RENDERED: AUGUST 29, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001409-MR

JAMES FUSTON — APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 04-CR-00252

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; NICKELL, JUDGE; GRAVES, SENIOR JUDGE.

NICKELL, JUDGE: James Fuston (Fuston) appeals from the order of the Bell Circuit Court reinstating his five-year sentence for assault in the second degree.[1]

Prior to this appeal, Fuston filed a motion for relief from judgment under RCr[2]

[1] Kentucky Revised Statutes (KRS) 508.020.
[2] Kentucky Rules of Criminal Procedure.

11.42. As a result, the trial court vacated his conviction pursuant to CR[3] 60.02, but left intact his conviction for robbery in the first degree[4] stemming from the same incident. However, upon request from the Commonwealth, the court reconsidered its decision and reinstated the original five-year sentence.

Fuston alleges on the night of August 26, 2004, he and two cohorts decided to purchase crack cocaine from Kenneth Span (Span). According to Fuston, Span previously sold the trio inferior rock cocaine. After telephoning Span and failing to persuade him to return the purchase price of the inferior cocaine, the cohorts conspired to attack and rob Span to recover their money. Upon Span's arrival, one cohort hid behind the door and struck Span over the head with a hammer as he entered the residence. Fuston then stabbed Span in the abdomen multiple times, causing serious physical injury. In the early morning hours of August 27, 2004, Fuston was arrested and charged with assault in the second degree and robbery in the first degree. Fuston denies receiving any of the spoils and alleges one of his cohorts robbed Span but later returned the money after coming to her senses.

Counsel was appointed on August 27, 2004. At the urging of Fuston's grandmother, counsel moved for a psychiatric evaluation on December 29, 2004. On February 7, 2005, the court heard testimony from Fuston and the jailer prior to

[3] Kentucky Rules of Civil Procedure.

[4] KRS 515.020.

arraignment. The trial court found no reason for an evaluation and denied Fuston's motion.

Subsequently, Fuston accepted a plea bargain. Following the customary colloquy in which Fuston acknowledged he was unimpaired, aware of the charges and evidence against him, had discussed his options with his attorney and was fully informed of the constitutional rights he would waive by pleading guilty, the court accepted Fuston's motion to enter a guilty plea. On February 21, 2007, the court entered judgment against Fuston in accordance with the plea agreement and sentenced him to ten-year's imprisonment for the robbery and five-year's imprisonment for the assault, with said sentences to run concurrently for a total of ten-year's imprisonment. The court denied Fuston's motion for shock probation on June 21, 2005.

On May 31, 2007, Fuston filed a motion to vacate or set aside judgment of conviction and sentence pursuant to RCr 11.42. In his supporting memorandum, he claimed: (1) counsel failed to investigate his psychiatric history; (2) failed to research and argue a double jeopardy violation; and (3) coerced his guilty plea. Without holding an evidentiary hearing, the court found the record refuted Fuston's first and third contentions. However, on June 6, 2007, the court vacated Fuston's five-year sentence for assault pursuant to CR 60.02, finding conviction on charges of both robbery and assault violated the prohibition against double jeopardy. After considering the Commonwealth's subsequent brief, on July 6, 2007, the court set aside its order vacating Fuston's assault conviction and

reinstated the five-year sentence. On July 12, 2007, Fuston filed this appeal from the lower court's order dated *June 6, 2007*. We now affirm.

Although not argued by the Commonwealth, the order from which Fuston appeals was not final; it was set aside one month after being entered. "Our rules require that there be a final order or judgment from which an appeal is taken." (footnote omitted) *Wilson v. Russell*, 162 S.W.3d 911, 913-14 (Ky. 2005). Technically, we do not have jurisdiction over Fuston's appeal. *Id*. at 913-14. However, "automatic dismissal is not an appropriate remedy . . . where the violation is only technical and no prejudice can be demonstrated." *Ready v. Jamison*, 705 S.W.2d 479, 481-482 (Ky. 1986). Further, rules are to be liberally construed in favor of *pro se* prisoners. *Million v. Raymer*, 139 S.W.3d 914, 920 (Ky. 2004) (citing *Case v. Commonwealth*, 467 S.W.2d 367, 368 (Ky. 1971)). Fuston timely filed his notice of appeal and no harm was caused by transposing the similarly worded orders of June 6 and July 6. We will not allow an inadvertent typographical error to preclude us from considering the merits of Fuston's claims. *Ready, supra*, 705 S.W.2d at 482. In light of *Ready* and *Million*, we will review Fuston's appeal as though it pertains to the lower court's final order of July 6, 2007.

On appeal, Fuston's claims mirror those originally made to the trial court in his RCr 11.42 motion. He claims counsel: (1) failed to investigate and present evidence of his mental condition; (2) failed to investigate the facts and law

applicable to his case; and (3) coerced him to accept the Commonwealth's offer and enter a guilty plea. We disagree.

As a reviewing court, we defer to the findings of fact and determinations of credibility made by the trial court. *Commonwealth v. Bussell*, 226 S.W.3d 96, 99 (Ky. 2007). Unless clear error is apparent, we will not disturb the trial court's findings. *Id.* However, we will review application of the law to the facts *de novo*. *Carroll v. Meredith,* 59 S.W.3d 484, 489 (Ky.App. 2001).

To demonstrate ineffective assistance of counsel, Fuston must overcome a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. 668, 669 (1984); *Gall v. Commonwealth*, 702 S.W.2d 37, 39-40 (Ky. 1985). Fuston must allege and prove: (1) counsel's assistance was deficient and (2) that deficiency prejudiced his defense. *Strickland, supra,* 466 U.S. at 687.

With respect to the first prong, when a defendant pleads guilty on the advice of counsel, "the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." (internal quotation marks omitted) *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S.Ct. 366, 369 (1985) (citing *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763, 773 (1970)).

> The second, or "prejudice," requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in 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.

(footnote omitted) *Id.* at 58. The standard for evaluating counsel's duty to investigate is no different. *Strickland, supra,* 466 U.S. at 669. Because there was no evidentiary hearing on the motion for psychological evaluation, our 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, 322 (Ky. 1967).

The record clearly refutes Fuston's claim of mental incapacity. Fuston contends the court should have found him incompetent because he dropped out of school after the eighth grade, had difficulty reading and writing, and spent a year in a mental institution. But, Fuston's averments are unsupported, and we see them for the first time in his appellate brief; the trial record is devoid of any such claims. The only support found within the record is Fuston's own statement that a psychological evaluation was necessary because, "I don't know what's wrong with me, I just don't act right." Further, Fuston exhibited no signs of irrational behavior or oppositional defiant disorder[5] while in custody or when appearing before the court; he was calm, compliant and respectful at all times. Fuston does not claim he gave counsel any evidence or reason to suspect his mental capacity was below the

[5] The trial court states Fuston has been diagnosed with oppositional defiant disorder; however this diagnosis does not appear in the record and Fuston does not refer to the diagnosis in his brief.

requisite level. "We will not engage in gratuitous speculation . . . based upon a silent record." *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985).

Fuston needed only "substantial capacity to comprehend the nature and consequences of the proceedings against him, and [the ability] to participate rationally in his defense to be judged competent to stand trial." *Alley v. Commonwealth*, 160 S.W.3d 736, 739 (Ky. 2005). The record reflects he had both. Fuston was able to explain the events surrounding the assault and robbery in open court, question the soundness of the robbery charge during his guilty plea colloquy and sentencing hearing, and express remorse for his acts in a letter accompanying his motion for shock probation. Thus, we see no substantive reason for counsel to question Fuston's mental state and therefore no deficiency in counsel's performance. *Strickland, supra,* 466 U.S. at 699.

Likewise, counsel did not err by failing to challenge the assault charge on double jeopardy grounds. In *Taylor v. Commonwealth*, 995 S.W.2d 355, 358 (Ky. 1999), a defendant was convicted of both robbery in the first degree and assault in the second degree. Therein the Supreme Court of Kentucky announced, "the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." *Id*. (citing *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932)).

Unlike robbery in the first degree, which merely requires *intent to accomplish theft*, assault in the second degree requires *intent to cause physical*

injury. Additionally, to prove robbery in the first degree the Commonwealth must prove the threat of physical force. Since each charge against Fuston clearly requires proof of an additional fact which the other does not, there has been no double jeopardy violation. *Id.* Even if his assault conviction were vacated, Fuston would still serve the same ten-year sentence of imprisonment for robbery. Thus, Fuston has suffered no prejudice. *Strickland, supra*, 466 U.S. at 699.

Finally, the record clearly refutes Fuston's contention that counsel coerced his guilty plea. Fuston signed a motion to enter guilty plea confirming his judgment was not impaired by drugs, alcohol, or medication and that he had fully discussed his case with his attorney prior to executing the document. The written motion contains a detailed recitation of the constitutional rights he understood he was waiving by entering a guilty plea as well as the consequences of entering such a plea. In addition, the form stated:

> I declare my plea of "GUILTY" is freely, knowingly, intelligently and voluntarily made; that I have been represented by counsel; that my attorney has explained my constitutional rights to me, as well as the charges against me and any defenses to them; and that I understand the nature of this proceeding and all matters contained in this document.

Fuston executed the guilty plea form on February 7, 2005. Immediately below his signature is a certificate executed by counsel affirming, to the best of his knowledge and belief, that Fuston was fully informed of the consequences of entering a guilty plea and that his plea was freely, knowingly, voluntarily, and intelligently made.

The record reveals that at the time of the plea, the trial court conducted a *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), hearing at which Fuston reaffirmed his written statements to the trial court. Given these facts, we must conclude his guilty plea was valid.

"[T]he effect of a plea of guilty is to waive all defenses other than that the indictment charges no offense." *Quarles v. Commonwealth*, 456 S.W.2d 693, 694 (Ky. 1970) (citing *Commonwealth v. Watkins*, 398 S.W.2d 698 (Ky. 1966); *Boles v. Commonwealth*, 406 S.W.2d 853 (Ky. 1966)). Fuston has failed to demonstrate that he received ineffective assistance of counsel as a matter of fact, and as a matter of law he is not entitled to raise such a claim because he waived all defenses in his plea.

For the foregoing reasons, the opinion of the Bell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James Fuston, *pro se*
Burgin, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Joshua D. Farley
Assistant Attorney General
Frankfort, Kentucky