

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2004-CA-000383-MR

WENDELL CLAYTON SAMS

APPELLANT

v. APPEAL FROM WOODFORD CIRCUIT COURT  
HONORABLE ROBERT B. OVERSTREET, JUDGE  
ACTION NO. 88-CR-00006

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI, JOHNSON, AND McANULTY, JUDGES.

JOHNSON, JUDGE: Wendell Clayton Sams has appealed from the January 29, 2004, order of the Woodford Circuit Court which denied his motion to vacate and set aside the trial court's final judgment of conviction and sentence of imprisonment pursuant to RCr<sup>1</sup> 11.42. Sams's motion asserted two grounds for relief: (1) that the trial court erred when it found that his guilty plea was entered knowingly, voluntarily, and intelligently; and (2) that he received ineffective assistance

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<sup>1</sup> Kentucky Rules of Criminal Procedure

of counsel. Having concluded that the trial court did not err in finding that Sams entered his plea knowingly, voluntarily, and intelligently, and that he received adequate representation by counsel, we affirm.

In 1988 Sams was indicted on one count of rape in the third degree<sup>2</sup> and one count of custodial interference.<sup>3</sup> On March 2, 1988, Sams pled guilty to both charges. On April 6, 1988, Sams was sentenced to five years' imprisonment on each count, with the sentences to run consecutively for a total of ten years, probated for five years. Sams's probation was revoked on November 2, 1988, and he was sentenced to ten years in prison.

On July 1, 1996, Sams filed a motion to vacate his sentence pursuant to RCr 11.42. Sams alleged that his guilty plea was not entered knowingly, voluntarily, and intelligently because at the time of the plea he was under the influence of prescription medication which prevented him from fully understanding the proceedings and the significance of the proceedings. Sams claimed that his defense counsel, James Springate, knew that he was on medication, but failed to inform the trial court of that fact. Sams also contended that Springate's failure to inform the trial court that Sams was on medication constituted ineffective assistance of counsel because

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<sup>2</sup> Kentucky Revised Statutes (KRS) 510.040.

<sup>3</sup> KRS 509.070.

a competent attorney would have informed the trial court, thereby compelling the trial court to hold a hearing to determine whether Sams was capable of entering a voluntary plea.

On September 11, 1996, the trial court denied Sams's motion without appointing counsel, without conducting an evidentiary hearing, and without reviewing the transcript of the guilty plea. The trial court ruled that Sams's RCr 11.42 motion was untimely filed, and that it had no merit on its face. On March 11, 1998, this Court remanded the case to Woodford Circuit Court holding that Sams's RCr 11.42 motion was timely filed, and that the merits of the motion could not be determined on its face. The trial court was directed to review the record to determine whether an evidentiary hearing was necessary.<sup>4</sup>

On remand, the trial court conducted a hearing on August 4, 1999.<sup>5</sup> Sams did not have counsel present at the hearing.<sup>6</sup> Sams testified at this abbreviated hearing that at the time of his plea he was under the influence of prescription medication. Sams further testified that he had told his attorney that he was on medication, but that his attorney told him to keep quiet and not to tell the trial court.

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<sup>4</sup> Case No. 1996-CA-002739-MR, rendered January 30, 1998, not-to-be published.

<sup>5</sup> Apparently, the trial court conducted an abbreviated hearing to determine whether Sams was entitled to a full evidentiary hearing.

<sup>6</sup> The record reflects that Sams had an attorney at this time, but it is unclear if counsel was appointed. Further, for some unexplained reason counsel failed to appear at the hearing.

After reviewing the record, the trial court denied Sams's RCr 11.42 motion, finding that nothing in the record supported Sams's assertions that his guilty plea was not entered knowingly, voluntarily, and intelligently, and finding that Sams's claim of ineffective assistance of counsel was unfounded. In an Opinion rendered on March 22, 2002, this Court affirmed.<sup>7</sup> The Supreme Court of Kentucky granted Sams's motion for discretionary review, vacated this Court's Opinion, and remanded the case to the trial court for an evidentiary hearing with appointed counsel to represent Sams.<sup>8</sup>

On remand, the trial court appointed counsel to represent Sams and held, for the first time, a full evidentiary hearing. At this hearing, Sams introduced evidence to support his argument that his medication prevented him from knowingly, voluntarily, and intelligently entering his plea. The trial court heard testimony from Sams, attorney Springate, and Dr. Eljourn Don Nelson, a professor of Clinical Pharmacology at the University of Cincinnati College of Medicine. Dr. Fikret Yalkut, who had worked as a physician at the Woodford County Jail while Sams was in custody there, testified by affidavit. At the conclusion of the evidentiary hearing, the trial court again denied Sams's RCr 11.42 motion. This appeal followed.

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<sup>7</sup> Case No. 2000-CA-000289-MR, not-to-be published.

<sup>8</sup> Case No. 2002-SC-0290-D, rendered April 17, 2003.

For an RCr 11.42 motion to succeed, the movant must "establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceedings provided in RCr 11.42."<sup>9</sup> In addition, "a prisoner who has slept on his rights will bear a heavy burden to affirmatively prove the facts on which his relief must rest."<sup>10</sup> Thus, the burden of proof rests upon Sams to show that his allegations are, in fact, true. Merely raising a question as to their truthfulness is not sufficient.

First, Sams asserts that the trial court erred when it found his guilty plea was entered knowingly, voluntarily, and intelligently.<sup>11</sup> Sparks v. Commonwealth,<sup>12</sup> sets out the test for determining the validity of a guilty plea:

The test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 164, 27 L. Ed. 2d 162 (1970). There must be an affirmative showing in the record that the plea was intelligently and voluntarily made. Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). However, "the validity of a guilty plea is determined not by reference

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<sup>9</sup> Dorton v. Commonwealth, 433 S.W.2d 117, 118 (Ky.App. 1968) (citing Commonwealth v. Campbell, 415 S.W.2d 614, 616 (Ky. 1967)).

<sup>10</sup> Prater v. Commonwealth, 474 S.W.2d 383, 384 (Ky. 1971).

<sup>11</sup> See Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

<sup>12</sup> 721 S.W.2d 726, 727 (Ky.App. 1986).

to some magic incantation recited at the time it is taken but from the totality of the circumstances surrounding it." Kotas v. Commonwealth, Ky., 565 S.W.2d 445, 447 (1978), (citing Brady v. United States, 397 U.S. 742, 749, 90 S. Ct. 1463, 1469, 25 L. Ed. 2d 747 (1970)).

In examining the totality of the circumstances, the court considers such factors as "the accused's demeanor, background and experience, and whether the record reveals that the plea was voluntarily made."<sup>13</sup> The trial court is in the best position to determine whether there was involuntariness or incompetence to plead guilty, and solemn declarations in court carry a strong presumption of verity.<sup>14</sup> If the allegations in the motion can be resolved on the face of the record, there is no need for a hearing.<sup>15</sup> However, if a material question of fact is raised as to whether the plea is valid, an evidentiary hearing is necessary.<sup>16</sup> At the hearing, the trial court is required to make findings on those material issues of fact.<sup>17</sup> Those factual determinations are reviewed under a clearly

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<sup>13</sup> Centers v. Commonwealth, 799 S.W.2d 51, 54 (Ky.App. 1990).

<sup>14</sup> Id.

<sup>15</sup> Glass v. Commonwealth, 474 S.W.2d 400, 401 (Ky. 1971).

<sup>16</sup> RCr 11.42(5).

<sup>17</sup> RCr 11.42(6).

erroneous standard.<sup>18</sup>

In denying relief under RCr 11.42, the trial court, in considering the totality of the circumstances, was entitled to examine all evidence in the record as well as the evidence produced at the evidentiary hearing. Considering the totality of the circumstances, we conclude that the trial court had substantial evidence upon which to base a finding that Sams possessed a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and that he had a "rational as well as factual understanding of the proceedings[.]'"<sup>19</sup>

Our review of the record indicates that when Sams entered his guilty plea, he answered during the colloquy with the trial court that he was not under the influence of drugs, that he was not impaired in his judgment in any way, and that he was entering his guilty plea willingly, freely, voluntarily, and intelligently. Sams's defense counsel told the trial court that in his opinion Sams understood his rights and the nature of the proceedings, and that his plea was being made willingly, freely, voluntarily, and intelligently. Furthermore, at the subsequent sentencing hearing, Sams carried on a constructive and

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<sup>18</sup> Sherfey v. Sherfey, 74 S.W.3d 777, 782 (Ky.App. 2002) (citing Carnes v. Carnes, 704 S.W.2d 207, 208 (Ky. 1986)). See also Thompson v. Commonwealth, 147 S.W.3d 22, 33 (Ky. 2004).

<sup>19</sup> Thompson, 147 S.W.3d at 32 (quoting Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960)).

substantive conversation with the trial court, demonstrated an understanding of his personal history, and submitted a sentencing option to the trial court which he considered to be in his best interests.

In its January 29, 2004, order denying Sams's RCr 11.42 motion, the trial court found no "irregularities" in the record or proceedings, and thus determined that Sams's motion had no merit. Sams claims the trial court erred because it should not have relied upon the face of the record, but should have instead relied upon evidence adduced at the hearing. Sams is correct that the trial court must consider the evidence presented at the evidentiary hearing, but it need not base its determination entirely on that evidence. Again, the trial court is required to consider the totality of the circumstances.<sup>20</sup>

Sams testified at the evidentiary hearing that at the time of his plea and at the time of the sentencing hearing, he was taking both Mellaril and Sinequan, and that he was unable to remember any of the proceedings because of the effects of the drugs. Dr. Yalkut testified by affidavit that he had regularly prescribed Mellaril to Sams from October 29, 1987, through April 1, 1988. Dr. Nelson testified that Mellaril would have impaired Sams's ability to weigh the consequences of the plea, but also

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<sup>20</sup> Kotas, 565 S.W.2d at 447.



admitted upon cross-examination that such impairment would not necessarily have rendered him incompetent to enter a plea.

It was reasonable for the trial court, which is the best position to observe witnesses and determine their credibility,<sup>21</sup> to have still found the record more persuasive than either the testimony by Sams or Dr. Nelson. Thus, though the trial court must consider all the evidence presented, it may find the evidence in the record more persuasive than that produced at the hearing. We reiterate that Sams bears the burden of showing that he was incompetent, and that he must overcome the strong presumption that his plea was valid.<sup>22</sup> Accordingly, the trial court was not clearly erroneous in relying on this evidence, as the trial court may have found it more persuasive than the evidence presented at the hearing.

Sams's second assignment of error is that he received ineffective assistance of counsel. In order to prevail on a claim of ineffective assistance of counsel in entering a guilty plea, a movant must prove both

(1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable

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<sup>21</sup> Centers, 799 S.W.2d at 54.

<sup>22</sup> Id.

probability that the defendant would not have pleaded guilty, but would have insisted on going to trial [citations omitted].<sup>23</sup>

Review of counsel's performance is to be highly deferential.<sup>24</sup>

We agree with the trial court that Sams was represented competently and was not prejudiced by his counsel's performance.

Sams's claim of ineffective assistance of counsel is closely related to his claim of incompetence. Sams alleges that at the time of his plea and sentencing, he told his attorney that he was on medication, that Springate told him not to inform the trial court, and that Springate failed to further ascertain whether Sams was impaired by his medication. Sams's RCr 11.42 motion asserts that this was ineffective assistance of counsel because Springate should have informed the trial court that Sams was on medication.

The only evidence that supports Sams's allegation that Springate knew that he was on medication is Sams's testimony itself. At the evidentiary hearing, Springate testified that though he had no recollection of Sams's case, it was his practice not to allow "official business be transacted" if he was informed that a person was on medication. Sams also submits that Springate should have discovered through independent research that Sams was impaired. For support, Sams cites

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<sup>23</sup> Sparks, 721 S.W.2d at 727-28.

<sup>24</sup> Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Strickland, supra, where the Court stated, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."<sup>25</sup>

We do not accept Sams's contention that Springate's failure to investigate Sams's competence was unreasonable. In order to prove deficient conduct by counsel, Sams must show that Springate's actions fell outside the wide range of reasonable professional assistance.<sup>26</sup> The position advocated by Sams would require an attorney, without notice of any deficiency or impairment, to nevertheless investigate his client's competency. Such a standard does not exist. Thus, the trial court did not err in ruling that Sams failed to prove that Springate's performance fell outside the wide range of reasonable professional assistance.

In addition to proving that his counsel's representation was deficient, Sams must also show that he was prejudiced by that deficiency,<sup>27</sup> and that but for the deficiency, there is a reasonable probability that he would have insisted on a trial.<sup>28</sup> Once again, Sams has not met this burden. Since the trial court has found that Sams was indeed competent to enter a

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<sup>25</sup> Strickland, 466 U.S. at 691.

<sup>26</sup> Id. 466 U.S. at 688-89; Commonwealth v. Tamme, 83 S.W.3d 465, 470 (Ky. 2002); Commonwealth v. Pelfrey, 998 S.W.2d 460, 463 (Ky. 1999).

<sup>27</sup> Strickland, 466 U.S. at 687.

<sup>28</sup> Sparks, 721 S.W.2d at 728.

plea, Sams cannot show that he was prejudiced in any way. Accordingly, the trial court did not err by finding that Sams received adequate representation.

For the foregoing reasons, the order of the Woodford Circuit Court is affirmed.

ALL CONCUR.

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