

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000196-MR

DONALD TAYLOR BROWN

APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 83-CR-00128

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: BARBER, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: Donald Taylor Brown appeals from an order of the Laurel Circuit Court denying his motion to alter, vacate, or correct a sentence brought pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42 challenging his guilty plea. Following a hearing, upon remand by this Court, the trial court found that Brown was competent and entered his guilty plea knowingly, intelligently, and voluntarily. After reviewing the record, we agree with the trial court that Brown's guilty plea was legally valid.

In December 1983, Brown and his half-brother, Robert Allen Smith, were indicted on charges of capital murder (KRS 507.020), kidnaping (KRS 509.040), and two counts of theft by unlawful taking over \$100 (KRS 514.030), in connection with the death and abduction of an elderly car salesman and an automobile from a car dealership. Brown was also indicted for being a persistent felony offender in the first degree (PFO I) (KRS 532.080). In January 1985, the circuit court ordered a psychological evaluation of Brown to determine his competency to stand trial and his possible criminal responsibility for the offenses. In April 1985, the trial court denied Brown's motion for a change of venue. The Commonwealth notified the defendant that it would seek the death penalty.

While Brown was undergoing the psychological evaluation, the three attorneys representing him conducted plea negotiations with the Commonwealth. On June 4, 1985, Brown and his family met with one of his attorneys, George Sornberger, about a proposed plea agreement that called for Brown's pleading guilty to murder and PFO I with a recommended sentence of life without the benefit of parole for twenty-five years in exchange for dismissal of the robbery, kidnaping, and theft charges plus withdrawal of the request for a possible death sentence. On June 28, 1985, Joy Barrett, another of Brown's attorneys, sent Brown a letter further explaining the plea offer and recommending that Brown accept it because of the strength of the prosecution's case, and "a pretty strong risk that the jury would give you a death sentence."

In mid-July 1985, after numerous psychological tests and evaluations were conducted by personnel at the Kentucky Correctional Psychiatric Center (KCPC), Dr. Phillip Johnson issued a report concluding that Brown was both competent to stand trial and capable of appreciating the criminality of his conduct at the time of the incident.

On August 5, 1985, Brown entered a guilty plea to murder and PFO I pursuant to a plea agreement with the Commonwealth. Under the plea agreement, the Commonwealth moved to dismiss the kidnaping, robbery, and theft counts, and withdrew its notice of intent to seek the death penalty. The agreement contained, however, several unique aspects. First, the Commonwealth recommended a sentence of life without the benefit of parole for twenty-five years for murder with sentencing on the PFO I conviction being deferred by agreement. The sentence of life without parole for twenty-five years was consistent with the 1984 amendment of KRS 532.030¹ that added this possible sentence for certain offenses such as murder. Prior to the amendment, defendants receiving a life sentence were eligible for parole after having served twelve years. Although the amendment did not become effective until July 13, 1984, which was subsequent to the date of Brown's alleged offenses, Brown specifically consented under the plea agreement to retrospective application of KRS 532.030 based in part on KRS 446.110, and he expressly waived any ex post facto objection to sentencing under the new law. Brown also acknowledged the presence of the aggravating circumstance

¹ See 1984 Ky. Acts Ch. 110, § 2 (eff. 7-13-84).

that the murder was committed during the commission of first-degree robbery. The deferred sentencing on the PFO I count was included with the understanding that a sentence on this offense could be imposed at a later date if retrospective application of the sentence of life without the benefit of parole for twenty-five years under the amended version of KRS 532.030 was subsequently vacated by a court.² The Commonwealth also agreed to withdraw its notice of intent to seek the death penalty against Brown's co-defendant and half-brother, Robert Smith.³

On August 27, 1985, the trial court sentenced Brown consistent with the plea agreement to life imprisonment without the benefit of parole for twenty-five years for murder and deferred sentencing on the PFO I conviction.

On February 1, 1989, Brown filed an RCr 11.42 motion seeking to vacate his sentence. In the motion, Brown contended that the guilty plea was invalid for several reasons including: (1) he was incompetent and misunderstood the terms of the plea agreement; (2) ineffective assistance of counsel; and (3) the sentence violated the constitutional prohibition on ex post facto application of the law. The circuit court denied the motion without a hearing. The court also denied a subsequent motion for

² The record suggests that the prosecution desired this term because under KRS 532.080(7), a defendant convicted of PFO I and a Class A, B, or C felony is not eligible for parole until he has served ten years of his sentence.

³ Robert Smith entered a guilty plea to murder, kidnaping, and first-degree robbery on August 16, 1984. Smith agreed to testify for the prosecution in a jury trial of Brown and sentencing was postponed pending resolution of the case against Brown.

leave to supplement the original RCr 11.42 motion and a motion to reconsider its order.

On April 10, 1998, this Court rendered an opinion affirming the circuit court in part, vacating the order denying the RCr 11.42 motion, and remanding the case to the trial court for an evidentiary hearing on two issues raised in the motion. First, we agreed with the trial court that Brown had not demonstrated that his plea violated the prohibition on ex post facto application of the law because he knowingly and voluntarily waived that claim. We also held that Brown did not receive ineffective assistance of counsel with respect to the guilty plea.

However, given the incomplete condition of the circuit court record, we vacated the denial of the motion and remanded the case for an evidentiary hearing on Brown's claims that "he was incompetent when he pled guilty or that he so utterly misunderstood the significance of his plea as to render it invalid." Our decision was predicated in large part on the fact that while some documents related to the plea were in the appellate record, no transcript of the original plea or sentencing hearings was available. Consistent with general policy, the court reporter had not preserved her notes beyond the five-year period subsequent to the proceedings and no transcript had been previously prepared.

Following the remand, the circuit court appointed an attorney to represent Brown on the motion. The court conducted an evidentiary hearing on December 15, 1998, at which the

witnesses included Brown; George Sornberger; June Woodyard; the court reporter at the time of Brown's plea; and retired Judge C. R. Luker, the trial judge who had presided over Brown's case and whose testimony was admitted by way of an audio-tape deposition. Brown's attorney acknowledged that the evaluation of Brown by personnel at KCPC and neurological tests conducted at the University of Louisville prior to the guilty plea indicated that he was competent to stand trial, and he offered no evidence to dispute that finding. Brown, however, testified that he did not understand the terms of the plea agreement. He stated that he believed that under the agreement he would receive either a sentence of imprisonment for twenty-five years, or a life sentence, and that he would be eligible for parole after serving eight years. Brown based his misunderstanding of the terms of the plea agreement on his lack of education and very poor reading skills. Brown stated that he had only a second or third grade education and although admitting that he signed the proposed plea agreement, he had to get another person to read it to him. On cross-examination, however, he admitted having entered guilty pleas in four prior felony prosecutions prior to the guilty plea in the present case.

Sornberger testified that he had discussed the plea offer with Brown on several occasions in meetings and through correspondence. Sornberger stated that he expended extra effort to explain the plea offer and the sentence of life without the benefit of parole under the new statute because retroactive reliance on the new sentence under the recently enacted statute

was an unusual situation. He stated that he had obtained information from Department of Corrections' personnel on their policy for applying good time credit to the twenty-five year parole eligibility time frame and had specifically explained it to Brown because it was not widely known at the time given the recent creation of that sentence in the new statute. Sornberger said that he believed Brown understood the plea agreement prior to entering his guilty plea.

Judge Luker also stated in his deposition that although he did not specifically recall Brown's guilty plea hearing, he regularly followed a standard procedure recommended by the Administrative Office of the Courts from a desk reference bench book outlining the questions and guidelines necessary to comply with constitutional law.⁴ Finally, Sornberger confirmed that Judge Luker followed his typical procedure during Brown's guilty plea hearing and had also specifically discussed Brown's competency and the report from KCPC during the proceeding.

On January 21, 1999, following the submission of legal memoranda by Brown's attorney and the Commonwealth's Attorney, the circuit court entered an opinion and order denying the RCr 11.42 motion. The court found that Brown was competent to plead guilty and that he had failed to show that he did not understand the effects of the guilty plea. It held that the plea was entered voluntarily, knowingly, and intelligently as required by

⁴ The Commonwealth introduced into evidence at the hearing a copy of the sections dealing with guilty pleas and sentencing hearings from the desk reference that was discussed by Judge Luker in his deposition.

Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). This appeal followed.

On appeal, Brown seeks to vacate his sentence arguing that it is invalid. First, he contends that the circuit court lacked jurisdiction to impose the sentence because the statute authorizing the sentence of life without the benefit of parole for twenty-five years, KRS 532.030, was not in effect at the time of the plea. Second, Brown asserts that application of the statute to his offense violates the prohibition on ex post facto laws. Third, he contends that the trial court incorrectly found that he entered the plea knowingly, intelligently, and voluntarily. Where the trial court conducts an evidentiary hearing on an RCr 11.42 motion, as in this case, "the reviewing court must defer to the determinations of fact and witness credibility made by the trial judge." Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 909 (1998), cert. denied, 526 U.S. 1025, 119 S. Ct. 1266, 143 L. Ed. 2d 361 (1999).

As an initial matter, we believe that Brown is foreclosed from raising the ex post facto issue based upon the doctrine of law of the case. Under this rule, a final decision by an appellate court, whether right or wrong, is conclusive of the questions resolved therein. Hardaway Management Co. v. Southerland, Ky., 977 S.W.2d 910, 915 (1998); See also Ellis v. Jasmin, Ky., 968 S.W.2d 669, 670 (1998) and Williamson v. Commonwealth, Ky., 767 S.W.2d 323, 325 (1989). The prior decision is binding on the parties and the trial court and the parties and those issues cannot be reconsidered in a subsequent

appeal to the same court. Haight v. Commonwealth, Ky., 938 S.W.2d 243, 250 (1996). In the current case, Brown raised the issue of the ex post facto application of KRS 532.030(1) in his initial appeal. This Court affirmed the trial court's rejection of this argument in our first decision and remanded the case for further proceedings on the other issues raised in the RCr 11.42 motion. Consequently, this Court's decision on appeal is binding on the parties and may not be relitigated in this appeal.

Nevertheless, to the extent that Brown's position raises an issue of jurisdictional defects in his sentencing, we still find no error. Brown contends that the trial court lacked jurisdiction to sentence him to life without parole for twenty five years under KRS 532.030(1) because that statute had not become effective prior to the date he committed the offenses. However, Brown expressly waived retroactive application of KRS 532.030(1) based in part upon KRS 446.110. The latter statute allows retroactive application of a statute, with the consent of the party affected, if the new statute would act to mitigate a penalty otherwise applicable.

Recently, in Commonwealth v. Phon, Ky. 17 S.W.3d 106 (2000), the Kentucky Supreme Court held that an amendment to the capital sentencing range to add the sentence of life without parole could be applied retroactively pursuant to KRS 446.110 because the addition of the new sentence served to mitigate the possible sentence of death. Id. at 108. Similarly, in Russell v. Commonwealth, Ky., 992 S.W.2d 871 (1999), this Court recently held that a trial court had the authority to sentence a defendant

to a plea agreement in which he agreed to a retrospective application of KRS 439.3401, which provided for a greater period before initial parole eligibility than existed under the prior law.. This Court found that the plea agreement informed the appellant that the statute was being applied retroactively, and that the new twelve year minimum was not outside the law as it existed at the time of the offense. Id. at 876.

In this case the plea agreement document clearly states that although KRS 532.030 was not effective until after the crimes were committed, Brown was agreeing to the application of that statute and waived any ex post facto challenge to its application. Brown's attorneys sought application of the statute to Brown because it provided an alternative to a possible death penalty. Prior to July 15, 1986, defendants receiving a life sentence generally were eligible for parole after serving eight years of their sentence under administrative regulation. This policy merely created a minimum date for an initial review for parole. There was no statute prohibiting a later initial parole review date. Even though the sentence Brown received was not explicitly set out in the prior statutes, it did not violate any statute in effect at the time the offenses were committed. Therefore, our initial decision rejecting the ex post facto argument was justified on the merits. See also Commonwealth v. Phon, 17 S.W.3d at 109 (2000) (Cooper, J., concurring) (stating defendant waived any possible ex post facto claim by seeking retroactive application of statute adding sentence of life without parole to capital sentencing range).

With respect to the issues of whether Brown was competent and entered his guilty plea knowingly, intelligently, and voluntarily, we agree with the trial court that the record indicates Brown was competent and he understood the significance and consequences of this plea. A criminal defendant may not plead guilty unless he does so "competently and intelligently." Godinez v. Moran, 509 U.S. 389, 396, 113 S. Ct. 2680, 2685, 125 L. Ed. 2d 321 (1993) (citing Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 2d 1461 (1938)); Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). The issue of a defendant's competency, however, 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, 43 L. Ed. 2d 103 (1975). On the other hand, 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 401 n. 12, 113 S. Ct. at 2687 n. 12. A trial court must determine both that a defendant who seeks to plead guilty is competent, and that the waiver of constitutional rights is "knowing and voluntary." Id. at 400, 113 S. Ct. at 2687.

As to competency, Brown was evaluated at KCPC and had neurological tests done at the University of Louisville. Dr. Johnson submitted a report describing the evaluation and concluding that Brown was competent. George Sornberger testified

at the hearing that Judge Luker discussed the report and inquired about Brown's competency at the guilty plea hearing. Brown offered no evidence at the RCr 11.42 hearing to rebut or discredit the trial court's original finding that he was competent. Thus, Brown has not shown that the circuit court's finding on remand that he was competent to enter the guilty plea was incorrect.

As to the issue of whether Brown entered the plea knowingly and voluntarily, the test 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); Russell v. Commonwealth, Ky. App., 992 S.W.2d 871 (1999). The validity of a guilty plea is determined from the totality of the circumstances surrounding it, rather than from reference to some magical incantation recited at the time it was taken. Kotas v. Commonwealth, Ky., 565 S.W.2d 445, 447 (1978); Centers, 799 S.W.2d at 54; Sparks v. Commonwealth, Ky. App., 721 S.W.3d 736, 727 (1987).

Brown's complaint centers on the prison sentence contained in the plea agreement. He testified at the hearing that he believed he would receive a sentence of twenty-five years or a life sentence and that he would become eligible for parole after having serving eight years. As the circuit court noted, however, there is extensive evidence conflicting with this position.

First, George Sornberger testified that he expended extra effort to explain the proposed sentence of life without the benefit of parole for twenty-five years to Brown through several meetings and written correspondence because it was somewhat novel at that time. In a June 28, 1985, letter to Brown explaining the plea offer, defense counsel repeatedly referred to the sentence as twenty-five years without parole. It states that the prosecution wanted a guilty plea to the PFO I charge as well to ensure that should the twenty-five years without parole provision be declared invalid at a later date, Brown would be subject to a ten-year parole ineligibility requirement under the PFO conviction. The letter also contrasts the proposed sentence to the life sentence with parole eligibility after eight years which Robert Smith, his co-defendant, would be subject to under his guilty plea. The letter also explicitly states that under the plea agreement Brown would not meet with the Parole Board until November 2008. Sornberger testified that he believed that Brown understood the terms of the plea agreement.

In addition, the proposed plea agreement document which Brown admitted having signed explicitly states three times that the sentence would be imprisonment for life without benefit of parole for twenty-five years. Although Brown asserts that he was unable to read the document, he stated that someone read it to him and Sornberger testified that he reviewed the document with Brown. We agree with the circuit court that while novel, the sentence was not an especially difficult concept to comprehend or understand.

Finally, Brown was familiar with the legal system. Prior to entering his August 1985 plea, he had pled guilty to felony offenses on four other occasions and he had been released on parole at the time when he committed the offenses in the current case.

Based on the totality of the circumstances, we cannot conclude the circuit court acted improperly in discrediting Brown's proffered interpretation of the sentence he would receive under the plea agreement and in finding that he understood the plea agreement. Brown has failed to show that he was not competent or that his guilty plea was not entered knowingly, intelligently, and voluntarily. Accordingly, the trial court did not err in denying Brown's RCr 11.42 motion.

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

ALL CONCUR.

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