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Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002684-MR

MELVIN BURROWS, JR.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 00-CR-00558

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: GUDGEL,¹ JOHNSON AND McANULTY, JUDGES.

JOHNSON, JUDGE: Melvin Burrows, Jr., has appealed pro se from an order entered by the Fayette Circuit Court on November 14, 2001, which denied his RCr² 11.42 motion to vacate his sentence. Having concluded that the trial court did not abuse its discretion by denying Burrows's motion, we affirm.

¹Judge Gudgel concurred in this opinion prior to his retirement effective November 1, 2002.

²Kentucky Rules of Criminal Procedure.

Burrows was indicted on May 22, 2000, by a Fayette County grand jury for rape in the first degree,³ sodomy in the first degree,⁴ and being a persistent felony offender in the first degree (PFO I)⁵ arising out of the sexual assault of his wife, Sonia, occurring on March 12, 2000. Burrows appeared with his appointed counsel at his arraignment on May 26, 2000, and entered a plea of not guilty. A pre-trial conference was originally set for June 9, 2000, rescheduled for June 28, 2000, and then held on July 7, 2000.

On June 27, 2000, the day before a scheduled status hearing, the trial judge received four hand-written letters concerning Burrows's case. In one letter, Sonia claimed that Burrows's did not commit these crimes. She claimed that they had had consensual sex and that she had lied to the authorities because she was angry with Burrows. The other three letters were from Burrows's daughter and stepdaughters. These letters did not discuss Burrows's guilt or innocence, but asked the judge for leniency.

At the status hearing on July 7, 2000, the case was scheduled for trial on September 19, 2000. On September 8, 2000, the Commonwealth filed a motion for the trial court "to determine whether Sonia Burrows had a legitimate privilege to refuse to testify at the trial of this case." The record does not include

³Kentucky Revised Statutes (KRS) 510.040.

⁴KRS 510.070.

⁵KRS 532.080(3).

an order ruling on this motion, but at a hearing on September 19, 2000, the trial judge orally ruled that Sonia would be allowed to assert her Fifth Amendment right not to testify, but the Commonwealth would be allowed to proceed with the prosecution of Burrows based on Sonia's statements which would be admitted into evidence under the hearsay exceptions for an excited utterance and medical treatment and that Sonia's medical records from an examination following the incident would also be admitted into evidence.

On October 27, 2000, Burrows signed a waiver of further proceedings with petition to enter plea of guilty to the amended charge of sexual abuse in the first degree.⁶ On November 2, 2000, the trial court entered a judgment on guilty plea and final sentence of imprisonment. Burrows was sentenced to prison for a term of one year and an additional period of conditional discharge of three years following his release from incarceration upon expiration of his sentence of imprisonment or from completion of parole.

On June 15, 2001, Burrows filed a pro se RCr 11.42 motion to vacate his sentence.⁷ In a one-page order entered on November 14, 2001, the trial court denied Burrows's RCr 11.42 motion. This appeal followed.

⁶KRS 510.110.

⁷The Department of Public Advocacy was appointed to represent Burrows. However the "supplement" it filed on September 28, 2001, stated that "[i]t appears to counsel that all issues that could potentially be raised under an RCr 11.42 motion" have been raised.

In Burrows's brief, which is very difficult to understand, he appears to have raised six issues for our consideration: (1) he claims that the trial judge improperly withheld exculpatory evidence from him; (2) he claims that his trial counsel provided him with ineffective assistance of counsel, which caused him to plead guilty; (3) he claims that he was coerced into pleading guilty so his guilty plea was not voluntarily, intelligently, and knowingly entered; (4) he claims that he is being subjected to an illegal sentence; (5) he claims he was entitled to a default judgment; and (6) he claims he was entitled to an evidentiary hearing.

In general, the Sixth and Fourteenth Amendments to the United States Constitution mandate that a defendant charged with a crime receive effective assistance of counsel.⁸ To establish counsel's ineffectiveness, a movant must show (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance as counsel was not performing as guaranteed by the Sixth Amendment, and (2) that the deficient performance prejudiced the defense so seriously that it affected the process whereby the end result would have been different.⁹ When an appellant challenges a

⁸United States v. Ash, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973); Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); Hopewell v. Commonwealth, Ky.App., 687 S.W.2d 153, 154 (1985).

⁹Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); Taylor v. Commonwealth, Ky.App., 724 (continued...)

guilty plea based on ineffective counsel, he must show both that counsel made serious errors outside the wide range of professionally competent assistance, 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 appellant would not have pled guilty, but would have insisted on going to trial.¹⁰ The burden is on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient.¹¹ An allegation of ineffective assistance of counsel does not state grounds for relief under a RCr 11.42 motion unless the motion alleges sufficient facts to show that counsel's representation was inadequate.¹²

When a case is resolved by a plea of guilty, the guilty plea must represent a voluntary and intelligent choice among the alternative courses of action open to a defendant.¹³ The trial court must determine that a defendant's guilty plea is

⁹(...continued)
S.W.2d 223, 226 (1986); Brewster v. Commonwealth, Ky.App., 723 S.W.2d 863, 864 (1986).

¹⁰Hill, 474 U.S. at 58; Phon v. Commonwealth, Ky.App., 51 S.W.3d 456, 459-60 (2001); Casey v. Commonwealth, Ky.App., 994 S.W.2d 18, 22 (1999).

¹¹Strickland, 466 U.S. at 689; Commonwealth v. Pelphrey, Ky., 998 S.W.2d 460, 463 (1999).

¹²Thomas v. Commonwealth, Ky., 459 S.W.2d 72 (1970); Evans v. Commonwealth, Ky., 453 S.W.2d 601 (1970); McCarthy v. Commonwealth, Ky., 432 S.W.2d 50 (1968).

¹³North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970); Centers v. Commonwealth, Ky.App., 799 S.W.2d 51, 54 (1990); Sparks v. Commonwealth, Ky.App., 721 S.W.2d 726 (1986).

intelligent and voluntary, and this determination must be put in the record.¹⁴ The validity of a guilty plea must be determined from considering the totality of circumstances surrounding it.¹⁵ These circumstances include the accused's demeanor, background and experience, and whether the record reveals that the plea was voluntarily made.¹⁶ Solemn declarations made in open court carry a strong presumption of verity.¹⁷ The trial court is in the best position to determine if there was any reluctance, misunderstanding, involuntariness, or incompetence by the defendant in pleading guilty.¹⁸ If the record refutes the claim of error, there is no basis for granting an evidentiary hearing on an RCr 11.42 motion.¹⁹ An evidentiary hearing is only required on an RCr 11.42 motion if the issues presented cannot be fairly determined on the face of the record.²⁰

Three of the issues raised by Burrows concern whether his guilty plea was entered voluntarily, intelligently and

¹⁴Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969); Centers, supra; Sparks, supra at 727.

¹⁵Commonwealth v. Crawford, Ky., 789 S.W.2d 779, 780 (1990); Centers, supra; Kotas v. Commonwealth, Ky., 565 S.W.2d 445, 447 (1978).

¹⁶Centers, supra; Sparks, supra; Littlefield v. Commonwealth, Ky.App., 554 S.W.2d 872 (1977).

¹⁷Blackledge v. Allison, 431 U.S. 63, 74, 97 S.Ct. 1621, 1629, 52 L.Ed.2d 136 (1977).

¹⁸Centers, supra (citing Blackledge, supra).

¹⁹Glass v. Commonwealth, Ky., 474 S.W.2d 400, 401 (1971).

²⁰Newsome v. Commonwealth, Ky., 456 S.W.2d 686, 687 (1970).

knowingly, to wit: (1) whether the trial judge withheld exculpatory evidence; (2) whether his trial counsel provided ineffective assistance; and (3) whether he was coerced into pleading guilty. Based on our review of the videotapes of the hearings of record, we conclude that none of these claims has merit.

As the trial court noted in its order denying RCr 11.42 relief, Burrows was aware that the victim stated in open court that he was not guilty of the charges, but that the Commonwealth chose to pursue the charges against him even with a hostile victim. This bare allegation by Burrows that he was denied exculpatory evidence is clearly refuted by the record and he is not entitled to any relief.²¹ In order for a movant to establish his claim of ineffective assistance of counsel, he must produce sufficient evidence to support his allegations.²² Burrows failed to produce any evidence to support this claim and he was not entitled to any relief on this claim.

Burrows also makes a general claim that he was denied the effective assistance of counsel, but he fails to identify the specific grounds for his claim.²³ A movant "must do more than raise doubt about the regularity of the proceedings under which he was convicted. He must establish convincingly that he has been deprived of some substantial right which would justify the

²¹Brown v. Commonwealth, Ky., 397 S.W.2d 160, 161 (1965).

²²King v. Commonwealth, Ky., 408 S.W.2d 204, 205 (1966).

²³Id.

extraordinary relief afforded by this post-conviction proceeding."²⁴ A court must indulge in a strong presumption that trial counsel's performance fell within the wide range of reasonable professional assistance.²⁵ Burrows has failed to establish grounds for relief on his claim of ineffective assistance of counsel.

The third issue raised by Burrows which is related to his claim that his guilty plea was not properly entered is his claim that he was coerced into pleading guilty. Again, Burrows has failed to provide any specific facts to support this bare allegation. However, we note that it is not ineffective assistance for trial counsel to recommend a plea of guilty. Under the original charges, Burrows could have received a life sentence, but the amended charge he pled guilty to was only a Class D felony and he received the minimum one-year sentence. It is proper for counsel to influence a defendant in accepting an offer to plead guilty when a lighter sentence is assured.²⁶ Burrows's claim of ineffective assistance of counsel is without merit.

We have reviewed the videotape of the colloquy when Burrows entered his guilty plea. The trial judge was very

²⁴Pelphrey, supra at 462 (quoting Commonwealth v. Campbell, Ky., 415 S.W.2d 614, 616 (1967)).

²⁵Strickland, supra; Wilson v. Commonwealth, Ky., 836 S.W.2d 872, 878 (1992), cert denied, 507 U.S. 1034, 113 S.Ct. 1857, 123 L.Ed.2d 479 (1993).

²⁶Campbell, supra; Osborne v. Commonwealth, Ky.App., 992 S.W.2d 860, 864 (1999).

thorough and patient in accepting Burrows's guilty plea. The trial judge carefully asked Burrows if he was voluntarily waiving his various constitutional rights, if he was satisfied with his counsel, if he needed any more time, if he was under the influence of any alcohol, drugs, or medication, and if he desired to plead guilty. The trial court properly determined that the plea of guilty was entered voluntarily, intelligently and knowingly.

Burrows additionally argues that his sentence should be vacated because it improperly subjects him to a three-year conditional discharge under KRS 532.043. However, Burrows's reliance on Purvis v. Commonwealth,²⁷ is misplaced since in Purvis, the offenses occurred before July 15, 1998, the effective date of the statute. Burrows stands convicted of an offense which occurred on March 12, 2000, and this conviction is clearly subject to KRS 532.043.

Burrows also claims that the trial court erred by not granting him a default judgment. However, he was not entitled to a default judgment, since the Commonwealth is not required to file a response to a RCr 11.42 motion.²⁸

Finally, Burrows claims that the trial court erred by not holding an evidentiary hearing. As previously stated, since Burrows's allegations were all clearly refuted by the record,

²⁷Ky., 14 S.W.3d 21 (2000).

²⁸Polsgrove v. Commonwealth, Ky., 439 S.W.2d 776, 778 (1969).

there was no basis for an evidentiary hearing.²⁹ An evidentiary hearing is only required when the RCr 11.42 motion presents an issue which cannot be fairly determined on the face of the record.³⁰ The trial court did not err by denying an evidentiary hearing.³¹

For the foregoing reasons, the Fayette Circuit Court's order denying RCr 11.42 relief is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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²⁹Glass, supra.

³⁰Newsome, supra.

³¹Hopewell v. Commonwealth, Ky.App., 687 S.W.2d 153, 154 (1985).