

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-000445-MR

AUGUSTUS KERN

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT  
HONORABLE FRED A. STINE, V, JUDGE  
ACTION NO. 02-CR-00395

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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

NICKELL, JUDGE: Augustus Kern, pro se, has appealed from the November 11, 2006, order of the Campbell Circuit Court denying his motion to vacate his sentence pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Having concluded that the trial court did not err in denying Kern's claims, we affirm.

On August 29, 2002, Kern was indicted by a Campbell County grand jury charging him with one count of robbery in the first degree,<sup>1</sup> one count of kidnapping,<sup>2</sup> one

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<sup>1</sup> Kentucky Revised Statutes (KRS) 515.020.

<sup>2</sup> KRS 509.040.

count of attempted kidnapping,<sup>3</sup> and one count of tampering with physical evidence.<sup>4</sup> Pursuant to a plea agreement with the Commonwealth, Kern entered a guilty plea on February 25, 2003, to one count of kidnapping for which the Commonwealth recommended a 20-year sentence, one count of attempted kidnapping for which the Commonwealth recommended a ten-year sentence, and one count of tampering with physical evidence for which the Commonwealth recommended a five-year sentence. All sentences were to run concurrently for a total sentence of 20 years in prison. On February 27, 2003, the charge of robbery in the first degree was dismissed. The trial court accepted Kern's guilty plea and sentenced him to 20 years in prison on April 2, 2003, in accordance with the Commonwealth's recommendations, with Kern to receive 242 days of jail custody credit as of the date of his sentencing.

On January 14, 2004, Kern filed a pro se motion to vacate or to correct his sentence pursuant to RCr 11.42. The motion requested appointment of counsel and an evidentiary hearing and asserted ineffective assistance by trial counsel based on four contentions, including that said counsel (1) erred by advising him that if he did not accept the plea agreement and was subsequently convicted of robbery in the first degree he would have to serve 85% of any resulting sentence under the Violent Offender Statute, KRS 439.3401; (2) erred when he failed to argue that the Kidnapping Exemption Statute, KRS 509.050, should have applied to his charges; (3) erred by failing to object to the

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<sup>3</sup> KRS 509.040 and KRS 506.010.

<sup>4</sup> KRS 524.100.

charge of tampering with physical evidence as set forth in KRS 524.100; and (4) erred by failing to advise the trial court of his documented psychological problems for consideration at a competency hearing or during sentencing.<sup>5</sup>

On February 11, 2004, the trial court sustained Kern's motion for appointment of counsel and ordered the Department of Public Advocacy to provide representation. The trial court also sustained Kern's motion for an evidentiary hearing, though the same was not scheduled for a date certain. Kern's newly appointed counsel did not file a supplement to his RCr 11.42 motion, but the Commonwealth filed a response in opposition on February 13, 2004.

On September 21, 2005, the trial court entered its first order denying Kern's RCr 11.42 motion based on his claim of ineffective assistance of counsel relating to application of the Violent Offender Statute, application of the Kidnapping Exemption Statute, and his conviction for tampering with physical evidence. The trial court also granted Kern additional time to obtain and review his trial counsel's file concerning the issue of Kern's competency at the time he was arrested, yet Kern's counsel advised the trial court by letter dated October 1, 2005, that based on her review of trial counsel's record she would not be filing any subsequent pleadings relating to the competency issue. Thus, on November 11, 2005, the trial court proceeded to enter a second order denying

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<sup>5</sup> There are several motions and orders contained within the record that pertain to Kern's failure to verify his RCr 11.42 motion. Once the trial court appointed counsel to represent Kern, counsel stated that although Kern failed to verify his motion, if the trial court chose to dismiss the action, Kern was still within the three-year time frame and could file a verified RCr 11.42 motion for the trial court to consider. Instead of dismissing Kern's motion, the trial court granted Kern leave to file a verified RCr 11.42 motion.

Kern's claim of ineffective assistance by trial counsel based on counsel's failure to raise any issue concerning Kern's competency at the time of his arrest. The trial court ultimately did not hold an evidentiary hearing, but based its rulings upon its review of the trial record.

On November 17, 2005, Kern filed a motion pursuant to Kentucky Rules of Civil Procedure (CR) 59.05 to alter, amend, or vacate the trial court's orders entered on September 21, 2005, and November 11, 2005. The Commonwealth filed its objection to Kern's CR 59.05 motion on December 21, 2005, noting that it raised no new issues in addition to those already addressed in his previous RCr 11.42 motion. On February 27, 2006, the trial court entered an order denying Kern's motion. This appeal followed.<sup>6</sup>

The notice of appeal filed by Kern on December 8, 2005, designates only that he is appealing the trial court's order of November 11, 2005, which specifically

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<sup>6</sup> The trial court granted Kern's motion for appointment of counsel to represent him on appeal. However, the Department of Public Advocacy filed a motion to withdraw from the case stating that it was not a "proceeding that a reasonable person with adequate means would be willing to bring at his own expense." KRS 31.110(2)(c). This Court entered an order on May 26, 2006, allowing the DPA to withdraw as counsel for Kern, and allowing Kern the opportunity to file a pro se brief.

Upon further review of the record in this case, we must address an additional procedural matter. Although Kern filed a motion to alter, amend, or vacate pursuant to CR 59.05 on November 17, 2005, the filing of that motion did not suspend the running of the 30-day time period for filing a notice of appeal from the trial court's November 11, 2005, denial of his RCr 11.42 motion. *See Mills v. Commonwealth*, 170 S.W.3d 310 (Ky. 2005). Initially, it appears Kern failed to file his notice of appeal until February 27, 2006, well outside the 30-day time limitation. However, we note that a notice of appeal and a motion to proceed informa pauperis were timely tendered to the trial court on December 8, 2005. In an order entered on December 14, 2005, the trial court acknowledged its timely receipt of Kern's notice of appeal and motion to proceed informa pauperis, but suspended submission of those documents until it ruled on his pending CR 59.05 motion. Because we find the trial court's action procedurally incorrect, and consider Kern's notice of appeal to be timely filed, we will proceed to review the merits of his appeal.

denied his RCr 11.42 motion to vacate his guilty plea based on his assertion of ineffective assistance of counsel arising from his trial attorney's failure to raise the issue of Kern's competence prior to entry of his guilty plea. Pursuant to RCr 12.04, the notice of appeal shall "designate the judgment from which the appeal is being taken." Accordingly, Kern is procedurally barred from raising any issue other than his competency at the time the crimes were committed as support for his assertion of ineffective assistance of counsel, and we will not review any other argument raised by Kern in support of his appeal. Unfortunately, Kern's brief failed to address the issue of his competency at the time he committed his crimes. However, in the interest of judicial economy and to avoid any necessity of relitigating this matter, we have reviewed the totality of the record to determine if trial counsel rendered ineffective assistance by failing to raise the issue of Kern's mental competence prior to his entering a guilty plea, and whether the trial court thereby erred in accepting his guilty plea.

In order to be constitutionally valid, a guilty plea must be entered knowingly, voluntarily, and intelligently. *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. 1998); *Woodall v. Commonwealth*, 63 S.W.3d 104, 132 (Ky. 2002). 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." *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). Further, “the validity of a guilty plea is determined . . . from the totality of the circumstances surrounding it.” *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)). An attorney, acting in good faith, and in the exercise of reasonable judgment, may properly recommend that his client plead guilty. *Hendrickson v. Commonwealth*, 450 S.W.2d 234 (Ky. 1970). *See also Messer v. Commonwealth*, 454 S.W.2d 694 (Ky. 1970); and *Quarles v. Commonwealth*, 456 S.W.2d 693 (Ky. 1970).

The United States Supreme Court set out the standard for ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), 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.

This standard also applies to the guilty plea process. *Hill v. Lockhart*, 474 U.S. 52, 57, 106 S.Ct.366, 88 L.Ed.2d 203 (1985). “[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]. *Id.*, 474 U.S. at 56. When reviewing trial counsel's performance, this Court must be highly deferential and we should not usurp or second-guess counsel's trial strategy. *Strickland*, 466 U.S. at 689. "[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]. *Id.* "[I]n order to satisfy the 'prejudice' requirement, the defendant must show 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." *Hill*, 474 U.S. at 59.

In the case sub judice, the trial judge was very thorough during the guilty plea colloquy in advising Kern of his constitutional rights and allowing Kern to speak. When Kern entered his plea of guilty on February 25, 2003, the trial court carefully reviewed with him and his attorney the charges for which he was indicted, the possible penalties he faced under those charges, and the sentences recommended by the Commonwealth. Kern participated in an exhaustive guilty plea colloquy in which he assured the trial court that he had not been threatened, forced, or coerced to plead guilty, and that he did so knowingly and intelligently, confirmed that he was not under the influence of any drugs, alcohol, or mental incapacity, answered affirmatively when asked if his attorney had kept him fully informed and if he understood the charges against him and the possible defenses, and acknowledged his awareness of the constitutional rights he

was giving up by pleading guilty. At no time did Kern indicate any dissatisfaction with his trial counsel or with the plea agreement, though given adequate opportunity to raise any such concerns. Clearly, the trial court engaged in sufficient dialogue with Kern to ensure his understanding of the rights he was waiving. *See Centers v. Commonwealth*, 799 S.W.2d 51 (Ky.App. 1990).

Additionally, the record contains a preprinted form styled “Motion to Enter Guilty Plea” signed by Kern and acknowledging his understanding of the statements contained therein, including that: (1) by pleading guilty he would be waiving his statutory and constitutional rights, including the right to appeal; (2) his guilty plea was entered freely, knowingly, intelligently, and voluntarily; and (3) he discussed all defenses with his attorney and he was satisfied that his attorney had been diligent.

Only later, in his RCr 11.42 motion, did Kern contend that he was under the influence of excessive alcohol consumption and had taken numerous prescription medications at the time he committed his crimes. He stated that he had been having suicidal urges and on the date of his crimes had decided to “take his own life,” and argued that he had informed his trial attorney that he had been prescribed medications for psychological problems. Kern now urges that if trial counsel had presented these psychological issues regarding his competency at the time his crimes were committed to the trial court, “[t]here is a reasonable probability the out-come [sic] would have been different[.]” We fail to see the reasoning in Kern’s argument because Kern chose to plead guilty based on an offer procured by his trial attorney from the Commonwealth



based on a lesser charge and a substantially lower prison sentence. In this regard, Kern's trial counsel's assistance was not only effective, but exemplary. Based on the totality of the trial record, particularly including Kern's verbal acknowledgments during the guilty plea proceedings and his written affirmations contained in the "Motion to Enter Guilty Plea," we find his plea of guilty was entered knowingly, intelligently, freely, and voluntarily, devoid of any undue influence, force, or coercion, and that his assertion of ineffective assistance of counsel for alleged failure to raise the issue of his competency at the time the crimes were committed is unsupported and meritless.

For the foregoing reasons, the judgment of the Campbell Circuit Court is affirmed.

ALL CONCUR.

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