

RENDERED: August 15, 1997; 10:00 a.m.  
NOT TO BE PUBLISHED

NO. 96-CA-1426-MR  
AND  
NO. 96-CA-1427-MR

DARRYL JONES

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE GARY D. PAYNE, JUDGE  
ACTION NO. 93-CR-50

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: WILHOIT, Chief Judge; ABRAMSON and DYCHE, Judges.

ABRAMSON, JUDGE. Darryl Jones, pro se, appeals two orders of the Fayette Circuit Court entered February 7, 1996 and May 7, 1996, denying his motions pursuant to RCr 11.42 and CR 60.02(f). Finding that the circuit court acted properly, we affirm.

On August 21, 1992, Jones was driving a 1979 Ford Mustang on a two-lane highway. While in a no passing zone near the crest of a hill, he pulled into the left lane attempting to pass several cars and struck another car head-on. Jones, a companion in his vehicle, and all four occupants of the second car were seriously injured. A blood test taken an hour after the

accident revealed that Jones had a high blood/alcohol content. Reconstruction analysis indicated that Jones' car was travelling at approximately 70-80 miles per hour in a 55 mile per hour zone.

On January 19, 1993, the Fayette County Grand Jury indicted Jones on three felony counts of first-degree assault (KRS 508.010), two misdemeanor counts of fourth-degree assault (KRS 508.030), and one misdemeanor count of driving with no insurance (KRS 304.39-080). On April 12, 1993, Jones pled guilty to one count of first-degree assault, one count of second-degree assault (KRS 508.020), one count of first-degree wanton endangerment (KRS 508.060), and two counts of fourth-degree assault, pursuant to a plea agreement with the Commonwealth. The Commonwealth recommended a sentence of ten years on the first-degree assault count, five years on the second-degree assault count, one year on the first-degree wanton endangerment count, and twelve months on each of the two fourth-degree assault counts. On January 14, 1994, the court sentenced Jones consistent with the Commonwealth's recommendation, and ordered the sentences to run concurrently for a total sentence of ten years in prison.

On May 4, 1995, Jones filed a RCr 11.42 motion seeking to vacate and set aside the guilty plea based on ineffective assistance of counsel related to his alleged incompetency. This motion was denied without a hearing on February 7, 1996. On February 14, 1996, Jones filed a CR 60.02 motion to amend or correct the judgment based on his alleged incompetency. The

circuit court denied this motion on May 7, 1996. This appeal followed.

RCr 11.42 allows individuals in custody under sentence to collaterally attack the judgment entered against them. The trial judge may summarily dismiss the motion without a hearing where the movant fails to make a substantial showing of entitlement to relief. Stanford v. Commonwealth, Ky., 854 S.W.2d 742 (1993). On appellate review, we consider whether the record refutes Jones' allegations and whether his unrefuted allegations, if true, would invalidate his conviction. Hopewell v. Commonwealth, Ky. App., 687 S.W.2d 153 (1958). RCr 11.42(2), requires the movant to "state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds."

In general, a valid guilty plea waives all defenses except that the indictment charged no offense. Bush v. Commonwealth, Ky., 702 S.W.2d 46, 48 (1986). The guilty plea, however, must be both knowingly and intelligently made by a competent defendant. Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970); Centers v. Commonwealth, Ky. App., 799 S.W.2d 51, 54 (1990). The test for determining the validity of a guilty plea is whether it represents a voluntary and intelligent choice among the alternative courses of action open to a defendant. North Carolina v. Alford, 400 U.S. 25, 31, 91 S. Ct. 160, 164, 27 L. Ed. 2d 163 (1970); Kiser v. Commonwealth, Ky. App., 829 S.W.2d 432, 434 (1992). The validity

of a guilty plea is determined from the totality of the circumstances surrounding it, rather than reference to some magical incantation recited at the time it was taken. Kotas v. Commonwealth, Ky., 565 S.W.2d 445, 447 (1978).

A guilty plea may be rendered invalid if the defendant received constitutionally ineffective assistance of counsel under the Sixth Amendment. In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing that counsel's performance was deficient and the deficiency resulted in actual prejudice. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985), cert. denied, 478 U.S. 1010, 106 S. Ct. 3311, 92 L. Ed. 2d 724 (1986). Where an appellant challenges a guilty plea based on ineffective counsel, he must show both that counsel made serious errors outside the wide range of professionally competent assistance, McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449, 25 L. Ed. 2d 763 (1970), and 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, 58, 106 S. Ct. 366, 370, 80 L. Ed. 2d 203 (1985); accord Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726, 727-28 (1986). The burden is on the movant to overcome a strong presumption that counsel's assistance was constitutionally

sufficient. Strickland v. Washington, 466 U.S. at 689, 104 S. Ct. at 2065.

In his RCr 11.42 motion, Jones alleged that he was so heavily medicated at the time of his guilty plea, he was unable to enter a knowing and intelligent plea. He contends that his attorney suggested that he plead guilty given the circumstances of the incident even though Jones informed counsel that he could not remember the accident. Jones also maintains that he cannot recall even appearing in court for either the guilty plea hearing or the sentencing hearing. Although Jones' motion relies on a charge of ineffective assistance of counsel, his allegations implicate both defense counsel and the trial judge in allowing him to plead guilty.

The Due Process Clause of the Fifth and Fourteenth Amendments prohibits the criminal prosecution of an incompetent defendant. See Medina v. California, 505 U.S. 437, 112 S. Ct. 2572, 120 L. E. 2d 353 (1992). In Godinez v. Moran, 509 U.S. 389, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993), the Supreme Court held that the standard for determining competence to plead guilty and to stand trial was the same. See also Short v. Commonwealth, Ky., 519 S.W.2d 828 (1975). However, there is an initial presumption that a criminal defendant is mentally competent to stand trial or plead guilty. See Gabbard v. Commonwealth, Ky., 887 S.W.2d 547, 551 (1994) (presumption of competence disappears when reasonable grounds for competency hearing exist). The standard for competence is whether the defendant has the ability

to consult with his attorney with a reasonable degree of rational understanding and has a rational understanding of the proceedings against him. Godinez, 509 U.S. at \_\_\_\_\_, 113 S. Ct. at 2685.

The issue of a defendant's competency differs from that of whether the defendant entered the plea knowingly and voluntarily. The focus of a competency inquiry is the defendant's mental capacity and ability to understand the proceedings. See Drope v. Missouri, 420 U.S. 162, 171, 95 S. Ct. 896, 903-04, 43 L. Ed. 2d 103 (1975) (emphasis added). Meanwhile, the knowing and voluntary inquiry involves whether the defendant actually understands the significance and consequences of his decision and whether the decision is uncoerced. Godinez, 509 U.S. at \_\_\_\_\_ n. 12, 113 S. Ct. at 2687 n. 12 (emphasis added). A trial court must determine both that a defendant who seeks to plead guilty is competent, and that the waiver of his constitutional rights is "knowing and voluntary." Id. at \_\_\_\_\_, 113 S. Ct. at 2687.

Due process also requires the trial court to hold a hearing whenever evidence raises a sufficient or reasonable doubt about a defendant's ability to stand trial or plead guilty. See Pate v. Robinson, 383 U.S. 375, 378, 86 S. Ct. 836, 838, 15 L.Ed. 2d 815 (1966). Similarly, under KRS 504.100 and RCr 8.06, if at anytime during the proceedings there appear reasonable grounds to believe a defendant is incompetent, the court must appoint a qualified person to examine and report on the defendant's mental condition. Gabbard v. Commonwealth, Ky., 887 S.W.2d 547 (1994).

An incompetency hearing is only required when the trial judge is presented with sufficient evidence of reasonable doubt of competency to stand trial. Lear v. Commonwealth, Ky., 884 S.W.2d 657, 659 (1984). In viewing a challenge to the trial court's failure to hold a competency hearing, the Kentucky courts have long followed the criterion that "reasonable grounds must be called to the attention of the trial court by the defendant or must be so obvious that the trial court cannot fail to be aware of them." Smith v. Commonwealth, Ky., 567 S.W.2d 304, 307 (1978); Lear, 884 S.W.2d at 659.

We will first address whether the trial court erred by failing to have a competency hearing. Jones contends that he was so heavily medicated that he could not function properly and that he does not even remember attending the guilty plea and sentencing hearings. Jones, however, does not identify any specific evidence that should have alerted the trial court to the alleged incompetency. He presents no incidents of irrational behavior or medical evaluations by qualified physicians evidencing incompetency. A review of the transcript of the colloquy between Jones and the trial judge at the guilty plea hearing reveals that he was rational, attentive and well-informed. Jones indicated at this hearing that he understood the nature of the charges and the amendments in the indictment. Jones affirmatively pled guilty to each individual count of the amended indictment. Jones' answers to the court's inquiries were responsive and coherent. Jones' attorney also informed the court

that he believed Jones understood his rights and was entering the guilty plea voluntarily. In sum, Jones has failed to demonstrate a sufficient or reasonable doubt concerning his competency in view of the information known to the trial court at the time Jones entered the guilty plea.

Next, we consider whether Jones' guilty plea was invalid on the ground that, despite the lack of a competency hearing and contemporaneous findings, he actually was incompetent at the time of his plea. In addition to the previously noted indicia of competency, the record contains several letters that conflict with Jones' allegations. Jones wrote several letters to the trial judge that demonstrate that he was aware of the legal procedure and the nature of the charges against him. First, in June 1993, prior to the sentencing hearing, Jones wrote an extensive letter to the trial judge expressing his remorse for hurting the victims of the accident and allowing alcohol to ruin his life and apologizing for having caused the accident. This letter written during the period between his guilty plea hearing and the sentencing hearing, is lucid, coherent and well-written. Similarly, none of the other letters written by Jones mention that he did not understand the legal process because of the pain medication he was taking. In sum, Jones has failed to present legitimate evidence to support his contention. The contemporaneous evidence including his actions at the guilty plea hearing, the failure of either defense counsel, the Commonwealth's attorney or the trial court to raise the issue of



competence, and Jones' letter written in June 1993 prior to sentencing, all indicate that Jones was competent.

Next we consider whether Jones' guilty plea was invalid on the ground that, despite his competence, he did not in fact make a knowing and voluntary plea. Jones has not presented any specific evidence that he did not understand the nature of the plea proceeding or that he entered his plea involuntarily. The guilty plea transcript contains ample evidence that Jones understood the consequences of his guilty plea and that he entered it voluntarily. The transcript shows that Jones was expressly informed of the right to call witnesses, the right to cross-examine witnesses, the right not to testify himself, the burden on the Commonwealth to prove guilt on each element of the offenses beyond a reasonable doubt, and the requirement of a unanimous guilty verdict. Jones admitted signing the Petition to Enter Plea of Guilty, which enumerated his constitutional rights, including those guaranteed under Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). Defense counsel stated that he reviewed this form with Jones in detail. The Certificate of Counsel, stating that counsel had fully explained to Jones the allegations contained in the indictment and his constitutional rights and that in counsel's opinion the plea of guilty was voluntarily and understandingly entered, was completed and signed by counsel. In response to oral questions from the trial judge, Jones affirmed that counsel had informed him that a guilty plea waived all defenses and there was no appeal, that he had

sufficient time to discuss the guilty plea with counsel, that he was satisfied with counsel's representation, and that no one had put any pressure on him or made promises to him to get him to enter the plea. Jones also stated that he understood the amendments to the indictment, the recommended sentences by the Commonwealth, and that the court was not required to follow the Commonwealth's recommendations. Further, in response to the trial court's inquiries, Jones indicated he was entering the plea freely and voluntarily because he was guilty of the charges. A review of the guilty plea proceeding clearly shows that the requirements of Boykin were satisfied. See Commonwealth v. Crawford, Ky., 789 S.W.2d 779 (1990). Based on the record, Jones' guilty plea was both knowing and voluntary.

Jones' complaint of ineffective assistance of counsel is without merit because he has not shown that counsel's performance was deficient, nor that any deficiency resulted in actual prejudice. First, to the extent Jones contends counsel erred by failing to challenge his competence to plead guilty, the above discussion requires rejection of this argument. Jones fails to identify any objective evidence that would have alerted counsel to the possibility of Jones' incompetence. Given the absence of evidence that Jones' competence was in doubt at the time of the guilty plea, counsel's failure to request a competency hearing cannot be considered ineffective assistance. Similarly, Jones has not demonstrated that if counsel had sought a competency hearing, such a request would have been successful.

The record refutes any claim that but for counsel's errors, there was a reasonable probability that Jones would not have pled guilty and would have insisted on going to trial or the outcome of a competency hearing would have been different. See Strickland, 466 U.S. at 694, 104 S. Ct. at 2068; Hill v. Lockhart, 474 U.S. at 59, 106 S. Ct. at 370.

Jones also filed a CR 60.02 motion challenging the validity of his guilty plea. This motion raises the same grounds for relief as the RCr 11.42 motion, but focuses on the alleged error of the trial court, rather than ineffective assistance of counsel. Jones again contends the guilty plea was not entered intelligently and voluntarily because he was under the influence of prescription drugs. The circuit court summarily denied the CR 60.02 motion. We affirm the denial based on both procedural grounds and the merits.

In Gross v. Commonwealth, Ky., 648 S.W.2d 853, 857 (1983), the Kentucky Supreme Court discussed the relationship between RCr 11.42 and CR 60.02. As that Court stated: "final disposition of that [RCr 11.42] motion, or waiver of the opportunity to make it, shall conclude all issues that reasonably could have been presented in that proceeding. The language of RCr 11.42 forecloses the defendant from raising any questions under CR 60.02 which are 'issues that could reasonably have been presented' by RCr 11.42 proceedings." Id. at 857. CR 60.02 is for "extraordinary situations" where relief was not available by direct appeal or under RCr 11.42.

In the case sub judice, Jones' CR 60.02 motion is based on grounds that he was aware of when he filed the RCr 11.42. In fact, the two motions involve the same legal issues, although the RCr 11.42 motion is drafted to focus more on the role of counsel than that of the trial court. Jones was precluded from utilizing a CR 60.02 motion to obtain a second review of the competency issue and, therefore, the circuit court's summary denial of the CR 60.02 motion was proper.

Aside from competency and the knowing and voluntary nature of the guilty plea, Jones also argues that his plea is invalid because of ineffective assistance of counsel due to counsel's failure to inform him that intoxication was a defense that negated the necessary "intent" required to establish the elements of first-degree assault, as opposed to wanton endangerment. This argument is without merit.

Jones was indicted under KRS 508.010(b) which states: "Under circumstances manifesting extreme indifference to the value of human life he wantonly engages in conduct which creates a grave risk of death to another and thereby causes serious physical injury to another person." In Martin v. Commonwealth, Ky. App., 873 S.W.2d 832 (1994), the court held that KRS 508.010(b) included vehicular accidents involving intoxicants within the meaning of "assault" and that such accidents did not require specific intent. Thus, Jones' intoxication was not a legitimate defense to the assault charges. See also McGuire v. Commonwealth, Ky., 885 S.W. 2d 931, 934 (1994) (intoxication is

not a defense to a crime requiring a mental state of wantonness or recklessness). As a result, Jones was not prejudiced because he cannot show that counsel would have changed his recommendation as to the plea or the outcome would have been different.

Jones also has raised for the first time in his appellate brief several additional issues related to the alleged ineffective assistance of counsel. For example, Jones contends that counsel failed to consult with him, failed to interview the victims or any witnesses, failed to conduct any trial preparation, and failed to file any pretrial motions. Jones did not address these issues in his RCr 11.42 motion before the trial court. Our courts have consistently held that issues such as ineffective assistance of counsel must be raised at the trial level first to allow the trial court an opportunity to consider the alleged errors. See Hopewell v. Commonwealth, Ky., 641 S.W.2d 744, 748 (1982). Where the trial court has not considered and rejected an appellant's claims, we need not address them. White v. Commonwealth, Ky. App., 695 S.W.2d 438, 440 (1985).

For the foregoing reasons, we affirm the order of the Fayette Circuit Court.

ALL CONCUR.

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