RENDERED: DECEMBER 29, 2005; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000803-MR

DONNIE D. BENNETT — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 99-CR-002958

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER AND JOHNSON, JUDGES; MILLER, SENIOR JUDGE.[1]

JOHNSON, JUDGE: Donnie D. Bennett, pro se, has appealed from the March 3, 2004, order of the Jefferson Circuit Court which denied, without holding an evidentiary hearing, his pro se motion to vacate, set aside, or correct his final judgment and sentence of imprisonment pursuant to RCr[2] 11.42. Having concluded that the trial court did not err in denying Bennett's

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

[2] Kentucky Rules of Criminal Procedure.

claims that his plea was not knowingly, voluntarily, and intelligently entered without holding an evidentiary hearing, we affirm.

On December 14, 1999, Bennett was indicted by a Jefferson County grand jury on one count of bail jumping in the first degree[3] for failing to appear for sentencing on another felony indictment in Jefferson County. Bennett was also indicted as being a persistent felony offender in the first degree.[4] Because Bennett failed to appear for arraignment on the bail jumping charge on December 20, 1999, the trial court entered a bench warrant for his arrest. However, Bennett was not arrested on the bench warrant until January 24, 2001. He was arraigned on the 1999 bail jumping indictment on January 29, 2001.

On May 15, 2001, Bennett entered a guilty plea in reliance on an offer made by the Commonwealth. In exchange for Bennett's guilty plea, the Commonwealth agreed to amend the PFO I charge to PFO II[5] and to recommend a one-year sentence on the charge of bail jumping in the first degree, enhanced to five years by virtue of the amended charge of PFO II, with the sentence to run consecutively with any sentence Bennett was

[3] KRS 520.070.

[4] KRS 532.080(3).

[5] KRS 532.080(2).

currently serving. The trial court entered an order accepting Bennett's guilty plea and sentenced Bennett in accordance with the plea agreement on July 2, 2001.[6]

On February 23, 2004, Bennett filed a pro se motion to vacate, set aside, or correct his sentence pursuant to RCr 11.42, as well as a motion for appointment of counsel, and a request for an evidentiary hearing. The Commonwealth did not file a response to Bennett's RCr 11.42 motion. On March 3, 2004, the trial court denied Bennett's request for counsel, and denied his RCr 11.42 motion without holding an evidentiary hearing. This appeal followed.

Bennett argues on appeal (1) that his plea was not entered knowingly, voluntarily, or intelligently; (2) that trial counsel was ineffective for advising Bennett to plead guilty; (3) that the trial court lacked jurisdiction over the case and the indictment against him should have been dismissed; and (4) that all the errors enumerated in his arguments had the effect of reversible cumulative error.

In addition to challenging the trial court's rejection of his various claims, Bennett contends the trial court erred in failing to conduct an evidentiary hearing on his RCr 11.42 motion. A movant is not automatically entitled to an

[6] Bennett orally requested probation during the sentencing hearing, which the trial court denied. On December 28, 2001, Bennett filed a motion for shock probation, which was denied by the trial court on January 8, 2002.

evidentiary hearing on an RCr 11.42 motion unless there is an issue of fact which cannot be determined on the face of the record.[7] "Where the movant's allegations are refuted on the face of the record as a whole, no evidentiary hearing is required."[8] "Our review is confined to whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction" [citations omitted].[9] "The burden is upon the [defendant] to establish convincingly that he was deprived of some substantial right which would justify the extra-ordinary relief afforded by the post-conviction proceedings provided in RCr 11.42."[10] The record does not indicate that it is a reasonable probability that a different outcome would result if any of Bennett's claims are true. Thus, Bennett was not entitled to an evidentiary hearing.

A guilty plea constitutes an admission of guilt to a substantive crime and the waiver of various statutory and constitutional rights.[11] In general, a valid guilty plea waives all non-jurisdictional defects in the conviction unless they are

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[7] Stanford v. Commonwealth, 854 S.W.2d 742, 743-44 (Ky. 1993).

[8] Sparks v. Commonwealth, 721 S.W.2d 726 (Ky.App. 1986) (citing Hopewell v. Commonwealth, 687 S.W.2d 153, 154 (Ky.App. 1985)).

[9] Lewis v. Commonwealth, 411 S.W.2d 321, 322 (Ky. 1967).

[10] Dorton v. Commonwealth, 433 S.W.2d 117, 118 (Ky. 1968).

[11] See United States v. Broce, 488 U.S. 563, 570, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989); Taylor v. Commonwealth, 724 S.W.2d 223, 225 (Ky.App. 1986); and Centers v. Commonwealth, 799 S.W.2d 51, 55 (Ky.App. 1990).

preserved for appellate review either by entering a conditional guilty plea or by moving to withdraw the guilty plea.[12] This Court in Taylor stated as follows:

> Entry of a voluntary, intelligent plea of guilty has long been held by Kentucky Courts to preclude a post-judgment challenge to the sufficiency of evidence. . . . The reasoning behind such conclusion is obvious. A defendant who elects to unconditionally plead guilty admits the factual accuracy of the various elements of the offenses with which he is charged. By such admission, a convicted [defendant] forfeits the right to protest at some later date that the [Commonwealth] could not have proven that he committed the crimes to which he pled guilty. To permit a convicted defendant to do so would result in a double benefit in that defendants who elect to plead guilty would receive the benefit of the plea bargain which ordinarily precedes such a plea along with the advantage of later challenging the sentence resulting from the plea on grounds normally arising in the very trial which defendant elected to forego.[13]

However, in order to be constitutionally valid, a guilty plea must be entered voluntarily, knowingly, and intelligently.[14] RCr 8.08 requires a trial court to determine at the time of the guilty plea "that the plea is made voluntarily

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[12] See Hughes v. Commonwealth, 875 S.W.2d 99, 100 (Ky. 1994) (stating that "[t]he general rule is that pleading guilty unconditionally waives all defenses except that the indictment did not charge an offense"); and RCr 8.09 and 8.10.

[13] Taylor, 724 S.W.2d at 225.

[14] Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Tollett v. Henderson, 411 U.S. 258, 266-67, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973); Haight v. Commonwealth, 760 S.W.2d 84, 88 (Ky. 1988); Woodall v. Commonwealth, 63 S.W.3d 104, 132 (Ky. 2002).

with understanding of the nature of the charge."[15] "[T]he validity of a guilty plea is determined . . . from the totality of the circumstances surrounding it."[16]

The record in this case contains a preprinted form styled "Motion to Enter Guilty Plea[.]" Bennett signed the form indicating his acknowledgment and understanding of the following statements: "Because I am guilty and make no claim of innocence, I wish to plead 'GUILTY' in reliance on the attached "Commonwealth's Offer on a Plea of Guilty[,]" and "I declare my plea of 'GUILTY' is freely, knowingly, intelligently and voluntarily made, that I have been represented by competent counsel, and that I understand the nature of this proceeding and all matters contained in this document."

On May 15, 2001, when Bennett entered his plea of guilty, the trial court carefully reviewed with him and his attorney the charges for which he was indicted, the possible penalties he faced as a result of those charges, and the sentences recommended by the Commonwealth. Bennett participated in an exhaustive plea colloquy in which he assured the trial court that he had not been threatened, forced, or coerced to

[15] See James v. Cain, 56 F.3d 662, 666 (5th Cir. 1995) (stating that "[a] guilty plea is invalid if the defendant does not understand the nature of the constitutional protection that he is waiving or if he has such an incomplete understanding of the charges against him that his plea cannot stand as an admission of guilt" [citations omitted]). See also Bronk v. Commonwealth, 58 S.W.3d 482, 486 (Ky. 2001).

[16] Kotas v. Commonwealth, 565 S.W.2d 445, 447 (Ky. 1978) (citing Brady v. United States, 397 U.S. 742, 749, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970)).

plead guilty. He also answered in the affirmative when he was asked if his attorney had kept him fully informed and if he understood the charges against him and the possible defenses. He acknowledged that he was aware of the constitutional rights he was giving up by pleading guilty.

"[T]he representations of the defendant, his lawyer, and prosecutor at such a hearing . . . constitute a formidable barrier in any subsequent collateral proceeding. Solemn declarations in open court carry a strong presumption of verity."[17] Bennett agreed that his plea was entered freely, knowingly, intelligently, and voluntarily, that he was represented by competent counsel, and that he understood the proceedings. Because the record so clearly refutes Bennett's allegation that his plea was not knowingly, intelligently, and voluntarily entered, the trial court did not err in denying his RCr 11.42 motion or his motion for an evidentiary hearing.[18]

The remainder of Bennett's claims are based upon his theory of ineffective assistance of counsel. The United States Supreme Court set out the standard for ineffective assistance of counsel in Strickland v. Washington,[19] as follows:

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[17] Blackledge v. Allison, 431 U.S. 63, 73-4, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977).

[18] Fraser v. Commonwealth, 59 S.W.3d 448, 457-58 (Ky. 2001).

[19] 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

This standard applies to the plea process.[20] "[T]he voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases'" [citations omitted].[21] When reviewing counsel's performance, this Court must be highly deferential and we should not usurp or second-guess counsel's trial strategy.[22] "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy'" [citations omitted].[23] "[I]n order to satisfy the 'prejudice' requirement, the defendant must show

[20] Hill v. Lockhart, 474 U.S. 52, 57, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

[21] Hill, 474 U.S. at 56.

[22] Strickland, 466 U.S. at 689.

[23] Id.

that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[24]

Bennett claims that the bail jumping charge arose as a "supplemental" charge to a pending drug trafficking charge in Division 13 of Jefferson Circuit Court, and therefore because Division 13 ordered a forfeiture of his bail when he failed to appear for sentencing, Division 6 of Jefferson Circuit Court lacked jurisdiction to make any disposition of the bail jumping charge. He contends that two separate courts were making decisions on the same issue. Further, Bennett claims his counsel was ineffective for failing to inform him that Division 6 did not have jurisdiction over the bail jumping charges and that had he known of the jurisdiction question he would not have entered his guilty plea. We disagree with all of Bennett's claims.

Bennett cites this Court to SCR 1.040(4)(c), which states that "in the absence of good cause to the contrary, all matters connected with pending or supplemental proceedings shall be heard by the Judge to whom the proceeding was originally assigned." While the rule does not define the term "supplemental proceedings," in Brutley v. Commonwealth,[25]

[24] Hill, 474 U.S. at 59.

[25] 967 S.W.2d 20, 22 (Ky. 1998).

"contempt sanctions to collect a public defender fee" was considered a supplemental proceeding. Another example would be a PFO charge. In that instance, the charge does not stand alone and could not be tried alone, but is merely supplemental to another felony proceeding.

However, in this case, we cannot conclude that the indictment for bail jumping is a "supplemental proceeding" to the drug trafficking indictment. While the two are indirectly connected, the bail jumping indictment arose as an independent, original action with a separate case number. "A person is guilty of bail jumping in the first degree when, having been released from custody by court order, with or without bail, upon condition that he will subsequently appear at a specified time and place in connection with a charge of having committed a felony, he intentionally fails to appear at that time and place."[26] In essence, had the drug trafficking charges in Division 13 been dismissed for whatever reason, Bennett could still be prosecuted and sentenced on the bail jumping indictment in Division 6.

KRS 26A.040 provides that "[p]roceedings in any court having divisions shall be valid when prosecuted in any division thereof. . . . Any judge presiding over a division of a court mentioned in subsection (1) may hear and determine any case or

[26] KRS 520.070. See also Mullins v. Hess, 131 S.W.3d 769 (Ky.App. 2004).

question in any other division." The plain language of this statute provides no simpler way of stating that the bail jumping charge can arise and be prosecuted in any division of the Jefferson Circuit Court. It was not necessary for the bail jumping charge to originate in the same division as the drug trafficking charges. Counsel was not ineffective in advising Bennett to accept the plea agreement on the bail jumping charge.

Finally, Bennett asserts that the cumulative effect of his aforementioned errors resulted in a violation of his constitutional rights and as a result his conviction and sentence should be set aside. We find this argument to be meritless. Each of the allegations made by Bennett have been thoroughly reviewed and discussed in this Opinion and each one is refuted by the record. "Repeated and collective reviewing of alleged errors does not increase their validity."[27] Bennett has failed to demonstrate any basis for his claims that counsel's performance was deficient.

Accordingly, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

[27] Parrish v. Commonwealth, 121 S.W.3d 198, 207 (Ky. 2003).

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