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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court of Appeals

NO. 2002-CA-000799-MR

DAVID L. CARR — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 97-CR-003029

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; BAKER AND JOHNSON, JUDGES.

JOHNSON, JUDGE: David L. Carr has appealed, pro se, from an order of the Jefferson Circuit Court entered on March 15, 2002, which denied his RCr[1] 11.42 motion to vacate, set aside, or correct his sentence. Having concluded that all of Carr's claims of error are without merit, we affirm.

[1] Kentucky Rules of Criminal Procedure.

On December 11, 1997, Carr was indicted by a Jefferson County grand jury on two counts of murder,[2] two counts of robbery in the first degree,[3] and on one count of tampering with physical evidence.[4] The grand jury charged that on or between November 19, 1997, and December 4, 1997, Carr and two accomplices robbed and murdered Jodean Nichols and Kristy Motley, and then tampered with evidence in an attempt to conceal the crimes. On January 13, 1999, pursuant to KRS 532.025, the Commonwealth filed notice that aggravating circumstances existed and that punishments of death and/or life in prison without the possibility of parole could be authorized.[5]

Rather than go to trial, Carr elected to enter guilty pleas to all of the charges in his indictment. As part of its plea offer, the Commonwealth stated that it intended to argue for a sentence of life in prison without the possibility of parole on the murder convictions, but that the death penalty and a sentence of less than life in prison without the possibility

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[2] Kentucky Revised Statutes (KRS) 507.020. Murder is a capital offense.

[3] KRS 515.020. Robbery in the first degree is a Class B felony.

[4] KRS 524.100. Tampering with physical evidence is a Class D felony.

[5] The crimes for which Carr was charged were committed on or around November 24, 1997. KRS 532.025 was amended on July 15, 1998, to include life in prison without the benefit of probation or parole as a sentencing option in capital offense cases. On November 19, 1999, Carr filed a notice with the trial court wherein he agreed to allow the court to consider sentencing him to life in prison without the possibility of parole. Specifically, Carr stated that "[i]t is [Carr's] belief that under the particular circumstances of this case, including the proposed plea agreement, the penalty of [l]ife [w]ithout the [b]enefit of [p]robation or [p]arole is mitigating as an alternative to a death sentence."

of parole for 25 years would be excluded from consideration. In addition, the Commonwealth agreed to recommend 20 years' imprisonment on each of the two robbery convictions and 5 years' imprisonment on the tampering with physical evidence conviction. On November 30, 1999, the trial court accepted Carr's guilty pleas to all five charges.

On December 28, 1999, after a pre-sentence investigation had been completed and after a three-day sentencing hearing was held, the trial court sentenced Carr to life in prison without the possibility of parole on each murder conviction, 20 years' imprisonment on each robbery conviction, and five years' imprisonment on the tampering with physical evidence conviction.[6]

On May 4, 2001, Carr filed a pro se RCr 11.42 motion to vacate, set aside, or correct his sentence, on the grounds that he had received ineffective assistance of counsel. Carr argued, inter alia, that his defense counsel had been ineffective by allowing him to be sentenced in violation of the Ex Post Facto Clause of the United States Constitution,[7] and by "coercing" him to plead guilty while under the influence of prescription drugs. On December 21, 2001, after having counsel

[6] The sentences for Carr's robbery and tampering with physical evidence convictions were set to run concurrently with his life in prison without the possibility of parole sentences.

[7] See U.S. Const. Art. I §10, cl. 1.

appointed, Carr filed a supplemental RCr 11.42 motion, which restated the claim that his defense counsel had been ineffective by permitting him to plead guilty while under the influence of prescription drugs. On March 15, 2002, the trial court denied Carr's RCr 11.42 motion. This appeal followed.

Carr first argues that his defense counsel was ineffective by "coercing" him into accepting a sentence of life in prison without the possibility of parole. According to Carr, the Commonwealth recommended a sentence of life in prison without the possibility of parole for 25 years, but his defense attorney somehow improperly coerced Carr into pleading to a "harsher penalty." We disagree for two reasons.

First, Carr is simply incorrect with respect to the procedural history of this case. Our review of the record shows that the Commonwealth expressly stated that it intended to "recommend and argue for a sentence of life without parole [emphasis original]." In short, there is nothing in the record to suggest that the Commonwealth ever agreed to recommend a sentence of life in prison without the possibility of parole for 25 years as part of Carr's plea agreement.

Second, Carr seems to mistakenly believe that by agreeing to plead guilty, he was entitled to his choice of sentences and that his defense counsel "coerced" him into accepting a harsher sentence. After hearing evidence regarding

both aggravating and mitigating circumstances, the trial court, as the ultimate sentencing authority,[8] imposed a sentence of life in prison without the possibility of parole for Carr's murder convictions. Accordingly, Carr's argument that his defense attorney was ineffective by somehow "coercing" him into accepting a harsher sentence is wholly without merit.

Carr next argues that his sentences of life in prison without the possibility of parole violate the Ex Post Facto Clause of the United States Constitution, and that as such, he received ineffective assistance of counsel when his defense attorney allowed him to plead guilty and receive these sentences. According to Carr, since the crime for which he was charged was committed on or around November 24, 1997, and since KRS 532.025 was amended on July 15, 1998, for the trial court to include life in prison without the possibility of parole as a sentencing option in his capital case, subjected him to a sentence that violated the Ex Post Facto Clause. We disagree.

The Ex Post Facto Clause of the United States Constitution is aimed at laws that "'retroactively alter the definition of crimes or increase the punishment for criminal

[8] See Commonwealth v. Corey, Ky., 826 S.W.2d 319, 322 (1992)(noting that a trial court is vested with final sentencing authority).

acts'" [emphasis added].[9] In Commonwealth v. Phon,[10] our Supreme Court held that the July 15, 1998, amendment to KRS 532.025, which permitted a sentence of life in prison without the possibility of parole, was a "lesser penalty than death."[11] The Supreme Court further held that under KRS 446.110, the statute could be applied retroactively with the "unqualified consent of the defendant."[12]

In the case sub judice, a notice bearing Carr's signature was filed with the trial court wherein he agreed to "allow the [c]ourt to consider the penalty of [l]ife [w]ithout the [b]enefit of [p]robation or [p]arole. . . ." Thus, since a sentence of life in prison without the possibility of parole is a "lesser sentence" than death, there was no ex post facto violation. In addition, since Carr gave his "unqualified consent" pursuant to KRS 446.110, he was properly sentenced to life in prison without the possibility of parole. Accordingly, since no ex post facto violation occurred, Carr did not receive

[9] California Dept. of Corrections v. Morales, 514 U.S. 499, 504-05, 115 S.Ct. 1597, 1601, 131 L.Ed.2d 588 (1995)(quoting Collins v. Youngblood, 497 U.S. 37, 43, 110 S.Ct. 2715, 2719, 111 L.Ed.2d 30 (1990)).

[10] Ky., 17 S.W.3d 106 (2000).

[11] Id. at 108.

[12] Id. KRS 446.110 states in part that "[i]f any penalty, forfeiture or punishment is mitigated by any provision of the new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect."

ineffective assistance of counsel when his defense attorney advised him to plead guilty.

Finally, Carr makes a generalized argument that his guilty pleas were not knowingly, voluntarily, and intelligently entered. In Centers v. Commonwealth,[13] this Court discussed the elements of a valid guilty plea:

> In determining the validity of guilty pleas in criminal cases, the plea must represent a voluntary and intelligent choice among the alternative course of action open to the defendant. The United States Supreme Court has held that both federal and state courts must satisfy themselves that guilty pleas are voluntarily and intelligently made by competent defendants. Since pleading guilty involves the waiver of several 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 determine that he has a full understanding of what the plea connotes and of its consequences, and this determination should become part of the record [citations omitted].
>
> The validity of a guilty plea must be determined not from specific key words uttered at the time the plea was taken, but from considering the totality of circumstances surrounding the plea. These circumstances include the accused's demeanor, background and experience, and whether the record reveals that the plea was voluntarily made. The trial court is in the best position to determine if there was any reluctance, misunderstanding,

[13] Ky.App., 799 S.W.2d 51, 54 (1990).

> involuntariness, or incompetence to plead guilty. Solemn declarations in open court carry a strong presumption of verity [citations omitted].

Based on our review of the colloquy between Carr and the trial court, we conclude that Carr's guilty pleas were knowingly, voluntarily, and intelligently entered. When asked about his mental state, Carr stated that he was not suffering from any mental or emotional problems and that he was not under the influence of any drugs which would affect his ability to understand the proceedings. Carr stated that he had been given sufficient time to discuss the case with his attorney and that he was satisfied with the advice she had given him.

Carr stated that no one had forced him to plead guilty, nor had anyone made any promises to him in exchange for his agreeing to plead guilty. Carr affirmatively stated that he had read and signed a form containing a waiver of further proceedings and that he understood what this waiver meant. Carr also stated that he understood he was waiving his right to appeal, his right to a jury trial, his right to remain silent, his right to confront and cross-examine witnesses against him, and his right to call witnesses on his behalf.

Carr's defense counsel stated that she had informed Carr of possible defenses and of his Constitutional rights and that she believed Carr understood those rights. When asked if

he had any questions or if there was anything that had taken place which he did not understand, Carr responded in the negative. Finally, Carr stated affirmatively on the record that he was pleading guilty to all of the charges in his indictment[14] and that he understood the range of penalties that could be imposed for each conviction. Therefore, based on the "totality of the circumstances," we conclude that Carr's guilty pleas were knowingly, voluntarily, and intelligently entered. Accordingly, the trial court did not err in accepting Carr's guilty pleas.

Based on the foregoing, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

David L. Carr, Pro Se
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BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

Michael L. Harned
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[14] Our review of the colloquy suggests that Carr entered guilty pleas to both murder charges pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). Carr stated on the record that if the case proceeded to trial, he believed that based on the sufficiency of the evidence against him, a jury would find him guilty of murder. Carr admitted to being present when both victims were killed, but denied that he was the individual who actually pulled the trigger.