RENDERED: OCTOBER 9, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000809-MR

FREDERICK DORSEY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC J. COWAN, JUDGE
ACTION NO. 09-CR-003446

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, J. LAMBERT, AND MAZE, JUDGES.

MAZE, JUDGE: Appellant, Frederick Dorsey, appeals from the Jefferson Circuit Court's order overruling his motion to set aside his guilty plea and sentence stemming from multiple felonies. In his motions below, and on appeal, Dorsey alleged prejudicial error on the part of the trial court and ineffective assistance on the part of his trial counsel. Observing no such basis for relief, we affirm.

Background

In November 2009, a grand jury indicted Dorsey and a co-defendant, Kendell Towns, on multiple counts, including Burglary in the first degree, Possession of a Handgun by a Convicted Felon, and four counts of Robbery in the first degree. These charges stemmed from a September 2009 incident in which Dorsey and Towns entered a home and held four victims, including three children, at gun point. When police arrived at the home, they discovered Dorsey and Towns still inside and in the process of restraining their victims with duct tape.

The trial court appointed the Louisville Metro Public Defender's Office to represent Dorsey and Towns. On January 14, 2010, in open court, Dorsey signed a document waiving that office's joint representation of himself and Towns. Soon thereafter, at the request of Dorsey's counsel, the trial court ordered Dorsey to undergo an evaluation with the Kentucky Correctional Psychiatric Center (KCPC) to determine his competency to stand trial. Dorsey's counsel based this request on his "review of previous medical records of Mr. Dorsey[.]"[1]

The 2010 KCPC evaluation resulted in findings that Dorsey suffered from Polysubstance Dependence, Learning Disorder, and Antisocial Personality Disorder. Nevertheless, the KCPC report concluded that Dorsey was competent to

[1] In 2006, when Dorsey was a minor, he underwent a comprehensive psychiatric evaluation at Ten Broeck Healthcare due to repeated aggressive and defiant behavior. He also underwent a forensic psychiatric evaluation following his 2008 indictment on felony charges. The latter report established Dorsey's "sub-average general intellectual functioning[,]" but nonetheless found him competent to stand trial. Counsel's statement in the 2010 motion for a competency evaluation was likely a reference to one or both of these records.

stand trial and "capable of participating rationally and cooperatively in his own defense." KCPC sent this report to the trial court and copied Dorsey's trial counsel. At a hearing in March 2010, Dorsey's trial counsel stipulated to Dorsey's competency to stand trial based upon the results of the KCPC report.

On October 5, 2010, Dorsey filed a motion to enter a plea of guilty to most of the charges contained in the indictment. The trial court conducted a plea colloquy and accepted Dorsey's plea. However, Dorsey later contended that he agreed to plea under the mistaken belief that he would be eligible for parole after serving twenty percent of his sentence. When Dorsey learned that he would be required to serve at least eighty-five percent of his sentence before becoming parole eligible, and that the trial court did not have the authority to change this, he asked his trial counsel to withdraw his plea.

The trial court conducted a hearing on Dorsey's motion to withdraw at which both Dorsey and his counsel testified. Dorsey's trial counsel stated that he maintained throughout his conversations with Dorsey that "this was an eighty-five percent crime" and that he never suggested the trial court had the power to change it. Dorsey testified, in pertinent part, as follows:

> COURT: Now, you just heard [counsel] tell you that it was going be eighty-five percent. Are you saying he didn't tell you that?
> DORSEY: No. He told me.
> COURT: Ok. Well, why would you think the judge could reduce it?
> DORSEY: You're the judge.

The trial court ultimately overruled Dorsey's motion to withdraw his guilty plea, again finding that Dorsey had entered his plea knowingly, intelligently, and voluntarily. The court sentenced Dorsey to thirty-five years' imprisonment pursuant to the Commonwealth's recommendation.

Dorsey subsequently filed a *pro se* motion to vacate his guilty plea and sentence pursuant to RCr[2] 11.42. Dorsey alleged several instances of ineffective assistance of counsel prior to his plea, including that his trial counsel coerced him to plead guilty and failed to investigate adequately his competency to stand trial. The trial court appointed the Louisville Public Defender to represent Dorsey in his post-conviction action; however, in an April 2013 motion, that office requested leave to withdraw, stating that Dorsey's *pro se* motion was not "a proceeding that a reasonable person with adequate means would be willing to bring at his or her own expense." KRS[3] 31.110(2). Soon after the trial court granted this motion, Dorsey supplemented his original motion, contending that the Metro Public Defender's Office's dual representation of Dorsey and Towns constituted a prejudicial conflict of interest.

In an April 16, 2014 order, the trial court summarily dismissed Dorsey's motion without holding an evidentiary hearing. The trial court concluded that each of Dorsey's allegations of ineffective assistance of counsel could be resolved on the record. Dorsey now appeals.

[2] Kentucky Rules of Criminal Procedure.

[3] Kentucky Revised Statutes.

Analysis

> A claim of ineffective assistance of counsel must show that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct 2052, 2064, 80 L.Ed.2d 674 (1984). Where a defendant has pleaded guilty, we juxtapose this analysis with the presumption of voluntariness inherent in a plea colloquy. *Bronk v. Commonwealth*, 58 S.W.3d 482, 486 (Ky. 2001). Hence, a defendant must demonstrate "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Commonwealth v. Pridham*, 394 S.W.3d 867, 875 (Ky. 2012) (citation omitted).

However, because the trial court did not conduct an evidentiary hearing on Dorsey's allegations, our review is confined to whether the motion on its face stated grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction. *See Baze v. Commonwealth*, 23 S.W.3d 619 (Ky. 2000), *citing Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967). We review such questions of law *de novo*. *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008) (citation omitted).

We first address two of Dorsey's claims which allege error on the part of the trial court, not his trial counsel. Dorsey argues that the trial court erred

when it did not hold a hearing on the issue of his competency to stand trial. He also alleges what he calls a "government intrusion into the attorney client privilege" when the trial court asked trial counsel to testify "against" him at the November 18, 2010 hearing on his motion to withdraw his plea. These claims are impermissibly brought under RCr 11.42, and they were properly dismissed.

"RCr 11.42 does not authorize relief from a judgment of conviction for mere errors of the trial court and in order for the rule to be invoked there must be a violation of a constitutional right, a lack of jurisdiction, or such violation of a statute as to make the judgment void and therefore subject to collateral attack." *Thompson v. Commonwealth*, 177 S.W.3d 782, 785 (Ky. 2005), *quoting Tipton v. Commonwealth*, 376 S.W.2d 290 (Ky. App. 1963).

Dorsey's motion alleges none of these things. Furthermore, the record refutes his claims. Counsel waived the issue of competency after KCPC completed and filed its report with the court; and trial counsel did not testify "against" Dorsey at the hearing on his motion to withdraw the plea. Like Dorsey, trial counsel merely testified to his recollection of their discussions during the case – testimony which was similar in nature and to which Dorsey did not object. Therefore, the trial court correctly dismissed Dorsey's allegations of trial court error.

The record clearly refutes Dorsey's allegation that his trial counsel failed to adequately investigate his competency. Dorsey's trial counsel filed a motion to have his client's competency evaluated. This motion was not merely an exercise in boilerplate procedure; it was based on counsel's discovery of potential

issues after he researched Dorsey's already extensive psychiatric record. Based on this, trial counsel requested, and Dorsey underwent, a comprehensive physical and psychiatric examination which concluded that he was competent to stand trial.

Dorsey argues that counsel should have sought an additional, "independent" competency evaluation. We disagree. While counsel must conduct a reasonable investigation, "[a] reasonable investigation is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources, but with the benefit of hindsight, would conduct." *Haight v. Commonwealth*, 41 S.W.3d 436, 446 (Ky. 2001); *see also Robbins v. Commonwealth*, 365 S.W.3d 211, 214 (Ky. App. 2012), *citing to Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). Rather, counsel's investigation must be reasonable under all the circumstances. *Haight* at 446. The record reflects that the efforts of Dorsey's counsel were entirely reasonable.

Dorsey next claims that trial counsel coerced him into pleading guilty and that his plea was therefore not voluntary. Again, the record refutes the facts upon which Dorsey bases his claim.

In his motion and on appeal, Dorsey repeatedly references his counsel's apparent awareness that Dorsey was "illiterate," "not smart," had a "low I.Q.," and was "not capable of thinking on his own." Dorsey suggests that these factors required counsel to pay him "special attention" and combined to allow counsel's "mental coercion" in favor of a plea. This was not the case.

A defendant's statements and testimony during a plea colloquy play a role in determining, based upon the record, whether his plea was knowing and voluntary. *See Commonwealth v. Elza*, 284 S.W.3d 118, 122 (Ky. 2009) (utilizing a defendant's "statements and demeanor" at the plea colloquy as evidence against allegations of coercion and deficient performance). Such "[s]olemn declarations in open court carry a strong presumption of verity." *Edmonds v. Commonwealth*, 189 S.W.3d 558, 569 (Ky. 2006), *quoting Blackledge v. Allison*, 431 U.S. 63, 74, 97 S.Ct. 1621, 1629, 52 L.Ed.2d 136 (Ky. 1977).

Dorsey's testimony during his plea colloquy refutes his allegations of "mental coercion" due to his diminished intellect. Pursuant to *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), the trial court conducted a thorough colloquy with both Dorsey and Towns regarding the recommendations of the Commonwealth, the defendants' decisions to plea, and the consequences of their pleas. The court twice asked Dorsey whether there was anything about his treatment that would affect his ability to "understand what you're doing here today and be able to weigh the pros and cons of your decision today[.]" Dorsey twice responded in the negative.

Dorsey alleges that "[c]ounsel did not have the time to consult with Dorsey to ensure that he fully understood the rights he was waiving and the time he was facing by pleading guilty." Yet, during the plea colloquy, the trial court twice asked Dorsey if he had sufficient time to consult with his attorney; and Dorsey twice said he had. Additionally, Dorsey claims that his trial counsel "virtually

twisted Dorsey's arm" to get him to plea; yet, during the plea colloquy, Dorsey testified as follows:

> COURT: Now, has anyone threatened you or coerced you or twisted your arm in some way to get you to plead guilty?
> DORSEY: No, sir.
> COURT: Other than the recommendation of the Commonwealth, has anyone made any promises to you to get you to plead guilty?
> DORSEY: No, sir.
>
> ….
>
> COURT: Are you doing this of your own free will?
> DORSEY: Yes, sir.

Dorsey states on appeal that "one can easily assess how confused and ill[-]advised Dorsey appeared" during the plea colloquy. However, this Court observes no such confusion. Dorsey submitted brief but firm responses to a multitude of questions and explanations regarding his rights and the nature and consequences of his plea. Overall, each of Dorsey's allegations of coercion leading up to his plea is directly and clearly refuted in the record before us.

Finally, in his supplemental motion, Dorsey alleged that a prejudicial conflict of interest arose from the Louisville Metro Public Defender's Office's dual representation of himself and Towns. The trial court correctly dismissed this allegation out of hand.

The Louisville Metro Public Defender's Office represented both Dorsey and Towns, though each defendant was assigned his own attorney. In a

document which Dorsey signed in January 2010 and which his counsel filed with the trial court, Dorsey expressly waived his objection to any "possible conflict of interest." This process complied with RCr 8.30. Hence, in the clearest of terms, the record refutes Dorsey's final allegation of ineffective assistance of counsel.

Conclusion

The trial court correctly concluded that Dorsey entered his plea knowingly, intelligently, and voluntarily. Furthermore, each of Dorsey's allegations of ineffective assistance of counsel is refuted by facts apparent on the face of the record. Therefore, the April 16, 2014 order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Frederick Dorsey, *pro se*
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Taylor Payne
Assistant Attorney General
Frankfort, Kentucky