RENDERED: JUNE 24, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001013-MR

DUANE HARPER — APPELLANT

v.

APPEAL FROM LYON CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
INDICTMENT NO. 02-CR-00023

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HENRY AND SCHRODER, JUDGES; EMBERTON, SENIOR JUDGE.[1]

HENRY, JUDGE: Duane Harper, pro se, appeals from a March 26, 2004 order of the Lyon Circuit Court denying his motion for relief pursuant to RCr[2] 11.42. We affirm.

On January 4, 2002, Harper, an inmate at the Kentucky State Penitentiary in Eddyville, Kentucky, got into a fight with

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] Kentucky Rules of Criminal Procedure.

another inmate in a recreational area of the prison. Recreation leader Frank Wilford, an employee of the prison, attempted to break up the fight, but was struck in the eye by a punch thrown by Harper. Wilford visited the infirmary and was treated and released.

On August 6, 2002, Harper was indicted on charges of third-degree assault and for being a second-degree persistent felony offender. After initially pleading not guilty to these charges, Harper, after consulting with his court-appointed attorney, made a motion to enter a plea of guilty on April 11, 2003. In exchange for his guilty plea, the Commonwealth offered a plea bargain in which the PFO charge would be dropped and a recommendation of a three-year sentence would be made on the assault charge. Following a plea colloquy with Harper, the trial court sentenced him to three years' imprisonment, pursuant to the Commonwealth's recommendation, and ordered that the sentence be consecutive to Harper's current term of imprisonment.

On February 27, 2004, Harper filed a pro se motion for relief pursuant to RCr 11.42, claiming ineffective assistance of counsel. On March 26, 2004, the trial court entered an order denying Harper's motion for relief without a hearing. The court indicated that, upon review of the videotape record of Harper's guilty plea hearing, particularly the dialogue between Harper

and the court, it appeared that Harper was "alert" and fully understood the subject matter of the court's questions since he was answering them in a "direct and clear voice." It further indicated that Harper was "unequivocal in expressing that he had no complaints about his counsel." The court further noted that when Harper was asked if he had ever suffered from a mental disease or defect, he indicated that he had, but "not at that moment," which the court concluded was a clear declaration that he fully understood the proceedings and what was being asked. The court finally noted that when Harper was asked whether he did, in fact, cause "physical injury to an employee at the Kentucky State Penitentiary," Harper stated affirmatively that he did. The court consequently concluded that Harper was competent at the time he entered his guilty plea and denied his motion for relief. Harper filed a motion to reconsider, but this motion was denied by the trial court in an April 14, 2004 order. This appeal followed.

On appeal, Harper raises three general grounds for relief: (1) he was denied the effective assistance of counsel when his attorney influenced him into entering into a guilty plea; (2) his counsel's representation was constitutionally deficient in that she failed to fully investigate the circumstances of the charged offenses as well as Harper's mental status at the time said offenses were committed; and (3) the

trial court committed reversible error in denying his motion for relief without conducting an evidentiary hearing. We will address each of these contentions in turn.

In determining whether counsel rendered ineffective assistance in connection with a defendant's guilty plea, this court has stated:

> A showing that counsel's assistance was ineffective in enabling a defendant to intelligently weigh his legal alternatives in deciding to plead guilty has two components: (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 probability that the defendant would not have pleaded guilty, but would have insisted on going to trial.

Sparks v. Commonwealth, 721 S.W.2d 726, 727-28 (Ky.App. 1986), citing Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); see also Russell v. Commonwealth, 992 S.W.2d 871, 874 (Ky.App. 1999). "The trial court's inquiry into allegations of ineffective assistance of counsel requires the court to determine whether counsel's performance was below professional standards and 'caused the defendant to lose what he otherwise would probably have won.'" Bronk v. Commonwealth, 58 S.W.3d 482, 487 (Ky. 2001), quoting Foley v. Commonwealth, 17 S.W.3d 878, 884 (Ky. 2000). It also requires an evaluation of "whether counsel was so thoroughly ineffective that defeat was

snatched from the hands of probable victory." Id., quoting Foley, supra. The voluntariness of a guilty plea can only be determined by examining the "totality of the circumstances surrounding the guilty plea." Id. at 486; see also Rodriquez v. Commmonwealth, 87 S.W.3d 8, 10-11 (Ky. 2002). "These circumstances include the accused's demeanor, background and experience, and whether the record reveals that the plea was voluntarily made." D.R. v. Commonwealth, 64 S.W.3d 292, 294 (Ky.App. 2001) (Citations omitted).

We further note our Supreme Court's mandate that "[j]udicial review of the performance of defense counsel must be very deferential to counsel and to the circumstances under which they are required to operate. There is always a strong presumption that the conduct of counsel falls within the wide range of reasonable professional assistance because hindsight is always perfect." Hodge v. Commonwealth, 116 S.W.3 463, 469 (Ky. 2002), citing Bell v. Cone, 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002). Moreover, simply advising a client to plead guilty, in and of itself, does not constitute evidence of ineffective assistance of counsel. Rigdon v. Commonwealth, 144 S.W.3d 283, 288 (Ky.App. 2004), citing Beecham v. Commonwealth, 657 S.W.2d 234, 236-37 (Ky. 1983).

In Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001), our Supreme Court summarized the procedure for trial courts to

follow in determining whether or not to conduct an evidentiary hearing under RCr 11.42. "After the answer is filed, the trial judge shall determine whether the allegations in the motion can be resolved on the face of the record, in which event an evidentiary hearing is not required. A hearing is required if there is a material issue of fact that cannot be conclusively resolved, i.e., conclusively proved or disproved, by an examination of the record." Id. at 452, citing Stanford v. Commonwealth, Ky., 854 S.W.2d 742, 743-44 (Ky. 1993); Lewis v. Commonwealth, 411 S.W.2d 321, 322 (Ky. 1967).

Our courts have further held that "a defendant is not entitled to an evidentiary hearing to simply fish for claims, and such is not warranted if the record resolves all issues raised in the RCr 11.42 motion." Baze v. Commonwealth, 23 S.W.3d 619, 628 (Ky. 2000), citing Glass v. Commonwealth, 474 S.W.2d 400 (Ky. 1972); Ford v. Commonwealth, 453 S.W.2d 551 (Ky. 1970). "Conclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of a discovery deposition." Sanders v. Commonwealth, 89 S.W.3d 380, 385 (Ky. 2002), citing Sanborn v. Commonwealth, 975 S.W.2d 905 (Ky. 1998). However, our Supreme Court has also held: "Generally, an evaluation of the circumstances supporting or refuting claims of coercion and ineffective assistance of

counsel requires an inquiry into what transpired between attorney and client that led to the entry of the plea, i.e., an evidentiary hearing." Rodriquez, 87 S.W.3d at 11. This is particularly the case where the charge of inadequacy is made with such particularity as to suggest substance to the charge. See also McCarthy v. Commonwealth, 432 S.W.2d 50, 50-51 (Ky. 1968).

Harper's first ground for relief, that he was coerced into entering his guilty plea, revolves around his belief that his actions did not meet the statutory requirements for committing assault in the third degree as defined by KRS[3] 508.025, as he did not intentionally inflict physical injury upon recreation leader Frank Wilford, and because he did not spit on Wilford. Harper submits that Wilford was not injured at all in the fight, as the generated police report indicates that no injury occurred and that medical attention was not required.

KRS 500.080(13) provides that "physical injury" means "substantial physical pain or impairment of physical condition." This Court has interpreted "impairment of physical condition" to mean any injury. Covington v. Commonwealth, 849 S.W.2d 560, 564 (Ky.App. 1992), citing Meredith v. Commonwealth, 628 S.W.2d 887, 888 (Ky.App. 1982). Accordingly, it is not a difficult standard to meet.

[3] Kentucky Revised Statutes.

Our review of the trial record finds that Harper freely admitted in open court, under oath, to inflicting physical injury upon Wilford during his guilty plea colloquy. The record further shows that Wilford was struck in the eye by a punch thrown by Harper while trying to break up a fight in which Harper was involved, and that Wilford visited the infirmary immediately afterward. Moreover, a report contained within the record from Nurse James Baker indicates that Wilford had "redness and swelling of the left eye and surrounding area." While these facts may not constitute the inflicting of a physical injury in Harper's personal opinion, and while he may take issue with the accuracy of Nurse Baker's statement, we cannot objectively say that Harper's counsel rendered advice below the wide range of prevailing professional standards in advising him to plead guilty under this factual scenario, particularly given the deference that we are required to afford defense counsel under Hodge, supra.

We also note that KRS 508.025(1)(b), the statutory provision under which Harper was indicted, encompasses wanton assault along with intentional assault.[4] Accordingly, the fact that Harper may not have intentionally hit Wilford would not have prevented a jury from finding him guilty of third-degree

[4] KRS 508.025(1)(b) deals specifically with physical assault against a detention center employee. While it does not expressly state the mens rea for third-degree assault against a detention center employee, it has been read in conjunction with KRS 501.040 to require the intentional or wanton infliction of physical injury. Covington, 849 S.W.2d at 562.

assault under that statute. Consequently, we do not believe that this particular basis for relief has merit.

We further note that although Harper submits that he would have elected to proceed to trial had his attorney "correctly" advised him that his actions did not constitute third-degree assault, the plea agreement reached with the Commonwealth limited his sentence to three years (out of a possible five) and completely eliminated the second-degree persistent felony offender charge (a conviction that would carry a possible ten years imprisonment).

Harper's second basis for relief is that his counsel rendered ineffective assistance in failing to properly investigate his mental status at the time of the offense in question and in waiving his pre-sentence investigation hearing. Harper submits that such an investigation would have disclosed that, only days before the incident, he suffered an episode of psychosis related to his diagnosed paranoid schizophrenia, and that he was also on state-provided medication, including Zyprexa, a psychotropic medication used to treat schizophrenia. He further submits that an appropriate investigation would have revealed that he was transferred to a correctional psychiatric treatment unit shortly after the fight because of his paranoid schizophrenia. Harper submitted medical records to the trial court in support of these contentions.

Upon review of Harper's guilty plea hearing with the trial court, it appears that he was coherent and alert in thought, unaffected by medication, and able to respond appropriately and logically to the court's questions. In particular, we note that Harper stated that he was not suffering from any mental disease or defect as of the time that he was entering his guilty plea. Accordingly, we see nothing in the record to suggest that the trial erred in finding that Harper was fully capable of making a voluntary plea of guilty at the plea hearing, particularly given this Court's belief that the "trial court is in the best position to determine if there was any reluctance, misunderstanding, involuntariness, or incompetence to plead guilty." Centers v. Commonwealth, 799 S.W.2d 51, 54 (Ky.App. 1990). We also note that Harper expressed satisfaction with his counsel's performance at the guilty plea colloquy and that his counsel was able to negotiate what we find to be an advantageous plea agreement on his behalf. These facts give further credence to the voluntariness and validity of his guilty plea.

Consequently, we find that Harper has failed to overcome the strong presumption that his counsel failed to render reasonably professional assistance and that he would not have entered his guilty plea otherwise. Given our courts' long-held position that a valid guilty plea waives all defenses

except that the indictment does not charge a public offense, we find that Harper's remaining contentions are without merit. Bush v. Commonwealth, 702 S.W.2d 46, 48 (Ky. 1986), citing Hendrickson v. Commonwealth, 450 S.W.2d 234 (Ky. 1970).

Accordingly, the judgment of the Lyon Circuit Court denying Harper's petition for RCr 11.42 relief is hereby affirmed.

ALL CONCUR.

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