

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002337-MR

MARVIN DAY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 97-CI-001130

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BARBER, BUCKINGHAM, AND MILLER, JUDGES.

BARBER, JUDGE: Marvin Day (Day), pro se, appeals the order of the Jefferson Circuit Court denying his RCr 11.42 motion for relief from a guilty plea to first-degree murder and two (2) counts of first-degree wanton endangerment. Having reviewed the record and applicable law, we affirm.

During a backyard party on May 4, 1997, Day intentionally fired one gunshot into the head of Daryl Hayes followed by his firing four (4) random shots into an alarmed and scrambling crowd. Due to the outdoor nature of the party, numerous attendants witnessed the event. On May 12, 1997, Day was indicted on the above-described offenses.

Upon Day's motion, the court ordered that a psychiatric evaluation be conducted in order to ascertain whether he was

competent to stand trial. The clinical results of that examination and report of the evaluators were produced on August 28, 1997. On September 30, 1997, Day pled guilty pursuant to a plea agreement with the Commonwealth. Having waived a formal sentencing hearing, the court sentenced Day to 30 years on the murder charge, and five years for each wanton endangerment charge to run, concurrently for a total term of 30 years.

On September 14, 2000, Day, pro se, filed a motion pursuant to RCr 11.42 seeking post-conviction relief from his sentence. Day alleged: (1) the trial court erred in accepting his guilty plea absent a competency hearing, (2) his trial counsel's failure to object to same constituted ineffective assistance and (3) the court erred in accepting guilty pleas to wanton endangerment when there was insufficient proof for a conviction on said charges substantially prejudicing Day. Day further tendered motions requesting the appointment of counsel and an evidentiary hearing. The trial court denied all the above-described motions. This appeal ensued.

Before this Court, Day contends that: (1) the court erred in denying his motion for an appointment of counsel, (2) he suffered prejudicial error as a result of the trial court refusing his motion to conduct a competency hearing, (3) he received ineffective assistance of counsel in that trial counsel waived same and (4) there was insufficient evidence for conviction on the charges of wanton endangerment; therefore, the court erred in accepting pleas of guilty on those charges. We disagree and discuss the reasons therefor in logical sequence.

With regard to Day's contention that he was entitled to a competency hearing, the record reflects that trial counsel requested such a hearing be conducted on September 4, 1997. However, at the time Day entered his guilty pleas, trial counsel stated, for the record, that competency was not an issue and waived the right to a hearing.

KRS 504.100(1) requires the court to appoint a psychologist or psychiatrist "to examine, treat and report on the defendant's mental condition" at any time "the court has reasonable grounds to believe that the defendant is incompetent to stand trial." KRS 504.100(3) provides that following the filing of such a report, "the court shall hold a hearing to determine whether the defendant is competent to stand trial." Unquestionably, subsection (3) is mandatory.

On appeal, however, the standard of review is "[w]hether a reasonable judge, situated as was the trial court judge whose failure to conduct an evidentiary hearing is being reviewed, should have experienced doubt with respect to competency to stand trial.'" Mills v. Commonwealth, Ky., 996 S.W.2d 473, 486 (1999) (quoting Williams v. Bordenkircher, 696 F.2d 464, 476 (6th Cir. 1983)). Day's psychiatric evaluation specifically concluded that he was competent to stand trial as he was able to understand the proceedings, charges against him and assist in his own defense. Moreover, the record reflects the trial judge did not order the psychiatric examination on the basis that he had not observed or otherwise perceived reasonable grounds upon which to question Day's competency to stand trial.

Rather, the evaluation was ordered in response to Day's motion requesting same. We conclude that Day has failed to demonstrate that there was any factual basis which would have caused the trial court to encounter reasonable doubt as to his competence to stand trial. Hence, permitting him to waive the mandatory hearing of KRS 504.100(3) operated as harmless error. Mills, 996 S.W.2d at 486.

Day further posits that there was insufficient evidence for a conviction on the wanton endangerment charges. However, we note that this issue is not proper for a RCr 11.42 post-conviction proceeding. Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856 (1983). Even if his claim were viable, by virtue of having entered a guilty plea he is precluded from raising same. King v. Commonwealth, Ky., 408 S.W.2d 622 (1966). Nonetheless, the record contains the statements of numerous eye-witnesses who reported that Day fired approximately four (4) random shots into the crowd after shooting Daryl Hayes in the head. Furthermore, the trial court adequately reviewed the conduct giving rise to these charges with Day prior to accepting his guilty plea.

As a final matter, Day claims that in accordance with KRS 31.110 and RCr 11.42 he was entitled to the appointment of counsel in an effort to have his conviction vacated. The Criminal Rule provides for appointed counsel only "[i]f the answer raises a material issue of fact that cannot be determined on the face of the record" RCr 11.42(5). The record discloses that the trial court reviewed all matters raised in Day's RCr 11.42 motion during the course of conducting the

requisite colloquy prior to accepting his guilty plea. As such, the test of Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) was satisfied. An evidentiary hearing was completely unnecessary for the resolution of Day's contentions. Under circumstances such as these, failure of the trial court to appoint counsel as directed by KRS 31.110 was harmless error. Commonwealth v. Stamps, Ky., 672 S.W.2d 336 (1984).

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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