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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000906-MR

DONALD SELBY — APPELLANT

v.

APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE SAM H. MONARCH, JUDGE
ACTION NO. 97-CR-00037

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER, BUCKINGHAM, and COMBS, Judges.

COMBS, JUDGE: Donald Selby appeals from an order of the Grayson Circuit Court denying his motion for post-conviction relief pursuant to RCr[1] 11.42. We affirm.

On April 1, 1997, Selby was indicted for four counts of first-degree wanton endangerment (KRS[2] 508.060) and one count of operating a motor vehicle while a license is revoked or suspended for driving under the influence, third or subsequent offense (KRS 189A.090). Three of the wanton endangerment charges involved a

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[1] Kentucky Rules of Criminal Procedure.

[2] Kentucky Revised Statutes.

vehicle occupied by three of his children when on August 13, 1994, Selby allegedly operated the motor vehicle in a reckless manner, while under the influence of alcohol, and while the children were unrestrained by seat belts. The fourth wanton endangerment charge resulted from the allegation that following his stop for these charges, Selby physically pulled a police officer off a bluff while trying to avoid arrest.

On August 14, 1997, the wanton endangerment charge concerning the police officer was dismissed. On August 29, 1997, pursuant to an offer on a plea of guilty by the Commonwealth, Selby filed a motion to enter a guilty plea. Under the plea bargain, Selby agreed to plead guilty to three counts of first-degree wanton endangerment and one count of third-offense operating a motor vehicle on a suspended license for DUI; in return, the Commonwealth agreed to recommend four years on each count — to run concurrently. Following a hearing, the trial court entered an order accepting the plea. On October 8, 1997, the trial court entered final judgment and sentence pursuant to the plea agreement.

On November 8, 1999, Selby filed a motion for post-conviction relief pursuant to RCr 11.42. On March 20, 2000, the trial court entered an order denying the motion without conducting an evidentiary hearing. This appeal followed.

Selby contends: (1) that he received ineffective assistance of counsel in making his decision to enter a guilty plea and (2) that the entry of his guilty plea was not knowingly and intelligently made. Both of these claims are based upon

Selby's assertion that he had never sought — nor had he been issued — a Kentucky operator's license; consequently, he had never been issued a license which could have been subject to suspension for DUI under KRS 189A.070. According to Selby's theory, even though he has had various DUI convictions in Kentucky, Kentucky does not have the power to revoke or suspend his out-of-state license. Hence, his license has never been revoked or suspended pursuant to KRS 189A.070.

In order to establish effective assistance of counsel, a person must satisfy a two-part test showing that counsel's performance was deficient and that the deficiency resulted in actual prejudice affecting the outcome. Strickland v. Washington, 466 U.S. 668, 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 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. 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); Casey v. Commonwealth, Ky.App., 994 S.W.2d 18, 23 (1999).

In this case, Selby has not shown that trial counsel's performance was deficient under the first prong of Strickland. Selby's Courtnet Disposition System criminal record disclosed two prior convictions for operating on a license suspended for DUI under 189A.090. Based upon this information, the present indictment would have appeared accurate to trial counsel. Further, we note that the legal theory which Selby advances in his RCr 11.42 motion involves an issue which has never been ruled upon by a Kentucky appellate court; his theory as to the relevant statutes is not presently supported by legal precedent. In addition, the record discloses that on August 14, 1997, trial counsel filed a motion seeking to dismiss the driving on a suspended license charge based upon the absence of a Department of Transportation (DOT) driving record under Selby's name or Social Security number. Attached to the motion was an affidavit from a DOT employee confirming the absence of a DOT driving record for Selby. These efforts reflect that trial counsel was performing effectively in establishing a defense against the KRS 189A.090 charge.

In conjunction with or at approximately the same time that the plea bargain was agreed upon, counsel withdrew the motion to dismiss. We agree that it was sound trial strategy for trial counsel to abandon the motion to dismiss in order to secure the favorable terms of the plea agreement. At the time of the plea agreement, Selby was under indictment for four Class D felonies; if convicted, he was at risk of receiving a total sentence of up to twenty years. Pursuant to the plea agreement,

he was required to serve only four years.[3] After reviewing the totality of the record and circumstances, we are persuaded that trial counsel rendered effective assistance under the first prong of Strickland.

Selby has also failed to demonstrate that his guilty plea was not knowingly and voluntarily entered. In determining the validity of guilty pleas in criminal cases, the plea must represent a voluntary and intelligent choice among the alternative courses of action available to the defendant. North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970); Sparks v. Commonwealth, Ky.App., 721 S.W.2d 726 (1986). The United States Supreme Court has held that both federal and state courts must specifically determine that guilty pleas are voluntarily and intelligently made by competent defendants. Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). Since pleading guilty entails the waiver of several critical constitutional rights — including the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers, a waiver of these rights cannot be presumed from a silent record. The court must question the accused to ascertain that he has a full understanding of what the plea connotes and of its consequences, and this determination should become a part of the record. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969); Centers v.

[3]There is also information in the record to the effect that the Commonwealth was threatening to indict Selby as a persistent felony offender, a charge which was apparently avoided by the plea agreement.

Commonwealth, Ky. App., 799 S.W.2d 51, 54 (1990); D.R. v. Commonwealth, Ky. App., 64 S.W.3d 292, 294 (2001).

In this case, the trial court held a hearing on the plea agreement and engaged in textbook Boykin colloquy with Selby. The trial court went through a list of each of the constitutional rights that Selby was waiving by pleading guilty, and Selby acknowledged both his understanding of those rights and the fact that he was waiving them.

Selby claims that there could not have been a knowing and voluntary guilty plea because he did not believe that he was subject to conviction under KRS 189A.090 due to his lack of a Kentucky driver's license. As previously noted, this issue has never been passed upon by the Kentucky appellate courts. The validity of Selby's plea could not be deemed to be affected by the speculative state of an untested legal theory. Since a motion to dismiss the charge had been filed, Selby was aware that there had been a potential defense to this charge, a defense which he specifically abandoned in exchange for the plea agreement.

Selby's argument as to a non-existent license may be treated as a claim of insufficiency of evidence. Even so, a valid guilty plea waives all non-jurisdictional defenses except that the indictment charged no offense. Hughes v. Commonwealth, Ky., 875 S.W.2d 99, 100 (1994). A valid guilty plea also constitutes an admission to the underlying elements of the offense. Skeans v. Commonwealth, Ky. App., 912 S.W.2d 455, 456-57 (1995). Entry of a voluntary, intelligent plea of guilty

precludes a post-judgment challenge to the sufficiency of the evidence. Lovett v. Commonwealth, Ky., 858 S.W.2d 205, 207 (1993). A guilty plea is more than a general confession which admits that the accused committed various acts. Boykin, 395 U.S. at 242, 89 S. Ct. at 1711. Rather, it is an "admission that he committed the crime charged against him." Alford, 400 U.S. at 32, 91 S. Ct. at 164. By entering a plea of guilty, the accused is not simply stating that he performed the discrete acts described in the indictment; he is admitting guilt of a substantive crime. United States v. Broce, 488 U.S. 563, 570, 109 S. Ct. 757, 762, 102 L. Ed.2d 927 (1989). As a result, Selby is precluded from now claiming that there was insufficient evidence (*i.e.*, no evidence of a suspended license) to convict him under KRS 189A.090.

Finally, because the allegations in Selby's motion could be resolved from the face of the record, an evidentiary hearing was not required. Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 452 (2001). Therefore, since an evidentiary hearing was not required, Selby was not entitled to appointment of trial counsel. Id.

The judgment of the Grayson Circuit Court is affirmed.

ALL CONCUR.

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