RENDERED: DECEMBER 21, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000277-MR

WILLIAM THOMPSON — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 07-CR-00383

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND DIXON, JUDGES.

ACREE, CHIEF JUDGE: The issue before us is whether the Kenton Circuit Court erred in denying Appellant William Thompson's Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to vacate, set aside or correct the judgment against him due to ineffective assistance of counsel. Finding no error, we affirm.

On May 2, 2007, Thompson robbed, at gunpoint, two employees of The Greyhound Tavern in Ft. Mitchell, Kentucky. Shortly after the robbery, a K-9 unit discovered Thompson hiding in the brush across the street from The Greyhound Tavern. As officers approached, Thompson shot himself in the head. Thompson was flown to the University of Cincinnati Hospital. There, while in the emergency room, Thompson waived his *Miranda* rights and confessed to robbing The Greyhound Tavern employees.

On June 7, 2007, the Kenton County Grand Jury indicted Thompson on two counts of first-degree robbery and one count of first-degree burglary.[1] Thompson quickly moved to suppress his confession. Concomitantly, Thompson filed an *ex parte* motion seeking funds for a clinical psychologist to evaluate him, to assist in the preparation of a diminished capacity defense, and to act as an expert witness for the defense. Thompson claimed he intended to introduce at trial his attempted suicide and history of severe depression, other suicide attempts, black outs, and seizures as evidence that he lacked criminal responsibility at the time of the robbery; Thompson also intended to introduce the same evidence at sentencing, if needed, in mitigation. The circuit court granted Thompson's motion.

A hearing was held on Thompson's suppression motion on January 7, 2008; Thompson testified at the hearing. On January 31, 2008, the circuit court denied Thompson's suppression motion. Shortly thereafter, Thompson moved to enter an open guilty plea, with no recommended sentence given by the

[1] Initially, the Grand Jury charged Thompson with one count of third-degree burglary. The charge was later enhanced to first-degree burglary.

Commonwealth, to both counts of first-degree robbery.[2] During the plea colloquy, the circuit court immediately advised Thompson that first-degree robbery was a Class B felony carrying a penalty of 10 to 20 years in prison. A brief time later, the circuit court reinforced Thompson's potential sentence, and the following dialogue ensued:

> Circuit Court: Sir, you understand that if you plead guilty the court may impose any punishment within the range provided by law and I told you that it's a B [class felony], they each carry [a range of] 10 to 20 [years in prison] and you understand that I could run those consecutively. You understand that?
>
> Thompson: Yes, ma'am.
>
> Circuit Court: So [trial counsel] told you that you could be looking at up to 40 years, is that correct?
>
> Thompson: Yes, ma'am.

The circuit court also inquired as to Thompson's mental state. Thompson admitted he was taking an anti-depressant, but claimed the drug was not impairing his thinking or causing him confusion.

> Circuit Court: Is your judgment now impaired by any mental health disease?
>
> Thompson: No.
> Circuit Court: Is your judgment now impaired by any mental health issues such as depression?
>
> Thompson: No.

The circuit court then accepted Thompson's guilty plea. The case proceeded to sentencing. At the initial sentencing hearing, Thompson's trial counsel

[2] In exchange for Thompson's plea, the Commonwealth agreed to dismiss the burglary charge.

highlighted several robbery cases involving similar facts and evidence in which the defendant either received a ten-year sentence with 85% parole eligibility, or those in which the Commonwealth agreed to amend the first-degree robbery charge to second-degree robbery resulting in a ten-year sentence with 20% parole eligibility.[3] Trial counsel ultimately asked for the minimum sentence: ten years with 85% parole eligibility. In response, the Commonwealth did not seek the maximum sentence of forty years, but instead sought twenty years on each robbery count to run concurrently for a total sentence of twenty years.

The circuit court delayed sentencing. At the final sentencing hearing on May 12, 2008, Thompson's trial counsel reiterated Thompson was facing a minimum ten-year sentence with 85% parole eligibility. The circuit court ultimately sentenced Thompson to twenty years on each count to run concurrently.

On November 19, 2010, Thompson moved, *pro se*, to vacate his conviction pursuant to RCr 11.42 alleging ineffective assistance of counsel. Thompson asserted his trial counsel was deficient in: (1) failing to secure a competency hearing before advising him to enter a guilty plea; and (2) failing to advise him of the maximum potential punishment, and misleading Thompson as to the probable outcome, if Thompson entered an open guilty plea. Thompson also claimed his sentence was not being honored by the Kentucky Department of Corrections. Thompson moved for an evidentiary hearing on his RCr 11.42 claims and for appointment of counsel. The Commonwealth opposed Thompson's

[3] The Commonwealth was unwilling to reduce Thompson's first-degree robbery charge to second-degree robbery.

motions. The circuit court declined to grant an evidentiary hearing and denied Thompson's motions. This appeal followed.

On appeal, Thompson alleges ineffective assistance of counsel asserting the same grounds as he did in the circuit court.

Thompson pleaded guilty; therefore, to establish an ineffective assistance of counsel claim, he must prove:

> (1) [t]hat 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.

Commonwealth v. Elza, 284 S.W.3d 118, 120-21 (Ky. 2009) (citation omitted); *see also Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

Thompson first contends the trial court improperly ruled on his motion seeking RCr 11.42 relief without conducting an evidentiary hearing. He asserts the errors he raised could not be refuted by merely reviewing the record and case file, but could only be resolved by holding an evidentiary hearing.

RCr 11.42 permits a person convicted of a crime to collaterally attack his sentence if he believes he received ineffective legal assistance from his trial attorney. No RCr 11.42 movant is automatically entitled, however, to an evidentiary hearing. *See Stanford v. Commonwealth*, 854 S.W.2d 742, 743 (Ky. 1993). Instead, a circuit court need only conduct an evidentiary hearing "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." *Elza*, 284 S.W.3d at 120 (citing *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001)). This inquiry requires us to ascertain "whether the record refute[s] the allegations raised," not "whether the record support[s] the allegations." *Parrish v. Commonwealth*, 272 S.W.3d 161, 166 (Ky. 2008). Determining whether Thompson was entitled to an evidentiary hearing also requires us, in effect, to determine whether Thompson received ineffective assistance of counsel. *Id.* at 167 (explaining the appellant's procedural claim that the circuit court erred in refusing to grant him an evidentiary hearing is intertwined with his substantive claim that he received ineffective assistance of counsel). Accordingly, we will review Thompson's position that he was entitled to an evidentiary hearing in the context of his other allegations which, in Thompson's view, establish his claim of ineffective assistance of counsel.

Thompson complains that his trial attorney failed to seek a competency hearing prior to Thompson pleading guilty. Thompson asserts trial counsel had ample reason to question Thompson's competency, yet failed to request a hearing to ascertain whether Thompson was competent to enter a guilty plea. In support, Thompson points to trial counsel's request for a psychological evaluation, and his failed suicide attempt, his claimed history of depression and suicide attempts, and his recent personal hardships, including a divorce, financial troubles, and chronic health issues. We are not persuaded.

"Criminal prosecution of a defendant who is incompetent to stand trial is a violation of that criminal defendant's constitutional right to due process of law under the Fourteenth Amendment." *Dorris v. Commonwealth*, 305 S.W.3d 438, 441 (Ky. App. 2010); *Medina v. California*, 505 U.S. 437, 439, 112 S.Ct. 2572, 2574, 120 L.Ed.2d 353 (1992). In Kentucky, a defendant is competent to stand trial if he has the "substantial capacity to comprehend the nature and consequences of the proceedings against him and to participate rationally in his defense." *Alley* v. *Commonwealth*, 160 S.W.3d 736, 739 (Ky. 2005); Kentucky Revised Statute (KRS) 504.060(4). The mental capacity needed to enter a guilty plea is the same as it is to stand trial. *Conley v. Commonwealth*, 569 S.W.2d 682, 684 (Ky. App. 1978). The right to a competency hearing is triggered when facts arise that call into question the defendant's competence to stand trial or enter a guilty plea. *See Mills v. Commonwealth*, 996 S.W.2d 473, 486 (Ky. 1999).

Here, the trial court thoroughly examined the record and concluded no facts existed indicating Thompson was incompetent or unable to comprehend the nature of his guilty plea. As explained by the circuit court:

> The record is clear that the defendant's competency to stand trial was never the issue; the issue was defendant's competency at the time he made [a] statement to police immediately after the incident. Additionally, at each court appearance, the defendant was coherent and his behavior was not inappropriate.
>
> . . . .
>
> Counsel for [Thompson] acted reasonably in requesting an evaluation of the defendant at the time of the crime.

> There is nothing in the record to indicate that [Thompson's] actions after the crime caused counsel concern as to his competency to stand trial or assist them. In fact, the testimony at the suppression hearing, by both the Emergency Room Nurse[4] and [Thompson], shows the clearness of [Thompson's] mind. [Thompson] showed the mental ability necessary to assist with the preparation for trial and [the] participation at trial. This finding is supported by the defendant's actions and alertness at each court appearance, including his admission to reading the discovery.

We have also reviewed the record and are simply unable to pinpoint any evidence which would have required Thompson's trial attorney to request a competency hearing. In fact, Thompson's clear and concise testimony at the suppression hearing, his calm, alert, and oriented demeanor at every court appearance, and his admission during his plea colloquy that he was not impaired or confused by any mental health disease, including his depression, belies Thompson's position that he was incompetent at the time he entered his guilty plea. Similarly, the fact that Thompson testified at the suppression hearing and referred during his testimony to "reading discovery" indicates Thompson was rationally assisting trial counsel with his defense. Consequently, the record plainly refutes Thompson's claim that his trial counsel was ineffective for failing to request a competency hearing, and there was no need for the circuit court to hold an evidentiary hearing to resolve this issue.

[4] At the suppression hearing, the emergency room nurse testified Thompson was alert, oriented, spoke clearly, and did not exhibit any inappropriate behavior while at the University of Cincinnati Hospital.

Thompson next claims his trial counsel was ineffective by advising him to enter an open guilty plea and misleading him as to the "probable outcome" of such a plea. Thompson asserts trial counsel told him the "trial judge insinuated that a sentence of 10-13 years" with a 20% parole eligibility would be acceptable punishment and, if Thompson pleaded guilty and "threw himself on the mercy of the court," he would likely receive a lenient sentence. (Appellant's Brief at 11-12). Thompson further maintains he was never told the circuit court could assign him a forty- or even a twenty-year sentence. He claims that had he known there was a possibility he could get a twenty-year sentence at 85% parole eligibility, he would not have pleaded guilty. The record refutes Thompson's allegations.

At the plea colloquy hearing, prior to Thompson entering his guilty plea, the circuit court twice advised Thompson that first-degree robbery was a Class B felony carrying a penalty of 10 to 20 years in prison. The circuit court also confirmed that Thompson's trial counsel informed him that he was facing a potential forty-year sentence. If Thompson's trial counsel had, in fact, failed to inform Thompson he could receive up to forty years in prison, the circuit court's avowal cured trial counsel's omission. Moreover, at the initial and final sentencing hearings, Thompson's trial counsel repeatedly acknowledged the minimum sentence Thompson could receive was ten years *at 85% parole eligibility***.** At no point did Thompson display confusion or uncertainty regarding the potential sentence range, or the minimum parole eligibility requirements.

Further, even accepting Thompson's remaining allegation as true, *i.e.,* that trial counsel informed Thompson an open guilty plea might result in a lenient sentence, we cannot say trial counsel's advice constituted an error so serious as to give rise to a valid ineffective assistance of counsel claim. Thompson maintains that in order to convince him to enter an open guilty plea, his trial counsel told him "about other Kenton County defendant's [sic] charged with First Degree Robbery who received, in circumstances similar to Thompson's, less than twenty (20) years at 85% parole eligibility." (Appellant's Brief at 13). Trial counsel's sentencing presentation briefly reviewed each of these cases. The record reflects trial counsel thought Thompson's lack of criminal history, and the circuit court's recent sentencing practices would result in a similar, lenient sentence for Thompson. Accordingly, we are unable to conclude trial counsel's advice regarding the *probable* outcome of a blind plea constituted an error "so serious that counsel's performance fell outside the wide range of professionally competent assistance." *Elza*, 284 S.W.3d at 120-21. An evidentiary hearing on this matter was not warranted.

Thompson also claims the Kentucky Department of Corrections is mistakenly requiring him to serve 85% of his sentence, rather than 20% of his sentence, before becoming parole eligible. Thompson contends no mention was made in the May 21, 2008 Judgment and Sentence on Plea of Guilty (Judgment) whether he was subject to 20% or 85% parole eligibility. The Judgment does indicate, however, that "no death or serious physical injury occurred" to the

victims in this case. Consequently, Thompson urges, under a plain reading of KRS 439.3401, a person convicted of a Class B felony such as first-degree robbery should not qualify as a violent offender unless the court designates in its judgment that the victim actually suffered death or serious physical injury. We disagree.

KRS 439.3401 defines a violent offender as "any person who has been convicted of or pled guilty to . . . (c) A Class B felony involving the death of the victim or serious physical injury to a victim . . . or (l) Robbery in the first degree." KRS 439.3401(1)(c), (l). As correctly pointed out by Thompson, KRS 439.4301 also requires the circuit court to "designate in its judgment if the victim suffered death or serious physical injury." However, a defendant is not deemed a violent offender if the victim did not, in fact, suffer death or serious physical injury. As explained by our Supreme Court in *Benet v. Commonwealth*, 253 S.W.3d 528 (Ky. 2008), a "defendant automatically becomes a violent offender at the time of his or her conviction of an offense specifically enumerated in KRS 439.3401(1) regardless of whether the final judgment of conviction contains any such designation." *Id.* at 533; *see also Hampton v. Commonwealth*, 133 S.W.3d 438, 444 (Ky. 2004) ("[U]nder the current state of the law, a violent offender sentenced to a terms of years is eligible for parole consideration after serving eighty-five percent (85%) of the sentence imposed[.]"). When Thompson pleaded guilty to first-degree robbery, he was automatically classified a violent offender under KRS 439.3401 and, as a result, must serve 85% of his sentence before becoming parole eligible. *Benet*, 253 S.W.3d at 533; KRS 439.3401(3) ("A violent offender who

has been convicted of a . . . Class B felony who is a violent offender shall not be released on probation or parole until he has served at least eighty-five percent (85%) of the sentence imposed."). The circuit court's finding that the victims in this case did not suffer death or a serious physical injury simply has no bearing on Thompson's parole eligibility.

Finally, because the record refutes Thompson's allegations, as explained above, the circuit court did not err in refusing to grant Thompson an evidentiary hearing on his RCr 11.42 motion. *Bowling v. Commonwealth*, 981 S.W.2d 545, 549 (Ky. 1998).

For the foregoing reasons, the Kenton Circuit Court's January 20, 2011 order denying RCr 11.42 relief without an evidentiary hearing is affirmed.

ALL CONCUR.

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