

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001770-MR

RICKY KENTER

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE ANTHONY W. FROHLICH, JUDGE
ACTION NO. 01-CR-00521

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: COMBS, CHIEF JUDGE; MOORE AND NICKELL, JUDGES.

NICKELL, JUDGE: Ricky Kenter (Kenter) appeals from an order of the Boone Circuit Court entered on August 15, 2005, denying his motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 to vacate the trial court's final judgment and sentence of imprisonment without holding an evidentiary hearing. Having concluded that Kenter's plea was entered knowingly, intelligently, and voluntarily, and that the trial court did not err in refusing to hold an evidentiary hearing to address his motion, we affirm.

On January 8, 2002, Kenter was indicted by a Boone County grand jury on one count of rape in the first degree,¹ one count of burglary in the third degree,² and for being a persistent felony offender in the first degree (PFO I).³ The charges arose when Kenter allegedly raped a 16-year old girl after entering her stepfather's residence and then hid from police in a nearby trailer.⁴

Pursuant to a plea agreement wherein the Commonwealth agreed to (1) dismiss the count of burglary in the third degree and the PFO I count, (2) amend rape in the first degree to rape in the second degree, and (3) recommend a ten-year prison sentence, Kenter entered a guilty plea on August 30, 2002. Final judgment was entered on October 16, 2002, and Kenter was sentenced to ten years in prison pursuant to the plea agreement.

On July 28, 2004, Kenter filed his pro se Motion to Vacate Sentence and Conviction Pursuant to RCr 11.42 in the Boone Circuit Court, wherein he requested appointment of counsel and an evidentiary hearing. The trial court appointed counsel to represent Kenter on August 18, 2004, and appointed counsel filed a Supplemental RCr 11.42 Motion/Memorandum on January 10, 2005. The Commonwealth's response opposing Kenter's RCr 11.42 motion was filed on March 4, 2005, and the trial court

¹ Kentucky Revised Statutes (KRS) 510.040.

² KRS 511.040.

³ KRS 532.080(3).

⁴ The PFO I charge related to Kenter's prior conviction on March 29, 1989, for theft by unlawful taking over \$300.00.

entered its order on March 14, 2005, overruling the motion without having held an evidentiary hearing. On July 19, 2005, Kenter's appointed counsel filed a motion and affidavit pursuant to Kentucky Rules of Civil Procedure (CR) 60.02, alleging that counsel had not received notice of the trial court's March 14, 2005, order denying his RCr 11.42 motion, and that Kenter was thereby precluded from filing a timely notice of appeal. The CR 60.02 motion requested the trial court to withdraw its previous Order overruling Kenter's RCr 11.42 motion and to enter a new ruling. The trial court granted Kenter's CR 60.02 motion to vacate on August 12, 2005, but entered a new Order overruling his RCr 11.42 motion on August 15, 2005, again without holding an evidentiary hearing.

Kenter filed this appeal on August 22, 2005. On appeal, Kenter contends that (1) the trial court's judicial interference in the plea bargaining process denied him due process and resulted in an involuntary plea; (2) his plea was involuntary based on ineffective assistance of counsel; and (3) the trial court erred in failing to conduct an evidentiary hearing on his RCr 11.42 motion.

I. STANDARD OF REVIEW

If the findings of the trial court are not clearly erroneous, its decision should be affirmed. *Commonwealth v. Payton*, 945 S.W.2d 424, 425 (Ky. 1997); *Ivey v. Commonwealth*, 655 S.W.2d 506 (Ky.App. 1983). Further, “[t]he burden is upon the [defendant] to 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.” *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968).

II. DUE PROCESS

In regard to Kenter's contention that he was denied due process and his guilty plea was entered involuntarily, particularly due to allegedly improper statements by the trial court during the guilty plea hearing, we find the record as a whole establishes Kenter's decision to enter his guilty plea was not the result of coercion by the trial court. *James v. Cain*, 56 F.3d 662 (5th Cir. 1995); *Bronk v. Commonwealth*, 58 S.W.3d 482 (Ky. 2001); *O'Neil v. Commonwealth*, 114 S.W.3d 860 (Ky.App. 2003); *Sparks v. Commonwealth*, 721 S.W.2d 726 (Ky.App. 1986). We further find the record establishes Kenter's guilty plea was entered knowingly, intelligently, and voluntarily. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *Tollett v. Henderson*, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973); *Woodall v. Commonwealth*, 63 S.W.3d 104 (Ky. 2002); *Haight v. Commonwealth*, 760 S.W.2d 84 (Ky. 1988).

RCr 8.08 requires a trial court to determine at the time of the guilty plea “that the plea is made voluntarily with understanding of the nature of the charge.” A guilty plea properly entered constitutes an admission of guilt to a substantive crime and the waiver of various statutory and constitutional rights. *United States v. Broce*, 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989); *Centers v. Commonwealth*, 799 S.W.2d 51 (Ky.App. 1990); *Taylor v. Commonwealth*, 724 S.W.2d 223 (Ky.App. 1986).

Kenter argues he was “defeated” by the trial court’s discussion concerning his guilt or innocence, and therefore entered his guilty plea involuntarily. However, the record discloses no inaccurate, incorrect, or untrue statements by the trial court during the

colloquy at Kenter's guilty plea hearing, but merely a forthright and painfully honest presentation of the difficult circumstance in which Kenter found himself. In discussing the ramifications of Kenter's decision regarding whether to enter a guilty plea pursuant to the Commonwealth's offer, the trial court simply noted that his refusal to accept the plea agreement could expose him to the reality of a potentially harsher verdict and sentence recommendation from a jury.

Regardless of the propriety of the trial court's statements during Kenter's guilty plea hearing, the issue before us is whether those statements coerced Kenter into entering his guilty plea. In this regard, our standard of review in determining the validity of Kenter's guilty plea was succinctly set forth in *Sparks*, 721 S.W.2d at 727, which states:

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, 1711, 23 L.Ed.2d 274 (1969). However, “the validity of a guilty plea is determined not by reference 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)).

This standard was reiterated by the Courts in *Bronk*, *supra*, and *O'Neil*, *supra*. Our review of the record demonstrates that this standard was satisfied in the instant case.

First, the record includes a Motion to Enter Guilty Plea, dated August 30, 2002, containing the standard language of AOC form 491, and signed by both Kenter and his counsel, and in which Kenter affirmed in pertinent part that (1) his judgment was not impaired by drugs, alcohol, or medication; (2) he had reviewed and fully discussed with his attorney the indictment and all charges, facts, and defenses related thereto; (3) he understood he could plead “not guilty” and thereby preserve and exercise his various constitutional rights; (4) his entry of the “guilty” plea had resulted from no promise, force, or threat by the Commonwealth or any other person; (5) he was entering the plea because he was guilty and made no claim of innocence; and (6) he entered the plea freely, knowingly, intelligently, and voluntarily, having been represented by competent counsel and understanding the nature of the proceeding and all matters referenced in the document. Second, Kenter's counsel signed a section of the foregoing form entitled “Certificate of Counsel,” in which he affirmed that (1) he had reviewed and fully discussed with Kenter the allegations of the indictment and all charges and defenses related thereto; (2) Kenter had evidenced an understanding of these matters, the effect of his plea of “guilty,” and his constitutional rights; and (3) he believed Kenter was entering his plea of “guilty” freely, knowingly, intelligently, and voluntarily.

Third, in addition to the “Motion to Enter Guilty Plea,” Kenter signed a “Plea Agreement” form, wherein he acknowledges that he engaged in sexual intercourse with another by forcible compulsion. This form documents that the Commonwealth agreed to dismiss the burglary and PFO I charges in exchange for Kenter's guilty plea to

the rape charge. By signing this form, Kenter further acknowledged that he had discussed his rights with his counsel, he understood the rights explained to him by his counsel, and he was entering the guilty plea freely, knowingly, intelligently, and voluntarily.

Fourth and finally, prior to accepting Kenter's guilty plea, the trial court engaged in a lengthy discussion with Kenter and counsel. During this discussion, Kenter admitted having sex with the victim, but claimed the sex was consensual. As Kenter expressed his innocence, the trial court interrupted and made it very clear it would not accept the guilty plea if Kenter claimed to be innocent of the crime. The trial court explained that neither it nor the Commonwealth was interested in sending an innocent person to prison. Kenter continued to maintain the sex was consensual, and the trial court suggested he take the case to trial because "it's hard to convince 12 people it's a pretty day today." However, the trial court cautioned Kenter that if the jury found him guilty, it would likely hand down a significant sentence because Boone County is "a conservative county" where juries give small damage awards in civil cases and stiff penalties in criminal cases. Kenter told the trial court he could not handle being in prison with child rapists and wanted the Commonwealth to "come down" a little more on the punishment. The trial court noted Kenter was in "a tough spot," and that the attorney for the Commonwealth was a "competent, aggressive prosecutor" who would not "come down any further--this is as good as it gets."

The Commonwealth then noted Kenter could potentially receive a life sentence if convicted of the offenses charged in the indictment, but reiterated that the Commonwealth was offering to amend the rape charge to rape in the second degree, drop the other charges, and recommend a sentence of ten years. The reason given for offering such a deal was to prevent the victim from having to testify at trial.

Later in the proceeding, the trial court reiterated its position of not accepting Kenter's guilty plea if he continued to deny the allegations. Finally, the trial court indicated it would see Kenter the next "Tuesday morning," referring to the scheduled date for his criminal trial. Kenter interrupted the trial court, saying "they won," signed some paperwork, and exclaimed "I signed your paper." At this point, the trial court addressed counsel for both sides, stating "I can't take his plea if he denies it." Both counsel then approached the bench and further discussion ensued concerning various issues. Kenter's counsel informed the trial court that the parties had agreed to Kenter entering a guilty plea to the charge of rape in the second degree under KRS 510.050, which occurs when a person over the age of 18 engages in sexual intercourse with another person who is either under the age of 14 or mentally incapacitated, and explained that Kenter could maintain that he did not force the victim to have sex while still acknowledging he committed the crime. After the Commonwealth summarized the evidence it would submit at trial, Kenter's counsel indicated to the trial court that he had reviewed the Commonwealth's evidence and the guilty plea offer with Kenter for several hours the night before and that he had recommended Kenter accept the offer.

The trial court then addressed Kenter, advising him that the only reason the Commonwealth was willing to make the guilty plea offer was to save the victim from having to testify at trial, and that Kenter was “in trouble” based on the evidence the Commonwealth intended to introduce at trial. The trial court stated it would be “happy” to conduct a trial, but noted Kenter would have a “tough sell” regarding his claim that the sex was consensual, primarily because the victim notified police immediately and had documented injuries, and because Kenter had hid from the police.

The trial court proceeded to engage in a lengthy guilty plea colloquy in which Kenter verbally acknowledged that: (1) he was not impaired by drugs, alcohol, or medications; (2) he had benefited from an opportunity to review the charges and discuss the facts of the case with his counsel; (3) he believed his counsel was fully informed about his case; (4) he had been informed of his statutory and constitutional rights and had no questions regarding those rights; (5) he understood he was presumed to be innocent and that the Commonwealth had the burden of proving his guilt; (6) he understood that if he proceeded to trial, the jury would be made up of 12 members and the verdict would have to be unanimous; (7) he had the right to subpoena witnesses and cross-examine the victim should he proceed to trial; and (8) he understood that he had the right to appeal, but that he would be waiving that right by entering a plea of guilty.

The trial court then read the Commonwealth's guilty plea offer and sentence recommendation, noting Kenter would be eligible for parole after serving 20% of his sentence, but due to his prior felonies, the parole board might not approve parole at that

time. The trial court next acknowledged Kenter maintained the sex was consensual, but that the Commonwealth maintained it had a good case to present to the jury. The trial court again encouraged Kenter to proceed to trial if that was his wish because Kenter would “hate this decision” in the future. But, the trial court further acknowledged Kenter would hate his decision even more if he elected to proceed to trial and thereupon was found guilty and given a life sentence. The trial court again summed up Kenter's predicament by stating he was “in a tough spot” because he claimed the sex was consensual, but noted the victim's allegations were consistent with her physical exam, Kenter's statements to the police, and Kenter's statements to the victim. Even so, the trial court again cautioned Kenter that if he believed he was not guilty, he should not plead guilty, but should proceed to trial, noting that it “might be easier to live with a jury verdict than it is a plea when you say you didn't do anything.”

The trial court then asked Kenter if he wanted some time to think about his decision, but Kenter stated he did not, at which point the trial court again asked Kenter if he was sure he did not need some additional time because “this is something you're gonna live with for 10 years.” Kenter did not request more time and proceeded to enter a plea of guilty, apologizing to the trial court for his earlier outburst, to which the trial court stated, “it's no problem, you're in a hard spot, I don't take issue with that.” Before Kenter left the courtroom, the trial court again told him he did not have to enter a guilty plea and that it would “tear these papers up” if he wanted to proceed to trial. Kenter said “no, I'm ready,” and the hearing ended.

Kenter now contends his guilty plea was not intelligent, voluntary, and knowing, maintaining the statements of the trial court during the guilty plea hearing were improper and resulted in his being coerced into entering the guilty plea. In support, Kenter cites *Corey v. Commonwealth*, 826 S.W.2d 319 (Ky. 1992) and *Haight*. However, these two cases are easily distinguishable from the instant case. *Corey* concerned a trial court's entering an order allowing a defendant to enter a guilty plea sua sponte, contrary to the sole discretion of the prosecuting authority to engage in plea bargaining. *Haight* involved a trial court's losing its right to impose sentence contrary to a guilty plea agreement due to its having interjected itself into the plea bargaining process and misleading the defendant into believing he would be allowed to withdraw his guilty plea if not sentenced in accordance with that agreement.

In the case sub judice, the trial court had absolutely no say in the plea offered by the Commonwealth and accepted by Kenter. Its statements were merely made to ensure Kenter fully understood his situation by addressing the details of the guilty plea agreement proposed by the Commonwealth, summarizing the Commonwealth's evidence, and discussing the pros and cons of both a guilty plea and proceeding to trial. We find the Commonwealth's argument persuasive that “the trial court was not negotiating the plea deal,” but merely “making sure appellant understood all the possibilities,” and we further find Kenter's contention that the trial court erroneously interfered in the plea bargaining process in its statements at the guilty plea hearing as unsupported and meritless.

In contrast, the Commonwealth cites *Commonwealth v. Crawford*, 789 S.W.2d 779, 780 (Ky. 1990), wherein the defendant similarly pled guilty to criminal charges by signing a “Waiver of Further Proceedings with Petition to Enter Plea of Guilty,” while his counsel signed a “Certificate of Counsel,” indicating that the defendant had been advised the defendant of his charges and rights. In *Crawford*, the Supreme Court of Kentucky held the signing of these documents was procedurally sufficient to satisfy the requirements announced in *Boykin*, 395 U.S. 238, for waiving one's constitutional rights. *See also Kiser v. Commonwealth*, 829 S.W.2d 432, 433 (Ky.App. 1992).

The Commonwealth further cites the supporting case of *Edmonds v. Commonwealth*, 189 S.W.3d 558, 569 (Ky. 2006), wherein the defendant alleged his guilty plea was invalid due to his use of medications when his plea was entered, even though he had advised the trial court at the time that these medications were not affecting his judgment. In rejecting the defendant's argument on appeal, the Court cited *Blackledge v. Allison*, 431 U.S. 63, 74, 97 S.Ct.1621, 52 L.Ed.2d 136 (1977), which states that “the representations of the defendant, his lawyer, and the prosecutor at such a hearing . . . constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity.” *See also Centers v. Commonwealth*, 799 S.W.2d 51, 54 (Ky.App. 1990).

Likewise, as in *Edmonds*, 189 S.W.2d at 569, Kenter's solemn declarations in open court, together with those of his counsel, carry a strong presumption of verity. In

the present case, our review of Kenter's entire record as summarized hereinabove, including his acknowledgments contained in the various referenced documents executed by him and his counsel, together with his affirmations voiced during the trial court's lengthy guilty plea hearing, convinces us that Kenter's plea of guilty was made knowingly, intelligently, freely, and voluntarily, without force, promise, or coercion. As such, Kenter's argument must fail. *Sparks*, 721 S.W.2d at 727.

III. INEFFECTIVE COUNSEL

Next, in regard to Kenter's second contention that his guilty plea was involuntary based on ineffective assistance of counsel, we find his counsel's representation to be neither deficient nor prejudicial to his defense. Thus, we affirm the trial court's ruling denying Kenter's motion.

“It is well-established that advice by a lawyer for a client to plead guilty is not an indication of any degree of ineffective assistance.” *Beacham v. Commonwealth*, 657 S.W.2d 234, 236-37 (Ky. 1983) (citing *Glass v. Commonwealth*, 474 S.W.2d 400 (Ky. 1971)). Further, a two-pronged standard of review in regard to allegations of ineffective assistance of counsel was first set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), stating as follows:

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 [emphases added].

Strickland also enunciated the principle that when reviewing counsel's performance, courts must be highly deferential and should not usurp or second-guess counsel's conduct, stating "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'" [citation omitted]. *Strickland*, 466 U.S. at 689.

In *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), the United States Supreme Court modified the foregoing two-pronged standard of review pertaining to allegations of ineffective assistance of counsel vis-à-vis the guilty plea process, requiring the defendant to show both that (1) counsel made serious errors outside the wide range of professional competence demanded of attorneys in criminal cases, thereby negating the requirement that the plea be entered voluntarily, and (2) 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 pled guilty but would have instead insisted on proceeding to trial, thereby satisfying the requirement of "prejudice" to his defense. *Hill*, 474 U.S. at 56, 58-9. See also *Sparks*, 721 S.W.2d at 727-28.

Kenter argues that trial counsel was ineffective for failing to object to the trial court's alleged interference in the guilty plea process. However, having previously found the trial court's statements during Kenter's guilty plea hearing to represent no error, it cannot be said that his counsel had any legitimate reason to object to those statements by the trial court during said proceedings, and Kenter's contention of ineffective assistance based thereon is also meritless.

The case of *Quarles*, 456 S.W.2d at 693, concerns similar facts and arguments as found in the present case and is dispositive to our finding. In *Quarles*, the Supreme Court of Kentucky reviewed a defendant's plea of guilty to determine the existence of ineffective assistance of counsel and particularly focused on whether the record demonstrated the trial court had inquired into the voluntariness of the defendant's plea and had warned of its effect regarding his rights. The Court held:

Since Quarles' allegation that his plea of guilty was coerced is thus disproved, his allegation that he was deprived of his right to effective counsel is of no avail. *Lawson v. Commonwealth*, Ky., 386 S.W.2d 734 (1965). In fact, the effect of a plea of guilty is to waive all defenses other than that the indictment charges no offense. *Commonwealth v. Watkins*, Ky., 398 S.W.2d 698 (1966) cert denied, *Watkins v. Kentucky*, 384 U.S. 965, 86 S.Ct. 1596, 16 L.Ed.2d 677[.]

Quarles, 456 S.W.2d at 694. Likewise, in the present case, conclusive proof exists in the record establishing Kenter's guilty plea was, in fact, entered knowingly, intelligently, freely, and voluntarily, without force, promise, or coercion, and as with the defendant in *Quarles*, Kenter cannot now reasonably claim he was deprived of effective assistance of counsel.

Even if we had found otherwise in regard to the trial court's challenged statements and were to accept, arguendo, that Kenter's counsel's failure to object thereto was deficient, Kenter has failed to demonstrate any prejudice since there is no proof or likelihood under the total circumstances that he would have refused the Commonwealth's guilty plea offer and proceeded to trial. His only qualm or hesitation in accepting the Commonwealth's plea offer concerned the sentence, as evidenced by his expressing his hope that it might “come down” on the length of the recommended sentence and that any requirement that he attend “baby raping school” be dropped. Clearly, once Kenter realized he could not negotiate a better deal than that procured by his counsel, he quickly signed the plea agreement papers and accepted the Commonwealth's offer.

It is also noteworthy that Kenter's counsel had admittedly discussed the charges, evidence, defenses and options with him at length the evening prior to the guilty plea hearing and had recommended his acceptance of the plea agreement at that time. The alleged misstatements by the trial court did not take place until the next day.

Moreover, it cannot be reasonably argued that by procuring and encouraging acceptance of the Commonwealth's plea agreement for a lesser charge, shorter sentence, and earlier possibility of parole, his counsel was deficient or prejudiced his defense in any manner. If anything, such performance by Kenter's counsel was exemplary, and there is no reasonable probability that Kenter would have proceeded to trial in the absence of the alleged errors by counsel.

Kenter has failed to demonstrate his counsel's conduct was deficient and that any such deficiency resulted in prejudice to his defense. Thus, Kenter's assertion regarding ineffective assistance by counsel is without merit and likewise must fail. *Strickland*, 466 U.S. at 687; *Hill*, 474 U.S. at 56, 59.

IV. EVIDENTIARY HEARING

Finally, in regard to Kenter's third contention that he was entitled to an evidentiary hearing prior to the trial court's denial of his RCr 11.42 motion, we find there was no issue raised therein that could not be conclusively resolved by reference to the trial court record. Thus, no hearing was required.

In regard to our standard of review concerning a trial court's denial of an evidentiary hearing pertaining to a RCr 11.42 motion, the Supreme Court of Kentucky has held “[i]t is often stated that an evidentiary hearing is required only if there is a material issue of fact that cannot be conclusively resolved by an examination of the trial court record.” *Hodge v. Commonwealth*, 116 S.W.3d 463, 469-470 (Ky. 2003). When considering a trial court's denial of such a request, review “is limited 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.” *Lewis v. Commonwealth*, 411 S.W.2d 321 (Ky. 1967). *See also Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001); *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001); and *Sanborn v. Commonwealth*, 975 S.W.2d 905, 909 (Ky. 1998). In the present case, Kenter specifically argues a hearing was required because it could not be determined from the

face of the trial record alone his counsel's reasons for not objecting to the trial court's statements during the guilty plea hearing, whether his counsel had failed to protect him from "judicial interference in the plea bargaining process," and whether his counsel had failed to ensure his "competency before he took the plea."

In the first instance, the reasons Kenter's counsel might have failed to object to the trial court's purportedly improper statements are not relevant to determining whether such failure to object to such statements represented ineffective assistance. If undue influence, force, or coercion were being perpetrated by the trial court, no reasoning or excuse would legitimize counsel's failure to act. Clearly, if counsel's reasoning in failing to object to the trial court's statements is irrelevant, then it cannot be said that the trial court erred in failing to conduct an evidentiary hearing to determine counsel's reasoning. The issue is without merit.

In the second instance, it cannot reasonably be argued that an evidentiary hearing was required to determine whether Kenter's counsel's assistance during the guilty plea hearing was ineffective due to his having failed to protect Kenter from "judicial interference in the plea bargaining process." Indeed, statements of the trial court and all parties made during the entire proceeding were recorded on videotape and made part of the trial record, thereby being available verbatim, along with the trial court's written orders and the parties' written pleadings, to any court reviewing the issue of whether Kenter's had counsel rendered ineffective assistance. Kenter was not entitled to an evidentiary hearing because the issues he raised were fairly determined on the face of the

trial record. *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993); *Sparks*, 721 S.W.2d at 726.

In the third and final instance, the aforementioned videotape of the guilty plea hearing, together with Kenter's executed written pleadings, conclusively established his counsel's effectiveness in ensuring Kenter's competency prior to entry of the guilty plea. As stated above, Kenter repeatedly acknowledged, verbally, in open court, and in writing, as documented by his "Motion to Enter Guilty Plea," that his guilty plea was entered absent any impairment, and was made knowingly, intelligently, freely, and voluntarily, without force, promise, or coercion. Kenter's counsel also verified he had explained the charges and possible defenses to his client, thereby indicating a belief that Kenter's mental state was not impaired or compromised. Moreover, Kenter exhibited an understanding of his charges, rights, defenses, potential sentence, and the Commonwealth's offer in lengthy discussions with the trial court during the guilty plea proceedings. Indeed, Kenter's demeanor and statements evidenced verbally and in writing in the trial record conclusively disprove his claim of ineffective assistance of counsel due to a failure "to ensure his competency at the time of the plea." In short, the trial record conclusively establishes Kenter was competent to enter a guilty plea, and that he may have done so grudgingly, but without coercion.

In conclusion, Kenter has failed to raise any material issue of fact which cannot be conclusively resolved by an examination of the trial court record. Thus, the trial court did not err in basing its rulings on the trial record without conducting an

evidentiary hearing concerning the matters raised by Kenter in his appeal. *Hodge*, 116 S.W.3d at 469-70.

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

ALL CONCUR.

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