RENDERED: OCTOBER 29, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001080-MR

MONTECARLO GARTRELL — APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JAMES R. SCHRAND, II, JUDGE
ACTION NO. 05-CR-00814

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: DIXON AND KELLER, JUDGES; LAMBERT,[1] SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Montecarlo Gartrell, proceeding *pro se*, appeals from a judgment of the Boone Circuit Court denying his petition for post-conviction relief filed pursuant to Kentucky Rules of Civil Procedure (RCr) 11.42. Appellant raised a number of claims in support of his motion, including ineffective

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

assistance of counsel. Having reviewed the record, we believe that an evidentiary hearing is required. Thus, we vacate and remand for further proceedings consistent with this opinion.

Facts and Procedural History

Appellant was charged with committing first-degree robbery in violation of KRS 515.020 and being a first-degree persistent felony offender (PFO) in violation of KRS 532.080(3) after he was accused of robbing the First Financial Bank in Hebron, Kentucky, and taking approximately $6,000 in cash. Pursuant to a plea agreement, Appellant pled guilty to the first-degree robbery charge in exchange for the Commonwealth's recommendation of the minimum ten-year sentence for that offense. The PFO charge was dismissed because of the age of Appellant's prior convictions. After a plea colloquy with Appellant and his defense counsel, the trial court accepted Appellant's guilty plea and sentenced him to ten years' imprisonment in accordance with the Commonwealth's sentencing recommendation.

On April 6, 2009, Appellant filed a motion for post-conviction relief pursuant to RCr 11.42 on the grounds that he had received ineffective assistance of counsel. Appellant also filed corresponding motions for an evidentiary hearing and for appointment of counsel. In support of his RCr 11.42 motion, Appellant argued that his trial counsel was ineffective because she had: (1) failed to properly investigate his mental health in order to determine his competency to plead guilty; (2) failed to conduct a proper investigation of the case in general and advised him

to plead guilty to first-degree robbery even though the facts would not have supported a conviction for this offense; and (3) advised him to plead guilty in the face of prosecutorial misconduct. The Boone Circuit Court denied Appellant's motion without an evidentiary hearing on May 20, 2009. This appeal followed.

Analysis

On appeal, Daniels argues that the circuit court erroneously denied his motion for RCr 11.42 post-conviction relief without a hearing. Because an evidentiary hearing was not held, "[o]ur review is confined 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). RCr 11.42 requires an evidentiary hearing "if the answer raises a material issue of fact that cannot be determined on the face of the record." RCr 11.42(5); *see also Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993). "The trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them." *Fraser v. Commonwealth*, 59 S.W.3d 448, 452-53 (Ky. 2001). However, there is no need for an evidentiary hearing if the record refutes the claims of error or if the defendant's allegations, even if true, would not be sufficient to invalidate the conviction. *Harper v. Commonwealth*, 978 S.W.2d 311, 314 (Ky. 1998). With these standards in mind, we turn to Appellant's arguments.

We first address Appellant's contention that he was entitled to an evidentiary hearing on his RCr 11.42 motion because his counsel advised him to

plead guilty to first-degree robbery even though the facts of the case could not have supported such a conviction. This case is somewhat unusual in that during Appellant's plea colloquy with the court, both Appellant's attorney and the Commonwealth's Attorney interjected and agreed that the facts of the case were undisputed. Both represented that Appellant had: (1) entered the bank; (2) made a demand for money in the guise of a request for a loan for $30,000; (3) placed his hand in his jacket pocket; and (4) then placed his hand/pocket on top of the bank counter while telling the bank clerk to give him money.

Appellant's attorney told the trial judge that this case was one of the most "borderline" first-degree robbery cases with which she had ever dealt. She indicated, though, that Appellant had acted in a way that arguably suggested to the bank teller that he had a gun. Based on unsworn assertions made by both Appellant's counsel and the Commonwealth's Attorney, it does not appear that Appellant was actually armed at the time of the robbery. Moreover, it does not appear that Appellant ever actually told the bank teller that he had a gun or was otherwise armed. Appellant's counsel told the court that she believed that the case ultimately boiled down to whether she could procure a directed verdict on Appellant's behalf as to the question of whether his actions – as a matter of law – were enough to constitute first-degree robbery. Because of her perception of the case as "borderline," however, she ultimately advised Appellant to plead guilty to first-degree robbery in exchange for the minimum sentence for that offense.

In order for a defendant to prove ineffective assistance of counsel when a guilty plea has been entered, he 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).

Because "the effect of a valid plea of guilty is to waive all defenses other than that the indictment charges no offense," *Commonwealth v. Elza*, 284 S.W.3d 118, 121 (Ky. 2009), the voluntariness and validity of Appellant's guilty plea requires particular examination. *See Bronk v. Commonwealth*, 58 S.W.3d 482, 487 (Ky. 2001). Where a defendant enters a guilty plea upon 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." *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S.Ct. 366, 369, 88 L.Ed.2d 203 (1985), quoting *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970). "We determine the voluntariness of the plea from the 'totality of the circumstances.' " *Elza*, 284 S.W.3d at 121, quoting *Rodriguez v. Commonwealth*, 87 S.W.3d 8, 10-11 (Ky. 2002). "In doing so, we 'juxtapose the presumption of voluntariness inherent in a proper plea colloquy with a *Strickland v. Washington* inquiry into the performance of counsel.' " *Id.*, quoting *Bronk*, 58 S.W.3d at 486.

As noted above, during Appellant's plea colloquy hearing, Appellant's counsel expressed her belief that Appellant's case was a "borderline" first-degree robbery case. KRS 515.020, the statute addressing the offense of first-degree robbery, provides:

> (1) A person is guilty of robbery in the first degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft and when he:
>
> > (a) Causes physical injury to any person who is not a participant in the crime; or
> >
> > (b) Is armed with a deadly weapon; or
> >
> > (c) Uses or threatens the immediate use of a dangerous instrument upon any person who is not a participant in the crime.

The parties appear to agree that Appellant did not cause physical injury to anyone and was not, in fact, armed with a deadly weapon. However, in accordance with KRS 515.020(1)(c), the Commonwealth is not required to prove that a robber actually possessed a gun or other deadly weapon in order to secure a conviction for first-degree robbery. *Whalen v. Commonwealth*, 205 S.W.3d 238, 240 (Ky. App. 2006). Thus, the question for Appellant's attorney in analyzing this case was whether Appellant's actions could be viewed as using or threatening the immediate use of a dangerous instrument to accomplish the intended theft.

The Commonwealth cites to a number of cases in support of its position that Appellant was subject to conviction for first-degree robbery and, therefore, his attorney did not render ineffective assistance of counsel in advising

him to plead guilty to that offense. In each of those cases – *Shegog v. Commonwealth*, 142 S.W.3d 101 (Ky. 2004), *Dillingham v. Commonwealth*, 995 S.W.2d 377 (Ky. 1999), and *Merritt v. Commonwealth*, 386 S.W.2d 727 (Ky. 1965) – the defendant was convicted of first-degree robbery, despite the fact that he did not actually possess a handgun or other dangerous instrument at the time, because his actions were viewed as threatening the immediate use of a dangerous instrument. The *Merritt* court specifically held that "any object that is intended by its user to convince the victim that it is a pistol or other deadly weapon and does so convince him *is* one" even if the user did not actually possess a deadly weapon. *Merritt*, 386 S.W.2d at 729.[2] In light of this holding, the Commonwealth argues that because Appellant placed his hand in his pocket and the pocketed hand on the counter in a manner suggesting that a weapon was contained therein, a first-degree robbery conviction was possible.

However, in both *Shegog* and *Dillingham*, the defendants expressly told the victims that they had guns. *Shegog*, 142 S.W.3d at 109; *Dillingham*, 995 S.W.2d at 380. Moreover, in *Merritt*, the victim was threatened with a visible object that appeared to the victim to be a gun. *Merritt*, 386 S.W.2d at 729. Thus, all three cases involved a direct, unambiguous threat of a gun, which does not appear from the abbreviated record in this case. Appellant argues that this

[2] We note that the viability of this rule of law has recently been called into question. *See Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010). However, because *Wilburn* was rendered after the pertinent events in this case occurred, we decline to comment further on this decision.

difference is critical in light of other case law, and we are compelled to agree after reviewing those decisions.

For example, in *Williams v. Commonwealth*, 721 S.W.2d 710 (Ky. 1986), one of the decisions relied upon by Appellant, a convenience store was robbed by an individual who threatened the store's clerk by reaching towards his back pocket and stating, "Do you want your life?" The individual was almost immediately apprehended, but no gun or other weapon was found. However, the clerk testified that when he was threatened, he believed "maybe he (Appellant) had a weapon or something." *Id.* at 711.

The Supreme Court of Kentucky concluded that these facts were insufficient to have supported submission of a first-degree robbery instruction to the jury. *Id.* at 712. The Court noted that "although force was threatened, the presence of a weapon or instrument was illusory at best" and held that "[w]ithout an instrument's ever being seen, an intimidating threat albeit coupled with a menacing gesture cannot suffice to meet the standard necessary for a first-degree robbery conviction." *Id.* Thus, in the absence of a specific object being seen or felt, "a mere pocket bulge" was held to be insufficient in this instance to create a jury issue as to the existence of a deadly weapon or dangerous instrument. *Id.*

The holding in *Williams* was recognized and reaffirmed in *Swain v. Commonwealth*, 887 S.W.2d 346 (Ky. 1994). There, the defendant was convicted of five counts of first-degree robbery. In one of the robberies, there was direct proof that the defendant was in possession of a handgun, while in another the

defendant specifically referred to a gun and demanded money. The Supreme Court affirmed both of these convictions. *Id.* at 348. However, on the three remaining occasions, the defendant did not reveal or refer to any weapon. Instead, he merely demanded money while keeping his hands in his pockets.

The Supreme Court concluded that this evidence was not enough to support a conviction for first-degree robbery. *Id.* The Court explained its decision as follows:

> As to the three remaining first degree robbery convictions, there was no evidence to prove anything more than menacing gestures by the appellant and assumptions by the victims that appellant may have been in possession of an object which was a deadly weapon or dangerous instrument. While the victim may have been in fear, as this court stated in *Williams*, *supra*, "perceiving danger is quite real under threat; however, such cannot serve to convert something merely speculated upon (a weapon or instrument) into established existence." *Id.* at 712. For the foregoing reasons, it was error for the trial court to deny appellant's motion for a directed verdict on the first degree robbery charges in which no gun was seen or mentioned. For this Court "to do otherwise places [the appellant] virtually without defense at the caprice of a victim's subjective evaluation without regard to the actual course of events and could lead to convictions for crimes neither intended nor committed." *Id.* A directed verdict should have been granted as to first degree robbery on these three counts.

Id.

The holdings of *Williams* and *Swain* have recently been firmly reiterated by our Supreme Court in a number of decisions. For example, in *Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010), the Supreme Court again

confirmed that "[n]o amount of intent or intimidation by a robber can turn a toy gun, or a stick, or a finger in the pocket" into a deadly weapon, "[n]or, can any subjective belief in the mind of the victim turn a toy into a deadly weapon." *Id.* at 327. In so holding, the Supreme Court explicitly overruled *Merritt v. Commonwealth* – a case relied upon here by the Commonwealth. *Id.*

Of particular relevance to the case before us,, the Supreme Court also reaffirmed in *Lawless v. Commonwealth*, --- S.W.3d ----, 2010 WL 3374165 (Ky. 2010), that "where the evidence established only menacing gestures, and a weapon was neither seen nor mentioned, the trial court erred when it refused to dismiss first-degree robbery charges." *Id.* at --. In support of its holding, the Court noted:

> Here there was testimony that Lawless kept her hand in her pocket and may have made gestures suggesting that she had a gun. No one saw a gun, however, a part of a gun, or any other deadly weapon as delineated in *Wilburn* and required by KRS 515.020(b). Moreover, Lawless never mentioned a gun or other weapon and thus did not "threaten the immediate use of a dangerous instrument," thereby rendering KRS 515.020(c) inapplicable.

Id. at --. These facts are strikingly similar to those presented in this case. Thus, we can only conclude that the referenced statutory requirements for first-degree robbery provisions are equally inapplicable here. We also note that although *Wilburn* and *Lawless* are recent decisions, they do nothing more than confirm precedent that was established in *Williams* and *Swain*. In our view, the prevailing law on these issues was clearly established long before the events leading to this appeal.

As noted above, attorneys for both parties represented at Appellant's plea colloquy hearing that Appellant had made a demand for money and then placed his hand, which was in his pocket, on top of the bank counter. It appears that Appellant did not explicitly threaten using a gun or otherwise show a gun or any other object to the bank teller. In light of *Williams*, *Swain*, and their progeny, these actions would not have supported a jury instruction on first-degree robbery. *Williams* clearly holds that "[w]ithout an instrument's ever being seen, an intimidating threat albeit coupled with a menacing gesture cannot suffice to meet the standard necessary for a first-degree robbery conviction." *Williams*, 721 S.W.2d at 712. Indeed, even reaching towards his back pocket in a threatening way and stating, "Do you want your life?" is apparently not enough for a defendant to be convicted of this offense. *Id.*; *see also Mitchell v. Commonwealth*, 231 S.W.3d 809, 812 (Ky. App. 2007). The fact that a gun was not mentioned also weighs against a first-degree robbery instruction. *Swain*, 887 S.W.2d at 348.

From the record before us, it appears that counsel for both parties were of the mistaken belief that a subjective perception by a robbery victim that a defendant was armed or the defendant's pretense of being armed was sufficient, standing alone, to convict the defendant of first-degree robbery. However, established law at the time of Appellant's guilty plea unquestionably foreclosed a conviction for first-degree robbery under such facts. Thus, when the Commonwealth conceded that Appellant did not have a weapon and that he did not tell the robbery victim that he had a weapon, it effectively conceded that he could

not be convicted of first-degree robbery. Consequently, a question exists as to whether Appellant was misadvised as to the likelihood that he could be convicted of first-degree robbery prior to deciding to plead guilty.

Because of this, we conclude that the circumstances merit an evidentiary hearing on Appellant's claim in order to clarify defense counsel's analysis of the case and corresponding advice to Appellant. Therefore, the circuit court's order denying Appellant's RCr 11.42 motion must be vacated and this matter remanded for further proceedings. "Generally, an evaluation of the circumstances supporting or refuting claims of coercion and ineffective assistance of counsel [with respect to entry of a guilty plea] requires an inquiry into what transpired between attorney and client that led to the entry of the plea, *i.e.*, an evidentiary hearing." *Rodriguez*, 87 S.W.3d at 11; *see also Stanford*, 854 S.W.2d at 744. This is because ineffective assistance claims "frequently concern matters outside the trial record, such as whether counsel properly investigated the case, considered relevant legal theories, or adequately prepared a defense." *United States v. Cyrus*, 890 F.2d 1245, 1247 (D.C. Cir. 1989). The circuit court should also take care to verify whether the facts of the case are, indeed, undisputed as was represented at the plea colloquy hearing.

In reaching this decision, we recognize that we have previously noted that "[t]he reported cases from our appellate courts involving first-degree robbery charges are so fact-specific as to be, frankly, potentially confusing and, at times, seemingly contradictory." *Whalen*, 205 S.W.3d at 243. With this said, this same

case law has consistently reflected that an instruction on first-degree robbery cannot be given when a gun or other dangerous instrument is not seen, felt, or mentioned. *See Swain*, 887 S.W.2d at 348; *Williams*, 721 S.W.2d at 712. If such facts were indeed at play here, and if Appellant was nonetheless advised to plead guilty, we believe that ineffective assistance of counsel did occur despite what appears to be the conscientious efforts of defense counsel. Ultimately, however, such matters must be resolved by the circuit court on remand.

We next turn to Appellant's argument that he was entitled to an evidentiary hearing on his RCr 11.42 motion because his counsel failed to investigate his alleged mental health issues and his competency to plead guilty. Appellant's brief is somewhat vague on exactly why his mental health required investigation. However, he mentions a letter that he provided to the trial judge prior to pleading guilty in which he indicated that he suffered from depression and that he must have taken too much of his prescribed depression medication on the day that he robbed the bank. Appellant's RCr 11.42 motion further alleges that he advised his attorney that he was under the care of a psychiatrist and was taking psychoactive drugs; therefore, she was aware of his mental health issues. The record also contains a document, presumably from Appellant's psychiatrist, that details Appellant's prescription information and estimated that Appellant would be able to return to work within three months of March 26, 2005 – approximately five months before the subject incident.

After reviewing this information, we fail to see how it supports Appellant's contention that his mental health affected his competency to plead guilty or his contention that his counsel was ineffective. Appellant himself blames an overdose of his psychiatric medication – not his depression – for his decision to rob the bank, and he has presented nothing specific to support his contention that he failed to understand the nature of the criminal proceedings against him or the consequences of pleading guilty because of his issues with depression. Indeed, a review of the plea colloquy hearing reflects that Appellant was an active participant in that proceeding and clearly understood the nature of the charges against him and the consequences of pleading guilty. Appellant also denied suffering from any mental disease or disability that would affect his ability to reason at the time of his plea. "Solemn declarations in open court carry a strong presumption of verity." *Centers v. Commonwealth*, 799 S.W.2d 51, 54 (Ky. App. 1990). Appellant further signed a motion to enter a guilty plea (AOC form 491) and indicated that he had read and understood its contents. Such facts create a presumption that Appellant's plea was voluntary. *See id.*

Moreover, Appellant acknowledges that a "hearing for the purpose of determining mental capacity is required only when there are reasonable grounds to believe that the defendant is not mentally competent." *Pate v. Commonwealth*, 769 S.W.2d 46, 47 (Ky. 1989). Appellant has provided nothing to suggest that there were "reasonable grounds" to believe that he was mentally incompetent at the time he pled guilty, and he has produced nothing of note to suggest that an evidentiary

hearing is merited as to this issue. Instead, his argument amounts to speculation that his depression "might have" affected his competency to plead guilty. Speculation alone, however, does not constitute grounds for an evidentiary hearing as "RCr 11.42 does not require a hearing to serve the function of a discovery deposition." *Sanders v. Commonwealth*, 89 S.W.3d 380, 385 (Ky. 2002), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). Therefore, Appellant's argument is rejected. All other arguments raised by Appellant in his brief do not merit comment and are summarily rejected.

Conclusion

For the foregoing reasons, the order of the Boone Circuit Court denying Appellant's RCr 11.42 motion for post-conviction relief without an evidentiary hearing is vacated and this matter remanded for an evidentiary hearing consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Montecarlo Gartrell, *pro se*
Sandy Hook, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General

Michael J. Marsch
Assistant Attorney General
Frankfort, Kentucky