commonwealth did not put forth any evidence to refute Brannon's assertions. Rather, it merely asserted in its answer that the record conclusively resolved Brannon's claims and noted that Brannon had pled guilty. In resolving this claim without an evidentiary hearing, the trial court concluded that "the diagnosis of this syndrome would not be a defense to the criminal acts of [Brannon] and therefore his attorney was not ineffective by not advising [Brannon] of the defense." We disagree with the trial court that the record conclusively established this fact.

The insanity defense is set forth in KRS 504.020. It provides in pertinent part: "A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental illness or retardation, he lacks substantial capacity either to appreciate the criminality of his conduct *or to conform his conduct to the requirements of law*." (emphasis added).

It is undisputed that Brannon has Klinefelter Syndrome. It is likewise undisputed that Brannon's physician previously noted that Brannon's difficulty in controlling his behavior was likely linked to his Klinefelter Syndrome. What is unclear from the record is the extent Klinefelter Syndrome has affected Brannon's behavior, whether Steele considered the availability of an insanity defense or

sought out an expert in this regard, and how successful such a defense might have been under the circumstances.

On appeal, the Commonwealth cites a legal treatise for the proposition that not enough research has been performed to support an insanity defense based on Klinefelter Syndrome. It should be noted, however, that those jurisdictions which have examined the issue have done so primarily under different insanity tests. For example, the federal statute states that insanity is available only as a defense where "the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts." 18 U.S.C. § 17. This statute differs from Kentucky's insanity statute in that it contains no exception where the defendant appreciates the wrongfulness, but is unable to conform his behavior to the requirements of the law.

In the federal case of *Elk v. United States*, 461 F.Supp.2d 529 (E.D. Tex. 2006), in rejecting an insanity defense based on Klinefelter Syndrome, the court focused exclusively on whether there was any reliable expert testimony linking the disorder to an inability to appreciate the wrongfulness of one's actions. Because Kentucky's insanity defense is broader in that it provides an exception where a defendant may understand his actions are wrong, but is unable to control them nonetheless, it is possible that Klinefelter Syndrome could be a viable defense under Kentucky's test assuming the right expert testimony is procured; it is also possible the XXY defense might fail under Kentucky's insanity test. It is also possible Brannon's counsel attempted to obtain an expert on this issue, but was

unable to find anyone who could link the condition to Brannon's conduct. What is certain, however, is that these issues cannot be resolved on the current record.

Therefore, we conclude that the trial court erred by failing to conduct an evidentiary hearing.

### *B. Remaining Claims*

However, we agree with the trial court that Brannon's remaining claims are entirely speculative or flatly refuted by the record. While Brannon avers that he was "coerced" by his counsel into accepting a guilty plea, he provides no specifics. Furthermore, while not stated exactly in this manner, Brannon appears to be arguing that his counsel should have moved to dismiss the burglary charge because Brannon's name was on the lease. The lease is not clear in this regard as it lists Toon on the first page as the sole tenant and Brannon is listed only as a prospective tenant pending further approval on subsequent pages. We do not believe this evidence would have required dismissal of the charge and it appears Brannon was made well aware of how it could be used at trial.

Finally, Brannon asserted that a recorded phone conversation he had with Toon revealed that she was a friend of the prosecuting attorney. Brannon asserts that his counsel should have moved for a change of venue on this basis. Even if the victim was friends with the prosecuting attorney, it would not have impacted the jury pool creating the need for a change of venue. Likewise, Brannon

has not alleged that the relationship worked to his prejudice in any manner or impacted the outcome of these proceedings.

## IV. CONCLUSION

For the foregoing reasons, we affirm in part, vacate in part, and remand Brannon's ineffective assistance claim regarding Klinefelter Syndrome to the trial court for an evidentiary hearing.

LAMBERT, J., JUDGE, CONCURS.

MAZE, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

MAZE, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: Respectfully, I dissent from the majority's decision to remand this matter for an evidentiary hearing on whether Brannon's trial counsel provided ineffective assistance by advising him to plead guilty. In cases involving a guilty plea, the movant must prove that his counsel's deficient performance so seriously affected the outcome of the plea process that, but for counsel's errors, "there is a reasonable probability that, [the movant] would not have pleaded guilty [but] would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed.2d 203 (1985); *Phon v. Commonwealth*, 51 S.W.3d 456, 459-60 (Ky. App. 2001). Brannon's allegations do not meet this standard.

While Brannon focuses on his diagnosis of Klinefelter Syndrome, his motion before the trial court did not allege that this condition affected his competency to enter a knowing and voluntary guilty plea. He cannot raise that issue for the first time on appeal. Brannon primarily contends that his guilty plea was not knowingly and intelligently made because his trial counsel failed to adequately investigate whether his Klinefelter Syndrome would be a defense to the underlying charges. However, the effect of a valid plea of guilty is to waive all defenses other than that the indictment fails to charge an offense. *Quarles v. Commonwealth*, 456 S.W.2d 693, 694 (Ky. 1970).

Consequently, our analysis must begin with the voluntariness of his guilty plea. *Commonwealth v. Elza*, 284 S.W.3d 118, 121 (Ky. 2009). We determine the voluntariness of the plea from the "totality of the circumstances." *Rodriguez v. Commonwealth*, 87 S.W.3d 8, 10–11 (Ky. 2002). A criminal defendant may demonstrate that his guilty plea was involuntary by showing that it was the result of ineffective assistance of counsel. *Rigdon v. Commonwealth*, 144 S.W.3d 283, 288 (Ky. App. 2004). In such cases, we "juxtapose the presumption of voluntariness inherent in a proper plea colloquy with a *Strickland v. Washington* inquiry into the performance of counsel." *Elza*, 284 S.W.3d at 121, *quoting Bronk v. Commonwealth*, 58 S.W.3d 482, 486 (Ky. 2001)

Advising a client to plead guilty is not, by itself, evidence of ineffective assistance of counsel. *Beecham v. Commonwealth*, 657 S.W.2d 234, 236–37 (Ky. 1983). Furthermore, it may be a reasonable tactical choice for trial

counsel to advise a defendant to accept a guilty plea even if the defendant must waive potentially meritorious defenses. But that tactical decision must be based upon an objectively reasonable investigation by counsel of the law, the evidence, and the circumstances surrounding the plea offer. *Wiggins v. Smith*, 539 U.S. at 522-23, 123 S. Ct. at 2536. "A reasonable investigation is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources, but also with the benefit of hindsight, would conduct. The investigation must be reasonable under all the circumstances." *Haight v. Commonwealth*, 41 S.W.3d 436, 446 (Ky. 2001) *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). *See also Wiggins*, 539 U.S. at 523, 123 S. Ct. at 2535.

This does not mean, however, that a defendant is entitled to an RCr 11.42 hearing merely by alleging that counsel failed to investigate. A movant must allege facts sufficient to prove that counsel's decision to forego a defense or a line of investigation was unreasonable in the circumstances and that a more thorough investigation is reasonably likely to have led the claimant not to plead guilty but to have insisted upon trial. *Hill v. Lockhart*, 474 U.S. at 59, 106 S.Ct. at 370. If counsel failed to conduct that inquiry and the defense is likely to have affected the defendant's decision to plead guilty, then counsel's ineffective performance prejudicially affected the outcome of the plea process. *Id.*

I disagree with the majority that Brannon's allegations meet this standard. A defense of extreme emotional disturbance based upon Klinefelter

Syndrome would have served no more than to lower the penalty for fourth-degree assault and would not have affected the felony charges. KRS 508.040. The plea agreement would not have been affected by that defense.

As the majority notes, Brannon's diagnosis of Klinefelter Syndrome would have been relevant only if counsel had pursued an insanity defense under KRS 504.020. Where one chooses to rely upon insanity as a defense, the burden rests upon him to prove to the satisfaction of the jury that, at the time the offense was committed, he lacked substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law as a result of a mental disease or defect. *Star v. Commonwealth*, 313 S.W.3d 30, 34 (Ky. 2010), *citing Edwards v. Commonwealth*, 554 S.W.2d 380, 383 (Ky. 1977). Even considering the broader range of the defense under KRS 504.020, Brannon presented no evidence showing that the behavioral and personality disturbances associated with Klinefelter Syndrome were so prominent as to render him unable to conform his conduct to the requirements of the law. Consequently, there is no evidence to support a finding either that counsel's decision to forego the defense was unreasonable or that Brannon was prejudiced by his trial counsel's decisions. Finally, I cannot help but note the very favorable plea agreement which Brannon received. The Commonwealth agreed to recommend concurrent three-year sentences for each felony offense. However, Brannon opted to "roll the dice" and accept consecutive sentences totaling eighteen years in exchange for immediate probation. Brannon is now subject to an extended sentence due to his own

decisions, and not because of any mistake of his trial counsel. Given the circumstances surrounding Brannon's guilty plea and the high burden which he would have faced in asserting an insanity defense, there is no reasonable probability that any failure by his trial counsel to investigate this defense affected the outcome of the plea process. Therefore, I would affirm the trial court's denial of Brannon's RCr 11.42 motion in total.

BRIEF FOR APPELLANT:

Jacob Brannon, *Pro se*
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General

James Havey
Assistant Attorney General
Frankfort, Kentucky