

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000102-MR

JEFFREY ALLEN

APPELLANT

v. APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL K. WINCHESTER, JUDGE
ACTION NO. 01-CR-00079

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, DIXON, AND JONES, JUDGES.

DIXON, JUDGE: Jeffrey Allen appeals from an order of the Whitley Circuit Court denying his motion for post-conviction relief pursuant to RCr 11.42. We affirm.

In June 2001, Allen was indicted by a Whitley County Grand Jury on charges of capital murder and first-degree robbery. Prior to trial, Allen sought to exclude the death penalty due to pursuant to KRS 532.140. He supported his

motion with a letter from David Finke, Ph. D., which indicated Allen's IQ was 66, and educational records showing sub-average academic performance. In March 2002, the trial court found that Allen was seriously mentally retarded and, therefore, ineligible for the death penalty pursuant to KRS 532.140. Shortly thereafter, Allen pled guilty to the charges. Pursuant to the Commonwealth's recommendation, the court sentenced Allen to life without parole for twenty-five years on the murder charge and twenty years' imprisonment on the robbery charge.

In July 2003, Allen, *pro se*, filed an RCr 11.42 motion to vacate his conviction due to ineffective assistance of counsel, and the Commonwealth filed a response.¹ The court appointed counsel to represent Allen; however, no additional pleadings were filed. In January 2004, Allen filed a *pro se* motion for writ of mandamus requesting the court to rule on his RCr 11.42 motion. In April 2004, Allen filed a petition for declaration of rights, arguing he was denied due process when the court failed to determine whether he was competent to plead guilty. The court received a response from the Commonwealth and subsequently denied Allen's petition. In its order, the court noted that it had addressed the issue of Allen's intelligence during the plea colloquy, wherein counsel advised the court that, although Allen was "a little slow," he was able to understand their discussions. Upon questioning by the court, Allen denied that he had a mental defect impairing his ability to reason and that he fully understood the significance of the proceedings. Allen appealed the order denying his petition for declaration of

¹ Allen's RCr 11.42 motion is not in the record on appeal; however, the Commonwealth's response and a rebuttal filed by Allen are included in the record.

rights. A panel of this Court summarily affirmed, concluding Allen's claim was a collateral attack that could only be raised in an RCr 11.42 motion. *Allen v. Commonwealth*, 2005 WL 2899474, at 3 (Nov. 4, 2005) (2004-CA-001017-MR, disc. rev. denied Oct. 12, 2006).

In September 2008, an attorney from the Department of Public Advocacy filed a supplemental motion in support of Allen's RCr 11.42 motion. The motion alleged Allen received ineffective assistance and his due process rights were violated when trial counsel and the court failed to determine Allen's competency. Over the Commonwealth's objection, Allen received expert funds for an evaluation by a forensic psychologist, Dr. Eric Drogin. The court held an evidentiary hearing on February 14, 2011, wherein the court heard testimony from Dr. Drogin and Allen's trial attorneys, Hon. Ron Findell and Hon. Roger Gibbs. In its order denying RCr 11.42 relief, the trial court noted that Dr. Drogin had been unable to determine whether Allen was incompetent at the time of his plea. The court further noted that the testimony of Allen's trial attorneys indicated they acted prudently and with professional care to ensure that Allen understood the proceedings and his decision to plead guilty. A final order denying RCr 11.42 relief was rendered November 30, 2012, and this appeal followed.²

Allen asserts that the court's determination that Allen was mentally retarded due to his low IQ constituted reasonable grounds for counsel and the court to

² It is unclear from the record why the original RCr 11.42 motion was never ruled upon or why the Department of Public Advocacy failed to assist Allen after the court entered its order appointing counsel in July 2003. Despite the inexplicable delay in the post-conviction proceedings, we will address the merits of Allen's claims.

question Allen's competence. Allen also contends that, when the court questioned Allen during the plea colloquy, the court should have recognized that a competency evaluation was required.

The United States Supreme Court has indicated that mental retardation does not automatically render an individual incompetent to stand trial. *See Atkins v. Virginia*, 536 U.S. 304, 318, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) ("Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial."). Incompetency is defined as a mental condition that renders a defendant without the "capacity to appreciate the nature and consequences of the proceedings against [him] or to participate rationally in [his] own defense[.]" KRS 504.060(4). The court is obligated to order a competency evaluation when it "has reasonable grounds to believe the defendant is incompetent to stand trial[.]" KRS 504.100(1). Additionally, a defendant's Fourteenth Amendment due process right to a fair trial may be infringed if the court fails "to hold a proper competency hearing where there is substantial evidence that a defendant is incompetent." *Padgett v. Commonwealth*, 312 S.W.3d 336, 347 (Ky. 2010).

We are not persuaded that anything occurred during the plea colloquy constituting "reasonable grounds" for the court to believe Allen was incompetent. The record reflects that counsel acknowledged Allen was "a little slow" intellectually, with an IQ between 66 and 70. The court questioned Allen regarding his understanding during each step of the colloquy and provided

additional explanation regarding his constitutional rights. When questioned regarding the significance of the legal proceedings, Allen asserted that he fully understood. Allen advised the court he had never been diagnosed with a mental defect, and Allen's sister also told the court he had no prior diagnosis. Allen stated he had difficulty reading, and he acknowledged his counsel had read all of the documents aloud and explained them to him. Allen expressed satisfaction with his attorney and asserted that he wanted to plead guilty.

Based on our review, there were no reasonable grounds for the court to believe Allen was incompetent. We conclude Allen's interaction with the court indicated he was capable of consulting with counsel to make an informed decision regarding his plea. *See Woolfolk v. Commonwealth*, 339 S.W.3d 411, 422 (Ky. 2011). The record does not support Allen's contention that the court was obligated to order an evaluation or that he was deprived of due process; likewise, Allen's claim of ineffective assistance of counsel is without merit.

Allegations of ineffective assistance of counsel arising from a guilty plea require a showing, "(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), *citing Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 370, 80 L. Ed. 2d 203 (1985).

Where, as here, “the trial court conducts an evidentiary hearing, the reviewing court must defer to the determinations of fact and witness credibility made by the trial judge.” *Sanborn v. Commonwealth*, 975 S.W.2d 905, 909 (Ky. 1998) (overruled on other grounds by *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)).

The trial court’s findings of fact stated, in relevant part:

4. At the evidentiary hearing held February 14, 2011, Dr. Drogin was not able to make a determination, within a reasonable degree of scientific certainty, that the Movant was incompetent at the time of his guilty plea. Dr. Drogin acknowledged that in certain other cases, he may be able to render an expert opinion on this subject. However, he could not do so in Movant’s case. Therefore, Dr. Drogin’s opinion and testimony regarding the Movant’s condition at the time of entry of the guilty plea cannot support a finding to overturn his guilty plea.

5. In addition, the testimony of both defense counsel, Hon. Roger Gibbs and Hon. Ron Findell, makes it clear that trial level counsel operated within a reasonable degree of professional care to ensure that Jeffrey Allen understood the court proceedings and his decision to enter his plea of guilty. The record reflects that counsel gained the assistance of Mr. Allen’s family member in communicating with Mr. Allen and ensuring his understanding of the proceedings and read over discovery, as well as other materials relevant with his case. The fact that trial counsel took such measures shows the effectiveness and prudence of counsel in representing Jeffrey Allen and in advising him regarding his decision to enter a guilty plea.

After considering the evidence, the trial court determined that Allen was competent when he entered his guilty plea and that his trial attorneys provided

reasonable and effective legal representation. Based upon our review, we conclude the trial court properly denied Allen's RCr 11.42 motion.

For the reasons stated herein, we affirm the order of the Whitley Circuit Court.

JONES, JUDGE, CONCURS.

CLAYTON, JUDGE, CONCURS IN RESULT ONLY.

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