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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-002488-MR

LUVELL WEST

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 03-CR-00091

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * ** * ** *

BEFORE: KELLER, THOMPSON, AND WINE, JUDGES.

THOMPSON, JUDGE: Luvell West appeals from an order of the McCracken Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. For the reasons stated herein, we affirm.

On December 20, 2001, during the course of a robbery, West killed David Thomas by beating and strangling him. A McCracken County grand jury

indicted West for murder, robbery in the first degree, tampering with physical evidence, and being a first-degree persistent felony offender (PFO I).

Subsequently, the Commonwealth filed notice of its intent to seek the death penalty due to the aggravating circumstances surrounding Thomas' murder, namely, the commission of a murder during the course of a robbery and the defendant's substantial history of serious criminal convictions. Thereafter, West filed a motion to enter a guilty plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

In exchange for his guilty plea, the Commonwealth offered West life for the murder charge, twenty years for the first-degree robbery charge both of which were enhanced to life by the PFO I, and five years for the tampering with physical evidence charge which was enhanced to ten years by the PFO I. Therefore, West would effectively receive a total sentence of life imprisonment.

On May 27, 2004, West was placed under oath and declared that his testimony would be truthful. He then informed the trial court that he had an eleventh grade education and that he was not under the influence of any substance or afflicted with any mental disease that would impair his judgment. He informed the trial court that he had read and signed the motion to enter the plea and the Commonwealth's plea offer.

The guilty plea that West signed contained a list of his constitutional rights, and he acknowledged that he understood these rights, including his right to plead not guilty. The trial court recited the rights to West who acknowledged he

understood that he was waiving these rights by entering into a guilty plea. The trial court then asked West if he had any questions regarding the waiver of these rights. West stated he had no questions.

After acknowledging he understood the penalty ranges for the charged offenses, he informed the trial court he had not been forced to accept the plea offer and that no extrajudicial promises had been made to him in exchange for his plea. He then acknowledged that his counsel's representation had been competent. He informed the trial court that his attorney had fully informed him regarding his case. He then informed the trial court that he fully understood the charges against him and his possible defenses to those charges.

West's defense counsel, Vince Yustas, of the Capital Trial Branch of the Department of Public Advocacy, informed the trial court that he had tried approximately thirty death penalty cases in the past five years. He further informed the trial court he had explained West's constitutional rights to him, and he believed that West's plea was freely, willingly, knowingly, voluntarily, and intelligently made.

Further, he informed the trial court that he had no reason to believe West was under the influence of any substance that would impair his judgment. He further informed that West had received two psychiatric evaluations and no evidence of mental problems had been reported. Following this lengthy colloquy, the trial court accepted West's guilty plea.

On July 14, 2004, at his sentencing hearing, West sought the trial court's permission to withdraw his guilty plea. He alleged that his defense counsel had forced him to accept the plea, he did not fully understand the earlier judicial proceedings, and that he had not been provided with discovery.

Responding to West's allegations, the trial court informed West that he had previously sworn that his plea was entered voluntarily and knowingly. The trial court recited West's extensive criminal record and experience with judicial proceedings in refuting his alleged lack of understanding. The trial court then informed West that his counsel was provided with discovery on May 15, 2003, and had been provided with continuing discovery throughout the proceedings.

At the conclusion of the sentencing hearing, the trial court denied West's request and sentenced him in accordance with the terms of the plea bargain. West then brought a direct appeal based on the trial court's denial of his motion to withdraw his guilty plea, and the Kentucky Supreme Court affirmed his conviction in Case No. 2005-SC-000239-MR.

On October 2, 2006, West filed a motion pursuant to RCr 11.42 to set aside his conviction on the basis that his defense counsel had rendered ineffective assistance. He alleged that his counsel forced him into entering a guilty plea. This motion was denied, and this appeal followed.

On appeal, West contends that his defense counsel rendered ineffective assistance when counsel forced him to enter into a guilty plea despite

not having adequately advocated and protected West's legal interests. Having reviewed the record, we conclude that West's contentions warrant no relief.

We first observe that Kentucky courts must follow the legal conclusions of higher appellate courts when reviewing issues that have already been decided on the merits. When an appellate court rejects a legal argument on the merits, the court's decision becomes the "law of the case," and all lower courts are bound by the decision. *Williamson v. Commonwealth*, 767 S.W.2d 323, 325 (Ky. 1989).

Specifically, the law of the case doctrine prohibits the re-litigation of an issue decided in a previous appeal. *Id.* As our Supreme Court noted, "[a] final decision of this Court, whether right or wrong, is the law of the case and is conclusive of the questions therein resolved. It is binding upon the parties, the trial court, and the Court of Appeals. It may not be reconsidered by prosecuting an appeal from a judgment entered in conformity therewith." *Ellison v. Commonwealth*, 994 S.W.2d 939, 940 (Ky. 1999).

West argued to the Kentucky Supreme Court in his direct appeal that his guilty plea was not made knowingly, voluntarily, and intelligently. Addressing his argument on the merits, the Supreme Court wrote the following:

The evidence of record is clear that the trial court properly conducted a hearing to determine if Appellant's guilty plea was entered voluntarily and knowingly.... Although the trial court determined that Appellant's motion to withdraw his guilty plea was made improperly, the court still heard Appellant's reasons for withdrawal of the plea at sentencing, and informed him that the earlier

guilty plea proceeding showed that Appellant's plea was not coerced and was entered willfully. Furthermore, our review of the record leaves no doubt that Appellant did in fact enter his guilty plea voluntarily and knowingly.

While West contends that his defense counsel rendered ineffective assistance when counsel forced him to enter into a guilty plea, our Supreme Court has extensively reviewed the record and decided that his guilty plea was entered voluntarily and knowingly. Accordingly, we are not permitted to second-guess the validity of West's guilty plea. *Id.*

Further, to the extent that the law of the case doctrine does not cover any particular claim of West, he is precluded from litigating these issues under RCr 11.42. RCr 11.42 motions cannot be used to re-litigate issues already decided on direct appeal or issues which could and should have been raised during direct appeal. *Baze v. Commonwealth*, 23 S.W.3d 619, 626 (Ky. 2000).

Because all of West's contentions could have been asserted to establish the invalidity of his guilty plea on direct appeal, he cannot re-litigate these issues collaterally pursuant to RCr 11.42. *Id.* Additionally, a defendant cannot couch an issue that should have been raised in a direct appeal as a claim of ineffective assistance of counsel pursuant to RCr 11.42. *Id.* at 628.

Accordingly, because West's contentions were refuted by the record, he was not entitled to any relief below, and the trial court properly denied his motion for post-conviction relief pursuant to RCr 11.42.

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

ALL CONCUR.

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