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 NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002092-MR

RAYMOND SMITH

APPELLANT

APPEAL FROM LAUREL CIRCUIT COURT
v. HONORABLE WILLIAM T. CAIN, SPECIAL JUDGE
ACTION NO. 00-CR-00075

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: BARBER, DYCHE, AND MINTON, JUDGES.

BARBER, JUDGE: Raymond Smith (Smith) brings this appeal from an order of the Laurel Circuit Court, entered September 21, 2004, summarily overruling his *pro se* motion to vacate the judgment arising from his unconditional guilty plea to two counts of capital murder,¹ two counts of complicity to commit kidnapping,² and one count of felony theft by unlawful taking,³ pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Before us,

¹ Kentucky Revised Statutes 507.020.

² Kentucky Revised Statutes 502.020; 509.040.

³ Kentucky Revised Statutes 514.030.

Smith asks for a remand to the circuit court for an evidentiary hearing, arguing that the circuit court erred in failing to hold an evidentiary hearing as to the involuntariness and unknowingness of his guilty plea and effective assistance of counsel relating specifically to whether counsel informed him of the contents of a psychiatrist's report. We affirm.

Smith and three others were indicted for the December 20, 1999, kidnappings and murders by beating and stabbing of Charles J. Deaton and Dorothy Raynard, the felony theft of Deaton's 1992 Plymouth Sundance automobile, and abuse of a corpse. Laurel Circuit Court Indictment No. 00-CR-00075. Based on the above indictments, the Commonwealth chose to seek the death penalty. Kentucky Revised Statutes (KRS) 532.025.

On May 22, 2000, the circuit court held a competency hearing to comply with Gabbard v. Commonwealth, 887 S.W.2d 547, 551 (Ky. 1994). A report prepared by Dr. Candace Walker, Staff Psychiatrist, Kentucky Correctional Psychiatric Center (KCPC), was placed in the record. According to the report, Smith indicated that on the day of the crimes, he and the three co-defendants had drunk a gallon of gin and juice; smoked crack cocaine, marijuana, and crank (methamphetamine); and taken prescription opiate pain relievers. While in town, one of the four co-defendants discharged a shotgun and a stray ricochet pellet allegedly hit an innocent woman in the leg. The police

were called. The group hid the shotgun and went to hide from the police. Although the victims were not drinking, they had smoked crack with the group. Having convinced themselves that the victims were going to turn them in to the police, the defendants decided to kill them. Smith remembered the ride to the crime scene and the walk back to the car with blood on him. According to the report, "(t)here was a great deal of 'overkill' (at the crime scene) in that the bodies appear to have been damaged considerably after the victims were already dead. Police reports indicate severe deforming of the skull in the female victim and the absence of an eye in the male victim, where the claw hammer had apparently been inserted to drag the body." The report concluded that Smith was competent to stand trial; and although he had no mental disease or defect and was competent to stand trial, he had a substance and alcohol dependence and an antisocial personality disorder.

On June 26, 2000, the court entered an order finding Smith competent, indicating that "(a)fter lengthy discussion the counsel for (Smith) stipulated that (he) was competent and the report of Dr. Candace Walker . . . shall be entered into the record, and the Court finds that all evidence indicates that

(he) is, in fact, competent to stand trial and DOES HEREBY FIND
(him) competent to stand trial."⁴

On April 5, 2001, Smith appeared before the circuit court and following an extensive colloquy pursuant to Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), entered a guilty plea, pursuant to the Commonwealth's offer, to 1) two counts of murder with recommendations on each of life imprisonment without parole; 2) two counts of complicity to commit kidnapping with recommendations on each of life imprisonment without parole; 3) felony theft of a vehicle with a recommendation of the maximum sentence of five years; and 4) dismissal of the abuse of a corpse charge. In addition to waiving his constitutional rights under Boykin, Smith affirmed 1) the facts as stated in the indictment; 2) that he did not suffer in the past or present from a mental disease or defect; 3) that he had no complaints with his attorney; and 4) that he was pleading guilty freely and voluntarily. At the colloquy, Smith admitted that his signature was on the guilty plea

⁴ According to counsel's comments at the motion day prior to the competency hearing, counsel had requested an evaluation of Smith due to some harm he caused himself while incarcerated. Pursuant to the evaluation, Smith was receiving treatment and was responding well. On that motion day, the discussion moved to the necessity of holding a competency hearing despite the conclusion from Dr. Walker's report that Smith was competent, and the lack of any indication to the court otherwise that Smith had competency issues. Due to the presence of the above two factors, defense counsel indicated that under current law there was no need for a competency hearing and was willing to stipulate to competency. Despite counsel's arguments, the court scheduled a competency hearing.

pleadings, his signature affirming that "(t)he facts of the case which establish my guilt are participation in kidnapping and murder of C.J. Deaton and Dorothy Raynard, and theft of their car."

On May 22, 2001, Smith was sentenced pursuant to his plea, the court further finding the existence of the aggravating factors that neither victim was released alive,⁵ and that Smith's acts of killing were intentional and resulted in multiple deaths.⁶

On May 21, 2004, Smith filed a *pro se* motion to vacate and set aside the above convictions and sentences pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. In the motion, Smith conceded that he participated in the crimes, was not entitled to an insanity defense, and was competent to stand trial. Still, Smith raised three issues, the first two issues alleging ineffective assistance of counsel for failure to investigate or obtain an expert witness as to alleged mitigating evidence of a mental disorder and intoxication as mentioned in Dr. Walker's report. In making this claim, although Smith contended that he never received a copy of Dr. Walker's report, he did indicate that the report was discussed with him one week before he signed the plea agreement. Smith lastly claimed in

⁵ Kentucky Revised Statutes 509.040.

⁶ Kentucky Revised Statutes 532.025(2)(a)6.

his motion that his guilty plea was not knowing and voluntary as based on counsel's advice to plead guilty or be sentenced to death. As an alternative to vacation of his sentence, Smith requested an evidentiary hearing and appointment of counsel.

On September 21, 2004, the circuit court summarily overruled Smith's RCr 11.42 motion in an eight-page order. This appeal followed.

Before us, although Smith presents three arguments, a close reading indicates that he basically takes issue with the failure of the circuit court to hold an evidentiary hearing on his RCr 11.42 motion, contending that such a hearing was required based on his allegation that counsel allegedly failed to herself read or discuss Dr. Walker's report with him, and thus in turn allegedly failed to discuss mitigation of a personality disorder and intoxication. Having reviewed the record, we disagree.

When the trial court has denied the request for post-conviction relief without an evidentiary hearing, our inquiry is whether the motion states grounds for relief that could not be conclusively resolved from the face of the record, and which, if true, would invalidate the conviction. Baze v. Commonwealth, 23 S.W.3d 619, 622 (Ky. 2000).

Taking a look at whether Smith's RCr 11.42 motion states grounds for relief that could not be conclusively

resolved from the face of the record, Smith alleges that counsel was ineffective in not informing him of the contents of Dr. Walker's report, thusly causing him to be uninformed as to mitigation of a personality disorder and intoxication when he accepted the Commonwealth's offer and pleaded guilty. Despite this allegation, the record contains Dr. Walker's competency evaluation of Smith, dated March 30, 2000, which indicated that as a part of the evaluation Smith was told that a report for the court would be prepared at the end of his stay at KCPC. The record also indicated that it was delivered to Smith's counsel upon completion, a fact that Smith does not dispute. The fact that Smith's counsel was aware of and had read the motion is apparent from discussion of the contents of the report between the Commonwealth and counsel at the motion day before the competency hearing, at which Smith was also present.

Furthermore, in his *pro se* RCr 11.42 motion, Smith admitted that he, counsel, and Dr. Walker were present at the competency hearing; and that Dr. Walker's report was entered into the record. The latter is consistent with the court's order finding Smith competent. Additionally, Smith's motion stated that the report was not discussed with him "prior to one week before he signed the Plea agreement," indicating that it was discussed with him within a week of signing the plea. Furthermore, during his extensive guilty plea colloquy, Smith specifically affirmed

that he did not suffer from a mental disease or defect, a conclusion reached by Dr. Walker's report, as well as satisfaction with counsel in discussion of his case and plea. Despite Smith's conflicting allegations to the contrary that he did not know the contents of Dr. Walker's report, based on the totality of the above from the record, we conclude that the record refutes his allegation. As such, the circuit court was correct in not holding an evidentiary hearing as to Smith's claims of ineffective assistance of counsel and involuntary guilty plea.

In so concluding it is important to note that as to Smith's claim of ineffective assistance of counsel and involuntary guilty plea, the effect of entering a voluntary guilty plea is to waive all defenses other than the indictment charges no offense. Centers v. Commonwealth, 799 S.W.2d 51, 55 (Ky.App. 1990); Quarles v. Commonwealth, 456 S.W.2d 693 (Ky. 1970). As stated by the court in Centers, *supra*, as a guilty plea constitutes a break in the chain of events the defendant may not raise independent claims related to the deprivation of constitutional rights occurring before entry of the guilty plea. White v. Sowders, 644 F.2d 1177 (6th Cir. 1980). Smith makes no claim that the indictment herein failed to charge an offense.

Pursuant to Centers, then, Smith's guilty plea waived all defenses unless the plea was involuntary, which Smith

essentially claims through his allegation of ineffective assistance of counsel by counsel's failure to advise him of the contents of Dr. Walker's report, specifically mitigation of a personality disorder and intoxication. Rigdon v. Commonwealth, 144 S.W.3d 283, 288-89 (Ky.App. 2004). As stated in Rigdon, supra:

In such an instance, the trial court is to "consider the totality of the circumstances surrounding the guilty plea and juxtapose the presumption of voluntariness inherent in a proper plea colloquy with a Strickland v. Washington[, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)] inquiry into the performance of counsel." Bronk[v. Commonwealth], 58 S.W.3d [482] at 486 (Ky. 2001) (footnotes omitted). To support a defendant's assertion that he was unable to intelligently weigh his legal alternatives in deciding to plead guilty because of ineffective assistance of counsel, he must demonstrate the following:

(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, Ky.App., 721 S.W.2d 726, 727-28 (1986).

Reviewing Smith's claims under the analysis of ineffective assistance of counsel pursuant to Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and in the case of guilty plea, pursuant to Hill v. Lockhart,

474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), it is clear that he did not meet his burden of showing that counsel made errors outside the range of competent performance, and that but for counsel's unprofessional errors, Smith would not have pleaded guilty but would have gone to trial. Smith's allegation of counsel error for failure to advise him of the contents of Dr. Walker's report and thus of possible mitigation is refuted by the record. Advising a client to plead guilty is not, in and of itself, evidence of any degree of ineffective assistance of counsel. Beecham v. Commonwealth, 657 S.W.2d 234, 236-37 (Ky. 1983). In this case, Smith and three co-defendants were each looking at four potential death sentences in especially heinous crimes when he accepted the Commonwealth's offer of four sentences of life without parole. A review of the extensive guilty plea colloquy and sentencing demonstrates Smith's admission to the facts as stated in the indictment and understanding of the process. It is difficult to believe that based on the record there is a reasonable probability that Smith would not have pleaded guilty but would have insisted on going to trial.

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

ALL CONCUR.

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