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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000809-MR

FREDERICK DORSEY — APPELLANT

ON REMAND FROM THE KENTUCKY SUPREME COURT
APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE FREDERIC J. COWAN, JUDGE
ACTION NO. 09-CR-003446-001

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 motion below, and on appeal, Dorsey alleged prejudicial error on the part of the trial court and ineffective assistance and coercion on the part of his trial counsel. Observing no 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 gunpoint. 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, according to his motion to withdraw his plea and his testimony at a subsequent hearing, Dorsey contended that he agreed to plea under the mistaken belief that he would be eligible for parole after serving twenty percent of his sentence. Shortly after sentencing, Dorsey apparently learned that he would be required to serve at least eighty-five percent of his sentence before becoming parole eligible, and he asked his trial counsel to withdraw his plea. Trial counsel discussed this request and assisted Dorsey with filing this motion.

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 conduct an adequate investigation into his competency to stand trial. The trial court appointed the Louisville Metro 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 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

[2] Kentucky Rules of Criminal Procedure.

resolved on the record. Dorsey appealed to this Court, and in an October 2015 opinion, we affirmed. However, the Supreme Court granted Dorsey's motion for discretionary review and summarily vacated and remanded to this Court "for further consideration in light of *Commonwealth v. Tigue*, 459 S.W.3d 372 (Ky. 2015)." Having reviewed and considered *Tigue*, we again affirm.

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, 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).

I. Allegations of Trial Court Error

As a preliminary matter, we 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. However, Dorsey impermissibly brought these claims under RCr 11.42, and the trial court properly dismissed them.

"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. Therefore, the trial court correctly dismissed Dorsey's allegations of trial court error.

II. Allegation of Deficient Performance

Turning to Dorsey's more traditional RCr 11.42 claims, we begin with his allegation that trial counsel failed to conduct an adequate investigation of his competency. We hold that the record clearly refutes this fact.

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 extensive psychiatric record. Based on this, trial counsel requested, and Dorsey underwent, a comprehensive physical and psychiatric examination, the conclusion of which was that Dorsey was competent to stand trial.

Dorsey argues that counsel should have sought an additional, "independent" competency evaluation. We disagree that counsel's decision to proceed without additional evaluation constituted deficient performance. 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 *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.

III. Allegation of Coercion on Plea of Guilty

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. The record reveals that 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, 52 L.Ed.2d 136 (Ky. 1977)).

The Supreme Court remanded to this Court with instruction to review Dorsey's arguments under the analysis the Supreme Court utilized in *Commonwealth v. Tigue*. In *Tigue*, our Supreme Court held that a motion to withdraw a guilty plea is a "critical stage" of criminal proceedings at which a defendant is entitled to effective assistance of counsel. *Tigue*, 459 S.W.3d at 383.

Tigue's counsel ignored Tigue's repeated requests for assistance with filing a motion to withdraw his plea, and counsel did not appear nor participate in the subsequent hearing on Tigue's *pro se* motion. Under these circumstances, the Supreme Court held that counsel's failure to assist Tigue effectively denied Tigue counsel for purposes of the Sixth Amendment. *Id*. at 386-87.

Perhaps more relevant to the present case, the Court also held that Tigue's argument that his counsel coerced him into pleading guilty presented "an actual conflict of interest" during the hearing on the withdrawal motion because it inevitably placed counsel's interests at odds with those of his client. *Id*. at 387. Such a conflict, according to the Supreme Court, constituted a "*per se* Sixth Amendment violation." *Id*. at 388 (citing *Smith v. Robbins*, 528 U.S. 259, 287, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000)).

There are key differences between the respective facts of *Tigue* and this case – differences which lead us to conclude that no such conflict of interest existed in this case and that a different result must follow. Unlike in *Tigue*, Dorsey's counsel was responsive to his request to withdraw his plea; counsel discussed the motion with Dorsey; and counsel drafted and filed Dorsey's motion to withdraw his plea. In addition, Dorsey's counsel was present and participated in the hearing on Dorsey's motion. It was the absence of these actions in *Tigue* which, in part, motivated the Supreme Court to conclude that Tigue was without counsel at a critical stage of his criminal case.

However, the most imperative difference between this case and *Tigue* is that Tigue's motion to withdraw his plea included the allegation that his attorney had threatened him and had refused to prepare a defense in an effort to coerce him to plead guilty. As the Supreme Court pointed out, "[w]hen a defendant makes a claim of coercion during his plea withdrawal hearing … his accusation places his attorney in the position of having to defend himself, and potentially contradict the defendant, in open court." *Tigue* at 387 (quoting *United States v. Davis*, 239 F.3d 283, 287 (2d Cir. 2001)). Dorsey's motion to withdraw made no such accusation of coercion. He first raised this accusation in the RCr 11.42 motion which is the subject of this appeal. Rather, Dorsey's motion to withdraw was exclusively based upon his alleged confusion regarding the sentencing implications of his guilty plea. At the hearing on Dorsey's motion to withdraw, trial counsel testified to his conversations with Dorsey regarding these sentencing implications. This testimony largely mirrored Dorsey's recounting of their conversations, and did not place counsel in the defensive "position" spoken of in *Tigue*. Therefore, the "actual conflict of interest" which acted to deprive the defendants in *Tigue* and *Davis* of their 6th Amendment rights to counsel did not arise in this case.

Dorsey's sworn statements during his plea colloquy refute his allegations of "mental coercion," as well as his other allegations; and they distinguish this case further from *Tigue*. At sentencing, 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 Dorsey regarding the recommendations of the

Commonwealth, his decision to plead, and the consequences of the plea. Dorsey now 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.

The trial court twice asked Dorsey whether anything about his treatment affected 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 now 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. Dorsey also 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 deficient performance, including coercion, leading up to his plea is directly and clearly refuted in the record before us. The record reflects a plea into which Dorsey knowingly and voluntarily entered.

IV. Public Defender's Dual Representation of Co-Defendants

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 properly dismissed this claim.

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

Certainly, a defendant's motion to withdraw his plea and the hearing that must accompany it constitute critical stages of his criminal case; and certainly, a failure to assist a defendant with such a motion and hearing would constitute a deprivation of his constitutional right to counsel at such a stage. However, no such deprivation occurred here. Each of Dorsey's allegations of ineffective assistance

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

ALL CONCUR.

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