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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000894-MR

DONALD BRIAN LEWIS — APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE LARRY D. RAIKES, JUDGE
INDICTMENT NO. 05-CR-00282

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

DIXON, JUDGE: Appellant, Donald Brian Lewis, appeals from the Nelson Circuit Court's denial of his motion for post-conviction relief pursuant to RCr 11.42. Finding no error, we affirm.

On August 17, 2005, Appellant was indicted by a Nelson County grand jury for second-degree assault, operating a motor vehicle while under the influence of alcohol and/or drugs, and possession of an open alcohol container in

the vehicle. The indictment was later amended to include a fourth count of being a first-degree persistent felony offender. The indictment stemmed from an incident that occurred in June 2005 during which Appellant assaulted two individuals with a tire tool.

During a pretrial hearing on November 28, 2005, court-appointed counsel informed the trial court that Appellant was inclined to accept the Commonwealth's outstanding plea offer of nine years on the felony assault charge and ninety days on the misdemeanor DUI charge, with the recommendation of probation on both.[1] Appellant, however, had been incarcerated since June 2005 due to the revocation of probation on a separate misdemeanor charge and was primarily concerned with whether the trial court would grant him shock probation on that charge and immediately release him from custody.[2] Both Appellant's counsel and the prosecutor informed him that they could not guarantee shock probation since that was left to the discretion of the court.

After privately conferring with counsel, Appellant stated that he wanted to go to trial on the instant charges. Counsel then asked for a continuance because his wife had had a baby the day before and he needed additional time to investigate the case. Although it is unclear from the video whether the trial court

[1] The plea offer further provided for dismissal of the other two charges and immediate furlough until sentencing. Appellant was to have no contact with the victim or his family and could not use alcohol or any controlled substances.

[2] Appellant only had eleven more days to serve on the misdemeanor charge.

ruled on the continuance or passed it for a later decision, the court thereafter advised Appellant:

> Mr. Lewis a minute ago wanted to take this plea but then did not want to because he had to serve 11 more days. With 11 days, he's going to be sitting in jail waiting for his trial . . . . I just want to make sure you understand Mr. Lewis that you're facing 10-20 years on this. I just want to make sure you understand the offer here because when you come back here on that Friday or the morning of trial, you probably won't have this offer. I just want to make sure you understand that.

At that point, Appellant attempted to explain to the trial court the facts of the incident that led to the instant charges. Both the court and Appellant's counsel dissuaded him from doing so, with the trial court commenting that the only relevant question was whether Appellant wished to accept the plea offer.

After again conferring with counsel, all parties agreed that Appellant could enter an *Alford* plea. During the plea colloquy that followed, Appellant stated that he was satisfied with his court-appointed counsel. They also discussed that Appellant wished to maintain his innocence but understood if he went to trial he risked having a jury find him guilty and he chose to enter a guilty plea instead of placing his fate in the hands of a jury. The following discussion ensued:

> Counsel: Your Honor, Mr. Lewis believes that he does have a defense but he recognizes the facts as they are and that it is a situation that he does not wish to risk taking to trial, so he believes that a jury could conceivably find him guilty and that's why he wants to enter this plea today.

Court: So he wishes to maintain his innocence but understands that if he went to trial there's a possibility a jury could find him guilty and he does not want to take that chance, would that be . . .

Counsel: Exactly.

Court: Do you agree with the statements your counsel has just placed on the record here today?

Appellant: Yes, your Honor.

A formal motion to enter a guilty plea was entered on November 29, 2005. Appellant was apparently furloughed until sentencing.

On December 26, 2005, prior to sentencing, Appellant was arrested in Jefferson County,[3] violating the terms of his furlough. As a result, the trial court herein issued a bench warrant and Appellant was taken into custody. Appellant thereafter retained private counsel.

On March 8, 2006, Appellant filed a motion to set aside his guilty plea claiming:

> Defendant has children, and was unable to be with his children while he was incarcerated awaiting trial on these charges, and was about to have a nervous breakdown because of it. Defendant was encouraged to enter a guilty plea to the Commonwealth's terms by his public defender . . . . Defendant chose to enter a guilty plea, not because he was guilty of the charges to which he pled guilty but only to be free from incarceration and to be able to see his children.

[3] The Jefferson County charges were dismissed on February 13, 2006.

Appellant further stated he "recited the 'magic phrases' required for the court to enter a guilty plea under duress, knowing that his answers would determine whether or not the Court would accept his guilty plea." Appellant contended that his new counsel had investigated the case and that the victims did not wish for him to be prosecuted.

On April 6, 2006, the trial court held a sentencing hearing and heard arguments on Appellant's motion to withdraw his guilty plea. Therein, counsel argued that Appellant had been charged with second-degree assault solely because he used a tire tool, and that if the case went to trial, Appellant would testify he acted in self-defense. Counsel stated that the victims had signed affidavits claiming that their injuries were minor and they did not want Appellant to be prosecuted any further. Counsel, however, acknowledged that Appellant was not complaining about his court-appointed counsel at the time of the plea and that the plea offer was "excellent" due to the recommendation of probation.

Following the hearing, the trial court denied the motion to withdraw the guilty plea, noting that Appellant's prior counsel was an excellent public defender, and that even the victim's affidavits stated that Appellant used a tire tool in the assault. The trial court thereafter sentenced Appellant in accordance with the terms of the plea agreement.

On April 18, 2006, Appellant failed to report to his probation officer. The same day, the probation officer received information that Appellant had assaulted a female acquaintance and had threatened to kill her and her mother. The

following day, Appellant was arrested and charged with fourth-degree assault. A drug test revealed the presence of cocaine in his system. Appellant again failed to report to his probation officer in May 2006, and absconded from supervision.

On June 8, 2006, Appellant appeared in court on the probation violations. During a brief hearing, Appellant waived the right to have counsel present and admitted the probation violations. The trial court thereafter revoked probation and sentenced Appellant to the terms of imprisonment set forth in the plea agreement.

In September 2006, Appellant filed a *pro se* RCr 11.42 motion to set aside his judgment of conviction and sentence, alleging ineffective assistance of counsel. He also filed motions for an evidentiary hearing and the appointment of counsel. The trial court thereafter appointed counsel, who filed a supplemental RCr 11.42 motion.

On March 29, 2007, the trial court entered its findings of fact, conclusions of law and judgment denying Appellant's motion without a hearing. This appeal followed.

Appellant argues on appeal that the trial court erred in denying his request for post conviction relief on the grounds that his counsel provided ineffective representation by (1) failing to adequately investigate the facts and law relevant to his case; (2) failing to prepare a defense; and (3) misinforming and misadvising him to accept the Commonwealth's plea offer. Appellant further contends that the claims he raised in his RCr 11.42 motion cannot be refuted from

the record and thus, the trial court erred in denying him an evidentiary hearing. We disagree.

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), sets forth the standard for determining ineffective assistance of counsel and requires a showing that (1) counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The two-part *Strickland* test also applies to guilty pleas based on ineffective assistance of counsel. *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985).

A criminal defendant may demonstrate that his guilty plea was involuntary by showing that it was the result of ineffective assistance of counsel. In such a case, 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* inquiry into the performance of counsel." *Rigdon v. Commonwealth*, 144 S.W.3d 283, 288 (Ky. App. 2004) (quoting *Bronk v. Commonwealth*, 58 S.W.3d 482, 486 (Ky. 2001)) (footnotes omitted). However, advising a defendant to plead guilty is not, by itself, sufficient to demonstrate any degree of ineffective assistance of counsel. *Beecham v. Commonwealth*, 657 S.W.2d 234, 236-7 (Ky. 1983). Rather, the defendant must show (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*, 721 S.W.2d 726, 727-28 (Ky. App. 1986). *See also Rigdon, supra*.

We find no merit in Appellant's claim that trial counsel was ineffective by failing to adequately investigate or prepare a defense. Contrary to Appellant's assertion, the victims did not state in their affidavits that trial counsel never attempted to contact them. Rather, the victims stated that "no person representing the Commonwealth of Kentucky" had spoken with them. Moreover, when Appellant initially appeared in court to discuss the plea offer, counsel stated on the record, "Having a baby yesterday and a full caseload and just taking over this docket, obviously I'm going to need to complete some investigation and get my investigators involved in order to get prepared." Clearly, Appellant was aware at the time he entered his plea that counsel had not conducted investigation into his case.

Notwithstanding, as the Commonwealth points out, under KRS 508.020(2), a person is guilty of second-degree assault when "[h]e intentionally causes physical injury to another person by means of a deadly weapon or dangerous instrument." There is no dispute that Appellant hit the victims with a tire tool, which constitutes both a dangerous instrument and a deadly weapon. KRS 500.080(3) and (4). And during the plea discussions, the prosecutor

explained that the Commonwealth was prepared to attack any claim of self-defense by introducing evidence of a similar attack by Appellant upon his girlfriend. Thus, even had trial counsel conducted a proper investigation, Appellant cannot demonstrate prejudice under the modified *Strickland* standard.

Nor can we conclude that trial counsel rendered ineffective assistance in advising Appellant to take the plea offer. In light of the evidence against him and the sentence he could have received if convicted by a jury, counsel's advice cannot be deemed improper. "It has remained the policy of this Commonwealth that where a plea of guilt may result in a lighter sentence than might otherwise be imposed should the defendant proceed to trial, influencing a defendant to accept this alternative is proper. *Osborne v. Commonwealth*, 992 S.W.2d 860, 864 (Ky. App. 1999).

It is obvious from a review of the proceedings that Appellant's guilty plea was knowing, intelligent and voluntary. The "Motion to Enter Guilty Plea" that Appellant signed states that his plea was "freely, knowingly, intelligently and voluntarily made." The trial court fully explained Appellant's rights and confirmed that he was aware of the consequences of his plea. Appellant's only concern at the time was getting out of jail. He was aware that his attorney lacked full knowledge of his case, but given the alternative of remaining jailed until trial, Appellant chose to accept the plea and take probation. "[T]he fact that a defendant's plea of guilty is partially motivated by his desire to escape greater punishment . . . does not render the plea invalid." *Harris v. Commonwealth*, 456

S.W.2d 690, 693 (Ky. 1970); see also *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970).

Appellant also argues that his private counsel was ineffective for failing to appeal the trial court's denial of his motion to set aside his guilty plea. The trial court noted that had Appellant's counsel appealed the denial of the motion to set aside the guilty plea after a finding that it was knowing, intelligent and voluntary, such would have constituted a frivolous appeal under CR 11.

Once the trial court makes a determination that a defendant's plea was made voluntarily, the decision to permit withdrawal of that plea is left to the sound discretion of the trial court. *Rodriguez v. Commonwealth*, 87 S.W.3d 8, 9 (Ky. 2002). A trial judge abuses that discretion when the decision is arbitrary, unreasonable, unfair or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Other than reiterating the arguments he made to the trial court, Appellant fails to demonstrate how the trial court abused its discretion in denying withdrawal of his guilty plea. This Court agrees that the plea was valid. Accordingly, there was no basis for appeal and counsel cannot be said to have provided ineffective representation. See *United States v. Carter*, 355 F.3d 920 (6th Cir. 2004); *Bowling v. Commonwealth*, 80 S.W.3d 405 (Ky. 2002), *cert. denied*, 538 U.S. 931 (2003).

Finally, we conclude that the trial court properly denied Appellant's RCr 11.42 motion without an evidentiary hearing. An RCr 11.42 motion does not

automatically entitle a movant to an evidentiary hearing. See *Skaggs v. Commonwealth,* 803 S.W.2d 573, 576 (Ky. 1990), *cert. denied*, 502 U.S. 844 (1991). RCr 11.42(5) requires the court to hold a hearing only "[i]f the motion raises a material issue of fact that cannot be determined on the face of the record." In *Fraser v. Commonwealth*, 59 S.W.3d 448, 452-453 (Ky. 2001), our Supreme Court held that "a hearing is required if there is a material issue of fact that cannot be conclusively resolved, i.e. conclusively proved or disproved, by an examination of the record . . . . A trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them." See also *Haight v. Commonwealth*, 41 S.W.3d 436 (Ky. 2001), *cert. denied*, 534 U.S. 998 (2001). The trial court herein determined that Appellant's claims were all refuted from the face of the record. As such, no hearing was warranted.

The order of the Nelson Circuit Court denying Appellant post-conviction relief pursuant to RCr 11.42 is affirmed.

ALL CONCUR.

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