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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001420-MR

JOE A. BROWDER, JR.

APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NO. 04-CR-00547

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KELLER, STUMBO, AND VANMETER, JUDGES.

VANMETER, JUDGE: Joe Alexander Browder, Jr. appeals from the Daviess Circuit Court's order denying his motion for post-conviction relief pursuant to RCr¹ 11.42. For the following reasons, we affirm.

¹ Kentucky Rules of Criminal Procedure.

Browder was arrested and searched after police officers made two controlled buys of crack cocaine from him. Pursuant to a guilty plea, Browder was convicted of three counts of trafficking in a controlled substance in the first degree, trafficking in a controlled substance within 1,000 yards of a school, and possession of drug paraphernalia. He was sentenced to ten years' imprisonment.

In his *pro se* motion for RCr 11.42 relief, Browder moved for an evidentiary hearing and for vacation of his judgment and sentence, on the grounds that his guilty plea was invalid and that he received ineffective assistance of counsel. After considering the Commonwealth's response, the trial court, without conducting a hearing, denied Browder's motion. This appeal followed.

First and foremost, “a plea of guilty constitutes a waiver of all defenses other than that the indictment charged no offense.” *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky.App. 1986) (quoting *Sanders v. Commonwealth*, 663 S.W.2d 216, 218 (Ky.App. 1983)). The court therefore properly limited its consideration of Browder's motion to his claims that he was afforded the ineffective assistance of counsel and entered an invalid guilty plea, rather than addressing the evidentiary and other issues raised in his motion for relief.

The test for determining the validity of a guilty plea is “whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” *North Carolina v. Alford*, 400 U.S. 25, 31, 91S.Ct. 160, 164, 27 L.Ed.2d 162 (1970). The record must contain “an affirmative

showing that [the plea] was intelligent and voluntary.” *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969). “[T]he validity of a guilty plea is determined not by reference to some magic incantation recited at the time it is taken but 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, 1469, 25 L.Ed.2d 747 (1970)). If, as here, no mental evaluation was ordered, despite a claim of competency concerns, the standard on review is: “whether a reasonable judge, situated as was the trial court judge whose failure to conduct an evidentiary hearing is being reviewed, should have experienced doubt with respect to competency to stand trial.” *Williams v. Bordenkircher*, 696 F.2d 464, 467 (6th Cir. 1983).

Browder elected to enter a plea of guilty during the *voir dire* phase of his jury trial. In his colloquy with the court, Browder confirmed that he was entering his guilty plea voluntarily, freely and intelligently. He stated that he had thirteen years of education, that he knew the difference between right and wrong both presently and when he committed the offenses, and that he knew his behavior at the time of the offenses was in fact wrong. In light of Browder’s claim that he had been previously diagnosed with a mental illness, the court made a point of ensuring that Browder knew the difference between right and wrong. Browder’s attorneys stated that they believed he was competent to stand trial or enter a guilty plea, and that he was competent when he committed the offenses.

Browder further declared that he had no complaints against his attorneys and that he was satisfied with their representation. Browder stated that he had read, understood, and agreed with the contents of the guilty plea forms. He acknowledged that he was pleading guilty because he was guilty and wanted to take advantage of the Commonwealth's plea offer, and that he knew his guilty plea would result in the waiver of his right to appeal and all defenses to the charges. Browder informed the court that no promises or force had been used to get him to plead guilty, that he was pleading guilty because he was in fact guilty, and that he was doing so willfully, freely, and voluntarily.

A review of the record reflects that a reasonable judge, situated as was the trial court judge here, should not have experienced doubt with respect to Browder's competency to stand trial. The court declined to order a KCPC² mental evaluation of Browder, which Browder's attorneys had moved for after Browder had accused them of uttering a racial slur against him. A subsequent investigation into the matter revealed Browder's allegation was baseless and the court found nothing in the record demonstrated the need for such an evaluation, as Browder had been participating logically and vocally throughout proceedings. Furthermore, the attorneys' and Browder's representation to the court that Browder was competent, along with the court's observations of Browder throughout this case, including the guilty plea, confirm that despite Browder's claim of mental incompetency, his guilty plea was intelligently and voluntarily made.

² Kentucky Correctional Psychiatric Center.

Thus, the court's acceptance of his plea of guilty was not in error. Moreover, "[w]here the movant's allegations are refuted on the face of the record as a whole, no evidentiary hearing is required." *Sparks*, 721 S.W.2d at 727. Since the record plainly refutes Browder's allegation that his guilty plea was invalid, the court did not err by declining to conduct an evidentiary hearing.

Next, Browder claims that he received ineffective assistance of counsel. We disagree. Such a claim requires Browder to show: (1) that counsel's representation was deficient in that it fell below an objective standard of reasonableness, measured against prevailing professional norms; and (2) that he was prejudiced by such deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Gall v. Commonwealth*, 702 S.W.2d 37, 39 (Ky. 1985) (adopting *Strickland* standard).

Under the first prong of *Strickland*, review of defense counsel's performance begins with the

[S]trong presumption that counsel acted reasonably and effectively. [The court] must also recognize that a defendant is not guaranteed errorless counsel or counsel that can be judged ineffective by hindsight, but rather counsel rendering reasonably effective assistance. Finally, [the court] must consider the totality of evidence before the jury and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance.

Mills v. Commonwealth, 170 S.W.3d 310, 328 (Ky. 2005)(internal citations omitted).

Here, the court's order denying RCr 11.42 relief included the following relevant findings, as summarized by this Court:

At his arraignment on November 10, 2004, Browder refused to have counsel appointed and informed the court that he intended to hire private counsel and would do so by the end of November. The court reset formal arraignment for November 19, 2004. On that date, Browder informed the court that he had still not hired private counsel, but that he had the funds to do so and did not believe he was entitled to a public defender. Browder requested the arraignment be reset again for ten days. The court accommodated his request. On December 1, 2004, Browder yet again informed the court that he had not hired an attorney, and he requested another continuance. The court once more granted Browder's request and reset the arraignment for December 14, 2004. The court advised Browder that a trial date was preliminarily set for April 29, 2005. When Browder informed the court on December 14, 2004 that he had still not hired private counsel, the court appointed a public defender to stand in on the case as Browder's counsel for arraignment. The appointed public defender, along with another public defender, advised the court that they would serve as counsel for Browder. The court formally set the trial date for April 29, 2005. One of the public defenders then filed an agreed order regarding discovery, a notice of appearance, and a notice to preserve evidence. Browder was present in court on April 7, 2005 with his attorneys for a hearing regarding the Commonwealth's motion to amend count five of the indictment. Browder was belligerent and disruptive in court and accused one of the public defenders and an investigator of using a racial slur against him. The public defender made an oral motion for a KCPC evaluation, which the court denied, stating that nothing had occurred thus far to reflect any need for a KCPC evaluation. After an investigation, Browder's accusations were found to be baseless and it was determined that no conflict prevented the accused public defender from continuing to represent Browder. When the results of the investigation were being presented to the court, Browder once again became

disruptive and was removed from the courtroom temporarily. Upon his return, he adamantly refused the Commonwealth's plea offer of five years on a guilty plea to count three and stated that he no longer wished to have the office of public advocacy represent him and that he was hiring a private attorney. The court ruled that it would relieve the public defenders from actively representing Browder by preparing for trial, but ordered that they remain counsel of record until Browder's new attorney entered an appearance or, alternatively, to answer questions Browder may have during the trial should he decide to represent himself. At a hearing on April 27, 2005, Browder informed the court that he had hired private counsel to represent him, that he had assets in excess of \$60,000.00 and that he was ineligible for a public defender. The Commonwealth advised the court that it had spoken with the private counsel who Browder claimed was representing him before the hearing, and that the private counsel had informed the Commonwealth that he was not representing Browder. In any event, the day of trial, two days later, Browder informed the court in chambers that he now wished to have a public defender but that his public defenders of record were not prepared for trial. The public defenders admitted as much, and moved for a continuance on the grounds of unpreparedness and that they would have filed a motion for a competency hearing had they been able to be more actively involved, rather than standby counsel. The court denied their motion, finding that they had reviewed all of the evidence in the case and were fully informed of the facts of the case. Furthermore, the court stated that it did not believe Browder to be incompetent, that there had been no evidence up to that point of either a mental defect or a mental disease, and that Browder appeared to appreciate the nature and consequences of the proceedings against him and could rationally participate in his defense. During *voir dire*, the public defenders again moved for a continuance, on the ground that they did not feel adequately prepared for trial. The court again denied the motion, stating that it believed Browder's actions were last minute maneuverings intended to frustrate the court's scheduling, as the court had made it clear to Browder that

if the case was not tried on April 29, the next available date would be months from then. The court also stated that if the office of public advocacy was not as prepared as they believed they could have been, that was due only to Browder's informed decisions and conduct up to that point. The Commonwealth's voir dire continued until a public defender approached the bench and informed the court that Browder wished to accept the plea offer of a combined sentence of ten years' imprisonment with dismissal of the PFO charge. The court sent the jury out of the courtroom and began a colloquy with Browder regarding the plea of guilty.

Reviewing the facts in light of *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064, the court concluded that Browder had not been afforded ineffective assistance of counsel. The record reflects that counsel reviewed all evidence and discovery prior to trial, that they were ready and willing to continue preparing for Browder's trial until Browder fired them in open court on April 7, 2005. Only on the morning of trial, some three weeks later, did Browder inform the court of his desire to have appointed counsels' representation of him reinstated. Thereafter, the court refused to grant Browder a continuance, finding that it knew of no one more knowledgeable of the facts and evidence in the case than the public defenders who had been acting as stand-by counsel.

Our review of the record shows that Browder has failed to satisfy the first prong of the *Strickland* test by proving that the performance of his trial counsel was deficient. Moreover, as Browder's allegation of ineffective counsel is clearly refuted, the trial court did not err by declining to conduct an evidentiary hearing.

The order of the Daviess Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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