

RENDERED: September 24, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-002012-MR

BEVERLY JONES

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE THOMAS McDONALD, JUDGE
ACTION NO. 98-CR-000029, 98-CR-000105 and 98-CR-000834

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: In June 1998, the Jefferson Circuit Court convicted Beverly Jones, pursuant to her guilty plea, of first-degree assault,¹ first-degree possession of a controlled substance (cocaine),² possession of drug paraphernalia,³ and

¹ KRS 508.010.

² KRS 218A.1415.

³ KRS 218A.500.

second-degree escape.⁴ The court sentenced Jones to a total of thirteen years' imprisonment.

Proceeding *pro se*, in December 2001 Jones sought relief from her conviction under RCr 11.42. She alleged that she had been incompetent to plead guilty because of a mental disease or defect and that her guilty plea had not been knowing and voluntary because it had been based on the ineffective advice of counsel. Trial counsel, allegedly, had failed to make any investigation of Jones's mental condition or to consider defenses based on it. Jones was appointed counsel, who sought funds to have Jones psychiatrically examined. Following a hearing on that issue, at which the Commonwealth was allowed to participate, the court, by order entered August 14, 2003, denied both Jones's request for funds and her RCr 11.42 motion. It is from those denials that Jones has appealed. The court erred, she maintains, by upholding her guilty plea, by denying her request for funds, and by refusing to consider her request *ex parte*, as KRS 31.185(2) provides. We affirm.

As Jones notes, punishment on the basis of an invalid guilty plea constitutes a due process violation subject to RCr

⁴ KRS 520.030.

1.42 relief.⁵ A plea is invalid if the defendant was incompetent to proceed⁶ or if the defendant's waiver of her trial-related rights was not sufficiently knowing and voluntary.⁷ To help ensure that pleas are valid, trial courts are required to interview the defendant before accepting her plea and to inquire concerning her competence, her understanding of her rights, and her willingness to waive them.⁸

A trial court may summarily dismiss an RCr 11.42 motion if the record conclusively refutes the movant's allegations or if the allegations, even if proved, would not entitle the movant to relief.⁹ In denying Jones's RCr 11.42 motion, the trial court concluded that the record of Jones's plea colloquy refutes her claims that she was incompetent and insufficiently advised.

We agree that the record of the colloquy refutes her claim of incompetence. It shows that she was lucid at the time

⁵ Brady v. United States, 397 U.S. 742, 25 L. Ed. 2d 747, 90 S. Ct. 1463 (1970); Thompson v. Commonwealth, Ky., 56 S.W.3d 406 (2001).

⁶ Thompson v. Commonwealth, *supra*.

⁷ Fraser v. Commonwealth, Ky., 59 S.W.3d 448 (2001).

⁸ Centers v. Commonwealth, Ky. App., 799 S.W.2d 51 (1990) (citing Boykin v. Alabama, 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969)).

⁹ Fraser v. Commonwealth, *supra*.

of her plea, understood both the seriousness of her predicament and the nature of the proceeding, and was capable of assisting in her defense.¹⁰ Her statements during the colloquy that she had undergone a psychiatric hospitalization about two years previously and that she was taking a prescription medication that did not impair her thought processes did not provide reason to doubt her competence given her apparently alert demeanor and her further statements indicating her understanding of the proceeding.¹¹

We also agree with the trial court, although for different reasons, that the record refutes Jones's claim that she was inadequately advised. As she notes, counsel has a duty to conduct a reasonable investigation of the case and thereupon to apprise the defendant of any viable defenses.¹² Counsel's failure to investigate and her neglect of substantial defenses

¹⁰ Fugate v. Commonwealth, Ky., 62 S.W.3d 15 (2001) (Competence to stand trial is the capacity to appreciate the nature and consequences of the proceedings and to participate rationally in the defense.); Littlefield v. Commonwealth, Ky. App., 554 S.W.2d 872 (1977) (Competence to plead guilty is measured by the same standard as competence to stand trial.)

¹¹ Mills v. Commonwealth, Ky., 996 S.W.2d 473 (1999) (A competency determination is not required unless a substantial reason to doubt the defendant's competence is either apparent to the trial court or brought to the court's attention.)

¹² Wiggins v. Smith, 539 U.S. 510, 156 L. Ed. 2d 471, 123 S. Ct. 2527 (2003). 539 U.S. 510, 156 L. Ed. 2d 471, 123 S. Ct. 2527 (2003).

can render her representation ineffective.¹³ Guilty pleas that would not have been entered but for counsel's failure to make a reasonable investigation may be deemed unknowing and hence invalid.¹⁴

Jones alleges, with some support, that she suffers, and did at the time of her offenses and guilty plea, from post-traumatic stress disorder as a result of childhood abuse. She alleges further that trial counsel made no investigation of her condition and thus failed to discover and develop viable defenses based on it. Because the record does not show what if any investigation counsel conducted, she argues, it cannot be said to refute conclusively her allegations. Thus, she claims, she is entitled at least to an evidentiary hearing.

No guilty-plea colloquy, of course, conclusively establishes that defense counsel did his or her job. That does not mean, however, that one becomes entitled to an RCr 11.42 hearing merely by alleging that counsel failed to investigate. One must allege facts sufficient to prove that counsel's decision to forego a defense or a line of investigation was unreasonable in the circumstances and that a more thorough investigation is reasonably likely to have led the claimant not

¹³ Id; Hodge v. Commonwealth, Ky., 68 S.W.3d 338 (2001); Norton v. Commonwealth, Ky., 63 S.W.3d 175 (2001).

¹⁴ Kaufmann v. United States, 109 F.3d 186 (3rd Cir. 1997); Copas v. Commissioner, 662 A. 2d 718 (Conn. 1995).

to plead guilty but to have insisted upon trial.¹⁵ The record refutes Jones's claim thus understood.

The record indicates that although no doubt painful and debilitating in some respects, the mental condition Jones alleges is not one likely to have excused either her assault or her escape. Indeed, the psychiatric associate who saw Jones in 1996 and again during her present incarceration stated that her primary problem was substance abuse, of which she has a long history. There was insufficient evidence, the associate believed, for any additional diagnosis. Jones's demeanor at the plea colloquy, too, did not suggest that she suffers from the sort of mental disability that would excuse her crimes.

That means that Jones, who had a multiple felony record, a prior escape, and was accused of very nearly killing someone by stabbing her in the abdomen, had to choose between going to trial, where she could assert her mental condition as a mitigating factor, but where she still faced the possibility of being sentenced to thirty years in prison, or accepting the Commonwealth's offer of the minimum sentence for first-degree assault and a total sentence less than half the maximum and unenhanced by the persistent felony offender statutes. Even if counsel failed to investigate as thoroughly as she should have

¹⁵ Wiggins v. Smith, *supra*; Hill v. Lockhart, 474 U.S. 52, 88 L. Ed. 2d 203, 106 S. Ct. 366 (1985).

done, a more thorough investigation is not reasonably likely to have altered her advice or to have led Jones to insist upon a trial. The circuit court did not err, therefore, by denying without a hearing Jones's motion for RCr 11.42 relief.¹⁶

Nor did the court abuse its discretion by denying Jones's KRS-Chapter-31 request for funds for a psychiatric examination. Although we agree with Jones that Chapter 31 applies to "other post-conviction . . . proceedings"¹⁷ such as those under RCr 11.42, RCr 11.42 is intended to give incarcerated persons a means of asserting known grievances, not a means of searching for grievances.¹⁸ Rarely, then, if ever, will funds for investigative services be reasonably necessary in an RCr 11.42 proceeding. Here, because trial counsel's decision to forego a psychiatric exam is to be judged in light of the information before counsel at the time, not in hindsight,¹⁹ we agree with the circuit court that Jones's RCr 11.42 motion did not necessitate an exam.²⁰

¹⁶ Hill v. Lockhart, *supra*.

¹⁷ KRS 31.110(2)(c).

¹⁸ Hodge v. Commonwealth, Ky., 116 S.W.3d 463 (2003); Haight v. Commonwealth, Ky., 41 S.W.3d 436 (2001).

¹⁹ Wiggins v. Smith, *supra*.

²⁰ McKinney v. Commonwealth, Ky., 60 S.W.3d 499 (2001) (claimant must establish "reasonable necessity" for Chapter 31 funds.)

We also agree with Jones that KRS 31.185(2) would require her request for funds to have been heard *ex parte*. Whether that statute is valid or is an unconstitutional legislative encroachment upon judicial practice is an interesting question. But it is a question we need not reach because even if the trial court erred by denying Jones's request for an *ex parte* hearing, the error was harmless given our holding that Jones was not entitled to funds.

Accordingly, we affirm the August 14, 2003, order of the Jefferson Circuit Court.

ALL CONCUR.

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