

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-002959-MR

DONALD RAY DUKE

APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT  
HONORABLE GARLAND W. HOWARD, JUDGE  
ACTION NO. 91-CR-000028

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, DYCHE, and GUIDUGLI, Judges.

COMBS, JUDGE: The appellant, Donald Ray Duke (Duke), appeals from the order of the Daviess Circuit Court denying his motion pursuant to RCr. 11.42 to vacate his conviction and sentence. Duke argues that he was denied effective assistance of counsel and that his plea was not entered knowingly, intelligently, and voluntarily. Finding no merit in his contentions, we affirm the order of the circuit court.

On February 4, 1991, Duke was indicted for six counts of robbery in the first degree; one count of assault in the second degree; one count of assault in the fourth degree; and twelve counts of wanton endangerment in the first degree. The

indictment was issued in connection with an armed robbery that had taken place at a drug store in Owensboro, Kentucky, on December 30, 1990. Duke was implicated in the robbery by two victims who identified him in a photographic line-up. While under arrest, Duke and his co-defendant confessed to being the perpetrators of the alleged armed robbery. Subsequently, on March 8, 1991, he filed a motion to enter a guilty plea to five counts of robbery in the first degree and to seven counts of wanton endangerment in the first degree. The court accepted Duke's plea of guilty and sentenced him in accordance with the Commonwealth's recommendation to a total of fifty years' imprisonment.

On September 25, 1997, Duke filed a motion pursuant to RCR. 11.42 to vacate his conviction and sentence, alleging that his counsel was ineffective and that his guilty plea was not entered knowingly, intelligently, and voluntarily. He also requested that the court conduct an evidentiary hearing. Duke claimed that his attorney had failed to file pre-trial motions to exclude certain evidence and that he had not conducted an adequate pre-trial investigation. He claimed that at the time he pleaded guilty, he had been suffering from severe drug withdrawal, which affected his mental capacity. On November 6, 1997, without conducting a hearing, the court entered an order denying Duke's motion, finding that it was not necessary to conduct an evidentiary hearing as the record sufficiently refuted the allegations presented in his RCr. 11.42 motion. This appeal followed.

Duke contends on appeal that he was did not receive effective assistance of counsel. Specifically, he alleges that his attorney failed to challenge certain evidence against him and that such challenges would most likely have resulted in a dismissal of the charges against him. In support of this contention, he cites his counsel's failure to file pre-trial motions challenging a photographic line-up in which two victims identified him; he contends that this procedure was unduly suggestive and prone to mis-identification. He also points to the fact that his counsel was deficient in failing to try to exclude his confession. He alleges that he was in the throes of drug withdrawal at the time he made the confession to the police. Duke argues that proper pre-trial motions challenging this evidence would have most likely resulted in a dismissal of the case against him. Additionally, he claims that his attorney failed to investigate his case or to consult with him while he was in jail.

In Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 80 L.Ed.2d 203 (1985), the United States Supreme Court found that the two-part test for ineffective assistance of counsel as set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1985) applied as well to ineffective assistance claims arising out of the plea bargaining process. Strickland dictates that the movant must first show that counsel made errors so serious that his or her performance fell outside the wide range of professionally competent assistance. Second, the movant must establish that the deficient performance of counsel 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.

Moreover, the Kentucky Supreme Court has stated:

. . . [T]his court absolutely will not turn back the clock and retry these cases in an effort to second guess what counsel should have or should not have done at the time . . . . The burden is upon the accused to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceedings provided in RCr. 11.42.

Dorton v. Commonwealth, Ky., 433 S.W.2d 117, 118 (1968).

The record shows that at the time Duke entered his guilty plea, the court questioned him as to his attorney's performance. Duke indicated that he was satisfied with counsel's performance and that he acknowledged that he had discussed his case with counsel. The Motion to Enter Guilty Plea signed by Duke and filed with the court also stated that he had reviewed and discussed the charges against him -- as well as the facts and circumstances surrounding the case -- with his attorney. Additionally, the motion contained a certification by his attorney that he had fully discussed with Duke the case and possible defenses. Duke was given several opportunities by the court to voice any complaint or dissatisfaction that he may have had with his attorney. However, at no time during the proceedings did he complain or express any dissatisfaction. Rather, Duke repeatedly declared and affirmed his satisfaction with his attorney's performance. These solemn declarations in

open court carry a strong presumption of verity. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977).

Furthermore, we do not find that the mere fact that Duke's counsel did not file any pre-trial motions indicates *per se* that his performance was deficient. As we have already discussed, both Duke and his attorney stated that they had discussed the case fully as well as the trial strategy of any possible defenses. Such discussions would necessarily involve an evaluation and assessment of the evidence against Duke. At each stage of the proceedings in this case, Duke was made aware of his right to a trial; he also was aware that if he chose to do go trial, he would be given the opportunity to present evidence and to cross-examine the evidence against him. His allegations against his counsel appear to be an attempt to "second guess" the course of action he had elected to pursue; *i.e.*, the entry of a plea of guilty. We find that Duke has failed to prove that his counsel's performance was either deficient or that the alleged deficiency affected the outcome of the plea process in this case.

Duke next contends that his guilty plea was invalid. He argues that at the time he pleaded guilty, he was suffering from drug withdrawal, which impaired his mental capacity to appreciate the consequences of a guilty plea and to understand the rights he was waiving. Thus, he maintains that his plea was not voluntary, intelligent, or knowing.

A valid 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, 91

S.Ct. 160, 27 L.Ed.2d 162 (1970). A plea which is the product of ignorance, incomprehension, coercion, inducements, threats, or promises is void. Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969). Before accepting a guilty plea, the court must determine that the accused has a full understanding of what the plea implies and of its consequences. Boykin, supra. The validity of a guilty plea must be determined by considering the totality of the circumstance surrounding the plea. Kotas v. Commonwealth, 565 S.W.2d 445 (1978).

The court specifically found that Duke's guilty plea was valid and that it had been entered knowingly, intelligently, and voluntarily. We agree. In the video-record of the proceedings, Duke appeared alert, lucid, and coherent. He appeared to be fully able to comprehend the questions asked of him by the court and to answer them clearly. The court questioned Duke as to whether he was under the influence of alcohol or drugs and whether he was suffering from any mental impairment. He indicated to the court that he was not under the influence of any drugs nor that he was suffering from any mental impairment. At no point in the proceedings did Duke indicate to the court that he was suffering from drug withdrawal – nor did he give the court any reason to suspect that such a situation existed.

Furthermore, the pre-sentencing investigative report (PSI), which was prepared by a probation and parole officer with the Corrections Cabinet, states that Duke was cooperative and that he appeared to be in good health. There is no mention or

indication anywhere in the report that Duke appeared to be suffering from drug withdrawal. Additionally, the Commonwealth introduced an affidavit signed by Duke's counsel which stated that at no time during the course of the proceedings was Duke under the influence of drugs or suffering from drug withdrawal. The record also reveals that the court thoroughly and meticulously questioned Duke as to the implications of a guilty plea and the rights that he was waiving by entering such a plea; he responded to the court that he fully understood the consequences and effect of a guilty plea. It is evident from the record that Duke's judgment was not impaired and that his plea was voluntary, knowing, and intelligent.

In the alternative, Duke argues that the court erred in not conducting a hearing to address the issues raised in his RCr. 11.42 motion. However, the trial court is not required to conduct an evidentiary hearing if the movant's allegations are refuted by the record as a whole. Hopewell v. Commonwealth, Ky. App., 687 S.W.2d 153 (1985). Where the trial court has denied a motion for an evidentiary hearing on the merits of the allegations raised in the movant's RCr. 11.42 motion, "our review is limited to whether the motion 'on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction.'" Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726, 727 (1986), (quoting Lewis v. Commonwealth, Ky., 411 S.W.2d 321, 322 (1967)). As the record in this case amply refutes Duke's allegations, the court did not err in refusing to conduct an evidentiary hearing.

For the foregoing reasons, we affirm the judgment of the circuit court.

ALL CONCUR.

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