RENDERED: DECEMBER 5, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002572-MR

JEFFREY HOWELL — APPELLANT

v.

APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 06-CR-00021

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CLAYTON AND KELLER, JUDGES.

ACREE, JUDGE: Jeffrey Howell appeals from the Grant Circuit Court's denial of his motion for Kentucky Rules of Criminal Procedure (RCr) 11.42 post-conviction relief. Finding no error, we affirm.

On January 18, 2006, Howell was arrested for first-degree rape and possession of marijuana. After initially pleading not guilty, on June 21, 2006,

Howell, represented by Marcus Carey, withdrew his plea and entered an *Alford*[1] plea of guilty to second-degree rape and possession of marijuana. Howell's sentencing was set for July 26, 2006.

On July 25, 2006, Howell hired new counsel, Robert Moffitt, to represent him during sentencing. Howell moved to withdraw his guilty plea based on the alleged rape victim recanting her accusations. However, on August 9, 2006, Howell withdrew his motion to withdraw his guilty plea.

At the sentencing hearing, the trial court went through an extensive plea colloquy in which Howell stated he understood the nature and consequences of the proceedings. Howell affirmatively replied that he reviewed his plea agreement with his attorney and did not have questions concerning the document.

In response to the trial court's questions concerning Howell's attorney's representation and his understanding of the *Alford* plea, the following exchange occurred:

> Trial Court: Sir, have you had enough time [sic] speak with your attorney about your case so that you feel comfortable entering a plea of guilty at this time?
>
> Howell: Yes, sir.
>
> TC: And has your attorney answered all of your questions for you?
>
> H: Yes, sir.
> TC: Has he investigated your case to your full satisfaction?
>
> H: Yes, sir.

[1] *See North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) and RCr 8.09.

TC: Has he discussed with you the ramifications of this plea under the Alford case?

H: Yes, sir.

TC: And you understand under that case[,] although you are saying today, you are pleading guilty not because you believe you are guilty but because you believe there is sufficient evidence to convict you? As far as your record is concerned you will be treated as a convicted felon, do you understand that, sir?

H: Yes, sir.

The trial court also asked Howell if he was being treated for any medical or mental problems of any kind. To which Howell replied, "No, sir."

Finally, the trial court engaged in a colloquy with defense counsel. In response to the trial court's questions, Mr. Moffitt stated that he believed Howell understood the charges and his rights. Mr. Moffitt stated he did not know of any reason why Howell should not plead guilty and that Howell would be able to assist him in a defense if that became necessary. Mr. Moffitt detailed that it was his opinion that the plea was being offered knowingly, voluntarily and understandingly.

The trial court found Howell entered his guilty plea knowingly and intelligently and sentenced him in accordance with his plea agreement. Howell received a five-year prison sentence, probated for five years, and was fined $1,000.00.

On June 15, 2007, Howell's probation officer filed a report stating Howell had violated the terms of probation by being terminated from the Department of Corrections Sex Offender Treatment Program (SOTP). The report stated that Howell had been terminated for failing to admit his offense and participate with group.

Subsequently, Howell hired his current legal counsel and filed an RCr 11.42 motion. In his motion, Howell maintained his guilty plea had not been entered knowingly, intelligently and voluntarily. Specifically, Howell argued: (1) he was not competent to enter a guilty plea; (2) trial counsel was ineffective for not investigating Howell's incompetency; (3) trial counsel related incorrect sentencing information; and (4) Howell did not understand that as a condition of his probation, he would have to admit guilt in order to complete his sex offender treatment program.

Howell's motion was denied. This appeal followed.

Howell claims the trial court erred by denying him an evidentiary hearing despite his having raised specific grounds for relief that could not be refuted by the record alone. Howell's claim is primarily based on his assertion that due to side effects from a 2004 automobile accident, he was not competent to understand the plea he accepted and unable to enter a voluntary guilty plea. However, Howell has cited to nothing in the record supportive of his claim that he suffered from mental impairments which rendered him incompetent to understand his plea and its consequences. Howell attached to his RCr 11.42 motion the

hospital discharge summary following his accident. No permanent brain damage or lingering mental impairment was noted in the report. On the date of his discharge, the report stated:

> The patient had normal neurological examination on the day of discharge. It is noted that however the patient has a difficult time focusing his attention and has very short attention span.

No additional evidence was presented describing Howell's mental condition or any problems he may have had on the date the plea was entered concerning his ability to comprehend the legal situation. As the trial court noted, there was no evidence from any doctor – just assumptions made by Howell that his previous head injury caused a lack of competence to enter a guilty plea.

Additionally, Howell specifically told the trial court at his plea colloquy that he was not being treated for any medical or mental problems, nor had he ever suffered from mental problems. Howell argued that his incompetence should have been obvious to the court because only a person suffering from a mental problem and unable to comprehend his own impairment would answer in the negative when asked whether he was suffering from a mental problem. We are not persuaded. The record before this Court clearly refutes Howell's assertion of incompetence.

We next turn to Howell's claims of ineffective assistance of counsel. In order to prevail on a claim of ineffective assistance of counsel, a defendant must meet a two-prong test, proving first that counsel made errors outside the norm of

professionally recognized assistance and, second, that counsel's errors caused prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Further, because he entered a guilty plea, Howell is required to 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 v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985). Our state courts have also recognized this standard for attacking legal representation leading to a guilty plea. *Sparks v. Commonwealth*, 721 S.W.2d 726, 728 (Ky.App. 1986).

Howell argues that he received ineffective assistance of counsel arising from counsel's failure to request a competency hearing. He contends that if a hearing had been requested, the court would have learned that he was not competent to enter an intelligent guilty plea. The corpus of this argument centers on his assertion that but for counsel's failure to seek a competency hearing, the court would have determined that he was not competent to enter a guilty plea.

In order to prevail on this claim of error, Howell would have to demonstrate that he was not competent during the same timeframe that both he and his counsel stated to the trial court on the record that he was competent. He would also have to show that but for counsel's failure to seek a competency hearing, the outcome of the proceeding would have been more favorable than the plea that he accepted. He has not met this burden. As noted above, Howell has cited to nothing in the record in support of his claim that he suffers from a mental impairment. Even if that assertion were accepted, he has not overcome the strong

presumption that counsel's strategy was proper. *Strickland*, supra; *Sanborn v. Commonwealth*, 975 S.W.2d 905 (Ky. 1998). Proper trial strategy may include pleading guilty. *Hendrickson v. Commonwealth*, 450 S.W.2d 234 (Ky. 1970). As there is no basis in the record to support the hypothesis that counsel should have sought a competency hearing nor that such a hearing would have benefited Howell, we find no error on this issue.

Howell also claims that trial counsel was ineffective because he did not have an appropriate amount of time to discuss his case with counsel before entering his plea. Appellant further alleges he was not properly advised of the meaning and consequences of an *Alford* plea. However, during the plea colloquy, Howell told the trial court that he had been provided with enough time with his attorney and felt comfortable about entering a guilty plea. He specifically acknowledged that his attorney had answered all of his questions and investigated his case to Appellant's full satisfaction. We agree with the trial court that Appellant's claim of ineffective assistance of counsel is clearly refuted by the record. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Finally, Howell's claim that revoking his probation after he refused to admit his guilt as a part of the SOTP violates his due process rights is without merit. Howell contends he was never told that he would have to admit his guilt as part of the SOTP and because he maintained his innocence pursuant to his *Alford* plea, he had no chance to complete the program. We disagree.

This Court rejected a similar argument is *Wilfong v. Commonwealth*, 175 S.W.3d 84 (Ky.App. 2004). We found:

> The entry of a guilty plea under the *Alford* doctrine carries the same consequences as a standard plea of guilty. By entering such a plea, a defendant may be able to avoid formally admitting guilt at the time of sentencing, but he nonetheless consents to being treated as if he were guilty with no assurances to the contrary.

Id. at 102 (quoting *State v. Faraday*, 842 A.2d 567, 588 (2004)). The condition that Howell successfully complete the SOTP was not inconsistent with his *Alford* plea and did not violate his due process rights.

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

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

Dace A. Lubans-Otto
Florence, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Michael L. Harned
Assistant Attorney General
Frankfort, Kentucky

ORAL ARGUMENT FOR APPELLEE:

Michael L. Harned
Assistant Attorney General
Frankfort, Kentucky