

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001379-MR

JOHN LEONARD RICHIE

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ERNEST A. JASMIN, JUDGE
ACTION NO. 95-CR-002233

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GUDGEL, Chief Judge; COMBS and MILLER, Judges.

COMBS, JUDGE: This is an appeal by John Leonard Richie from an order of the Jefferson Circuit Court denying his Rule of Criminal Procedure (RCr) 11.42 motion for post-conviction relief. Richie contends that he received ineffective assistance of counsel in the course of deciding to enter a guilty plea and that his guilty plea was not knowing, intelligent, and voluntary.

On September 7, 1995, Richie was indicted by the Jefferson County Grand Jury for complicity to wanton murder (Kentucky Revised Statutes (KRS) 507.020 & 502.020); complicity to first-degree robbery (KRS 515.020 & KRS 502.020); and

complicity to first-degree burglary (KRS 511.020 & KRS 502.020). Indicted as co-defendants were Damon Lavelle Sheppard and Carrisse Stewart. The indictment charged that on August 21, 1995, the co-defendants, acting either alone or in complicity with others, entered the apartment residence of Dion Crawford at 2100 Stoneybrook Drive in Louisville, robbed Crawford, and caused Crawford's death.

Richie entered a plea of not guilty and subsequently proceeded to trial along with his co-defendants. Following opening statements, Richie accepted a plea offer from the Commonwealth. In return for Richie's guilty plea, the Commonwealth agreed to amend the indictment to reflect a single count on the offense of first-degree hindering prosecution or apprehension (KRS 520.120). On September 26, 1996, the trial court conducted a hearing, carefully making inquiry and engaging in a colloquy with Richie for the purpose of determining whether his plea agreement was knowing, intelligent, and voluntary. At the conclusion of the hearing, the court determined that the plea agreement had been made knowingly, intelligently, and voluntarily; the trial court accepted Richie's guilty plea. Richie was sentenced to two and one-half years' imprisonment and was granted probation.

On July 31, 1998, Richie filed a motion to vacate sentence pursuant to RCr 11.42. Following a hearing on April 19, 1999, the trial court entered an order denying Richie's RCr 11.42 motion on May 20, 1999. This appeal followed.

Richie contends that the trial court erred in ruling that he did not receive ineffective assistance of counsel in the course of entering his guilty plea. In order to establish a claim of ineffective assistance of counsel, an appellant must satisfy a two-part test: (1) that counsel's performance was deficient and (2) that the deficiency resulted in actual prejudice affecting the outcome. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); 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 a guilty plea is challenged due to ineffective assistance of counsel, the appellant must show 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 pled guilty but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985); Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726, 727-28 (1986). Appellant bears the burden of proof to demonstrate that both prongs of Strickland have been met. Osborne v. Commonwealth, Ky. App., 992 S.W.2d 860, 863 (1998).

The mere fact that counsel advised or permitted a defendant to plead "guilty" does not constitute ineffective assistance of counsel. Beecham v. Commonwealth, Ky., 657 S.W.2d

234, 237 (1983). When the trial court has conducted an evidentiary hearing, the reviewing court must defer to the determinations of fact and the assessment of witness credibility made by the trial judge. McQueen v. Commonwealth, Ky., 721 S.W.2d 694 (1986); Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 909 (1998).

We are able to identify three specific allegations of deficient performance from Richie's brief. First, the guilty plea was made while Richie was in a precarious state of mind because of the pending jury trial. Trial counsel was aware of his mental disturbance but failed to adapt the nature and character of his representation to accommodate that precarious state of mind. Second, trial counsel advised Richie that they could not fight the charges and that he (Richie) would be stupid not to accept the plea – even though the offer was wholly distasteful to Richie. Third, trial counsel failed to apprise Richie adequately and completely of the impact and ramifications of his waiver, thereby depriving Richie of several fundamental constitutional rights.

The first allegation is too vague to be susceptible of accurate review, and we will not attempt to address it in detail. A RCr 11.42 motion must be specific about grounds and facts challenging a conviction. Gilliam v. Commonwealth, Ky., 652 S.W.2d 856, 858 (1983). Richie has failed to meet his burden of showing that trial counsel rendered deficient performance by failing to comprehend Richie's "precarious state of mind" and to adapt his representation to accommodate his delicate mental

condition. We simply cannot discern a basis in fact for this allegation.

With regard to the second allegation of deficient performance, we cannot agree that trial counsel's advice to accept the guilty plea was deficient performance. Richie was charged with a capital offense, carrying a possible sentence of 20 years to life or life without parole for 25 years¹ and with two Class B felonies, each carrying the possibility of 10 to 20 years. As a result of his guilty plea, Richie was able to plead out of the original charges in exchange for a single Class D felony and a sentence of two and one-half years. Additionally, Richie received probation.

The evidence presented at the evidentiary hearing disclosed that the Commonwealth had a viable case against Richie. Richie had sold the murder weapon to co-defendant Sheppard; that gun was found at the murder scene and was still registered in Richie's name. The day following Crawford's death, Richie falsely reported that the gun had been stolen. Sheppard's cellular phone was found near Crawford's apartment shortly after the murder, and phone records disclose calls between Richie and Sheppard close to the time of the murder. Sheppard was present at the murder scene and was shot in the struggle which led to Crawford's death. In his apartment, Richie had \$3,000.00 in cash - which was later "trained on" by a drug-sniffing dog.

¹The Commonwealth was not seeking the death penalty against Richie.

In weighing the unknown risks of going to trial *versus* the more certain outcome of the plea bargain, we cannot agree that trial counsel rendered deficient performance in counseling – or in vigorously and strongly advising – Richie to plead guilty.

Richie's final allegation of deficient performance (that trial counsel failed to inform him adequately of his constitutional rights) is contradicted by the terms of the plea agreement itself as well as by Richie's statements in open court. Moreover, even if trial counsel did not fully advise Richie of the constitutional rights that would be waived by entering a guilty plea, the trial court meticulously informed him of these rights at the September 26, 1999, hearing at which the trial court inquired into the voluntariness of the guilty plea. Thus, even if we accept Richie's allegation as true, there was no prejudice associated with the allegedly deficient performance because Richie was ultimately fully informed of the waivers inherent in his guilty plea.

The critical issue in this case is whether Richie entered his guilty plea knowingly, intelligently, and voluntarily. The test for determining the validity of a guilty plea 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, 91 S.Ct. 160, 164, 27 L.Ed.2d 162 (1970). There must be an affirmative showing in the record that the plea was intelligently and voluntarily made. Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969). However, "the validity of a guilty plea

is determined not by reference to some magic incantation recited at the time it is taken but from the totality of the circumstances surrounding it." Kotas v. Commonwealth, Ky., 565 S.W.2d 445, 447 (1978), (citing Brady v. United States, 397 U.S. 742, 749, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747 (1970)); Sparks v. Commonwealth, 721 S.W.2d at 727.

The record of the plea agreement discloses that Richie acknowledged that he understood the charges against him, that he had told his attorney all of the facts surrounding the case, and that his attorney had counseled him at length as to the nature and source of each accusation against him. The agreement stated that trial counsel had informed Richie of any possible defenses that he may have. The agreement also recited that Richie understood his various rights, including the rights: to plead not guilty; to a speedy and public trial; to see, to hear, and to confront all witnesses called against him; and to compel the production of any evidence in his favor. The agreement acknowledges that Richie's decision to enter a guilty plea was made freely and voluntarily and of his own accord.

In addition, the record discloses that before accepting Richie's plea, the trial court engaged in a lengthy colloquy to insure that Richie understood the nature of the plea. When the court advised him of the constitutional rights that he was waiving by pleading guilty, Richie stated that he understood and that he still desired to plead guilty. In response to direct questioning by the trial court, Richie answered in the affirmative when asked if his plea was entered voluntarily and

freely. This exchange occurred in open court. Solemn declarations in open court carry a strong presumption of verity. Centers v. Commonwealth, Ky. App., 79 S.W.2d 51, 54 (1990).

We are persuaded that Richie received effective assistance of counsel and that his guilty plea was knowing, intelligent, and voluntary.

Richie also contends that trial counsel rendered ineffective assistance by failing to prepare properly for trial. Even if this allegation were true, it is rendered moot by the fact that there was no trial. Richie instead entered a plea – which we have determined to have been made knowingly, intelligently, and voluntarily. We agree with the analysis of the trial court as to this issue:

At the hearing the Petitioner admitted meeting with his attorney six times and that his attorney had subpoenaed at least 20 witnesses. The Petitioner's attorney has been practicing criminal law for thirty (30) years and the Petitioner received a sentence of two and one half (2/12) years as opposed to twenty to life. Accordingly, the Petitioner's testimony at his hearing showed that he received competent and effectively prepared counsel.

For the foregoing reasons, the order of the Jefferson Circuit Court denying the appellant's motion for post-conviction relief is affirmed.

ALL CONCUR.

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