RENDERED: MARCH 22, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001909-MR

FRANCISCO VASQUEZ — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KEN M. HOWARD, JUDGE
ACTION NO. 13-CR-00403

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GOODWINE, JONES, AND NICKELL, JUDGES

GOODWINE, JUDGE: Francisco Vasquez appeals from a Hardin Circuit Court order denying his motion for relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 and 10.26. After careful review, finding no error, we affirm.

BACKGROUND

On June 23, 2013, Vasquez was indicted on one count each of the following: (1) incest;[1] (2) rape, second-degree;[2] (3) sodomy, second-degree;[3] and (4) sexual abuse, second-degree.[4] Vasquez's stepdaughter, V.S., accused him of sexual intercourse, deviant sexual intercourse and inappropriate touching, which took place on or about June 16, 2013. V.S. was less than 14 years old.

On September 10, 2014, the Commonwealth filed its KRE[5] 404(b) notice of other crimes, wrongs, or acts it intended to use at trial regarding similar acts Vasquez committed against V.S. in North Carolina and Texas when she was as young as seven years old. Vasquez filed a timely response and requested either to exclude the evidence or to continue the trial.

On September 23, 2014, the trial court heard Vasquez's motion. At that time, the Commonwealth also announced its intention to use 58 handwritten letters from Vasquez to his wife as evidence against him of his attempts to coach his wife's testimony for trial. The trial court denied Vasquez's motions.

---

[1] Kentucky Revised Statute (KRS) 530.020 (Class B felony).

[2] KRS 510.050 (Class C felony).

[3] KRS 510.080 (Class C felony).

[4] KRS 510.120 (Class A misdemeanor). Vasquez was subsequently indicted on sexual abuse first degree, KRS 510.110 (Class D felony).

[5] Kentucky Rules of Evidence.

On September 24, 2014, the morning of trial, Vasquez and the Commonwealth entered into a plea agreement. In exchange for Vasquez's guilty plea to incest, rape and sodomy, the Commonwealth agreed to dismiss the sexual abuse charge. The Commonwealth recommended a sentence of (1) twelve years on incest; (2) five years on rape, second degree; (3) five years on sodomy, second degree; and (4) dismiss sexual abuse, first degree. The Commonwealth also recommended that the sentences run concurrently for a total of 12 years to serve. The trial court sentenced Vasquez to 12 years' imprisonment and five years' post-incarceration supervision.[6]

Vasquez filed a motion to set aside, vacate or amend the judgment and sentence pursuant to RCr 11.42 and 10.26, alleging his trial counsel was ineffective based on a myriad of unsubstantiated grounds. He also alleged the trial court erred in accepting his plea under RCr 10.26. The trial court denied Vasquez's requested relief without a hearing by order entered September 20, 2017.

On appeal, Vasquez raises many of the same arguments. In sum, Vasquez contends: (1) his guilty plea was coerced and was not entered knowingly and voluntarily; and (2) his counsel was ineffective. After careful review, finding no error, we affirm.

[6] KRS 532.043.

STANDARD OF REVIEW

We review the trial court's denial of an RCr 11.42 motion for an abuse of discretion. The test for abuse of discretion is whether the trial court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English,* 993 S.W.2d 941, 945 (Ky. 1999) (citing 5 Am.Jur.2d *Appellate Review* § 695 (1995)).

"A showing that counsel's assistance was ineffective in enabling a defendant to intelligently weigh his legal alternatives in deciding to plead guilty has two components: (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, 88 L.Ed.2d 203 (1985); *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *McMann v. Richardson,* 397 U.S. 759, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970)).

In addition, the movant has the burden to establish convincingly that he was deprived of some substantial right which would justify the extraordinary

relief afforded by the post-conviction proceeding. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). An evidentiary hearing is warranted only "if there is an issue of fact which cannot be determined on the face of the record." *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993); RCr 11.42(5).

"[B]oth parts of the *Strickland* test for ineffective assistance of counsel involve mixed questions of law and fact, [but] the reviewing court must defer to the determination of facts and credibility made by the trial court." *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008) (citing *McQueen v. Commonwealth*, 721 S.W.2d 694, 698 (Ky. 1986)). "Ultimately however, if the findings of the trial judge are clearly erroneous, the reviewing court may set aside those fact determinations." *Id*. (citing Kentucky Rules of Civil Procedure (CR) 52.01).

The final review regarding whether trial counsel's performance was deficient, and the defendant suffered prejudice as a result is made *de novo* by the appellate court. *Id*.

ANALYSIS

We first address Vasquez's claims that his guilty plea was not entered knowingly and voluntarily. Vasquez argues his trial counsel misadvised him about his parole eligibility; and, thus, the trial court erred in finding his guilty plea was entered knowingly and voluntarily. He further argues his trial counsel coerced him

into entering a guilty plea because he was not prepared for trial. The record refutes Vasquez's claims.

Our Supreme Court held that a criminal defendant's guilty plea is intelligent if he is "advised by competent counsel regarding the consequences of entering a guilty plea, including the constitutional rights that are waived thereby, is informed of the nature of the charge against him, and is competent at the time the plea is entered." *Edmonds v. Commonwealth*, 189 S.W.3d 558, 566 (Ky. 2006). "A guilty plea is involuntary if the defendant lacked full awareness of the direct consequences of the plea or relied on a misrepresentation by the Commonwealth or the trial court." *Id.*

The plea colloquy conducted by the trial court was very thorough. The trial court questioned Vasquez repeatedly to ensure his comprehension and voluntariness. Vasquez's arguments that he was misinformed and coerced are contrary to his affirmative response on the record during the plea colloquy when he was asked if anyone influenced his decision to plead guilty. Additionally, Vasquez did not raise any concerns with the trial court at that time that he did not believe his trial counsel was prepared for trial.

The validity of a guilty plea must be determined not only from specific key words uttered at the time the plea was taken, but also from considering the totality of the circumstances surrounding the plea. *Centers v. Commonwealth*,

799 S.W.2d 51, 54 (Ky. App. 1990). The evaluation of the totality of the circumstances surrounding the guilty plea is an inherently factual inquiry that requires consideration of the "the accused's demeanor, background and experience, and whether the record reveals that the plea was voluntarily made." *Id.* "The trial court is in the best position to determine if there was any reluctance, misunderstanding, involuntariness, or incompetence to plead guilty." *Id.* (citations omitted). "A guilty plea constitutes a break in the chain of events, and the defendant therefore may not raise independent claims related to the deprivation of constitutional rights occurring before entry of the guilty plea." *Id.* at 55.

When Vasquez repeatedly stated he was pleading guilty to crimes he did not commit, the trial court took a recess from the guilty plea colloquy to allow Vasquez to consult with counsel. Following the recess, the plea colloquy continued. The trial court advised Vasquez of his constitutional rights he was giving up by entering a guilty plea, what it means to enter the guilty plea, and what was contained in the plea agreement. Vasquez was also given the opportunity to ask any questions he had prior to entering his guilty plea and he did not raise any of the issues he later raised in his motion for post-conviction relief or now on appeal.

Moreover, Vasquez's inculpatory statements would have been introduced at trial against him and he was facing up to 45 years in prison. His trial

counsel advised him it was in his best interest to take the plea offer. The guilty plea colloquy demonstrates that Vasquez's guilty plea was both voluntarily and intelligently entered.

Vasquez further claims that his plea was not voluntary because he was misadvised as to his parole eligibility by trial counsel and the trial court. Both Vasquez's counsel and the trial court interpreted the violent offender statute, KRS 429.3401, as permitting Vasquez to be eligible for parole at the 20% service mark as opposed to the 85% service mark. Vasquez seems to believe this advice was incorrect because the DOC sent him a letter advising that he was subject to parole eligibility after service of 85% of his sentence.

During the plea colloquy, the trial court discussed this with the Commonwealth and they both agreed that Vasquez's offenses carried a parole eligibility of 20% even though he was classified as a violent offender.[7] The trial court stated on the record that the parole eligibility information would be noted on the judgment for DOC's benefit. The judgment and sentence on a guilty plea entered December 9, 2014 noted 20% parole eligibility for each of Vasquez's offenses.

[7] *Contrast, Mills v. Commonwealth*, 2015-CA-001134-MR, 2016 WL 3181911 (Ky. App. May 27, 2016) (ineffective assistance of counsel claim for erroneous parole eligibility advice satisfied the first prong of *Strickland*, but insufficient to set aside the judgment).

Vasquez is considered a violent offender because he satisfies KRS 439.3401(1)(e),[8] as he pled guilty to the commission of "a felony sexual offense described in KRS Chapter 510." However, not all violent offenders are subject to 85% parole eligibility. None of the sections under KRS 439.3401(3) are applicable to Vasquez.

Having reviewed the statute in conjunction with interpretive case law, we are not persuaded that Vasquez received ineffective assistance of counsel. His counsel appears to have given him competent advice. To the extent that DOC has improperly calculated Vasquez's parole eligibility date, he can seek review by filing a declaratory judgment action in circuit court naming the DOC as a defendant. Suffice to say, the mere fact that DOC disagrees with counsel's interpretation does not mean counsel's representation was constitutionally inadequate.

Vasquez argues that he also was misinformed by the trial court on sex offender treatment requirements for parole eligibility. Vasquez's claim is baseless. During the plea colloquy, the trial court clearly informed Vasquez that certain requirements must be met before the parole board will consider him for parole eligibility, including sex offender evaluation and treatment. The trial court told

[8] This statute was revised effective July 14, 2018. This section is now KRS 439.3401(1)(f).

Vasquez that he at least needed to commence treatment, but that it was uncertain as to whether the parole board required completion.[9]

At sentencing, the trial court informed Vasquez that the sex offender evaluation concluded that "the extent and duration of his behavior was indicative of a deviant sexual interest that should be explored within the context of sex offender treatment." (VR, 12/9/14, 11:54:07). The trial court further noted that Vasquez was in need of sex offender treatment that could be provided most efficiently and safely during incarceration. The trial court included that same language in the judgment and sentencing order.

Vasquez argues that trial counsel was not prepared for trial and, thus, coerced him into pleading guilty. A prior panel of this court held that trial counsel merely advising a defendant to plead guilty does not demonstrate ineffective assistance of counsel. *Russell v. Commonwealth*, 992 S.W.2d 871, 875 (Ky. App. 1999). Since pleading guilty may result in a lighter sentence than otherwise might be imposed, such advice to a defendant is not improper. *Osborne v. Commonwealth,* 992 S.W.2d 860, 864 (Ky. App. 1998). Here, Vasquez was facing a maximum of 45 years in prison. The 33-year disparity between what Vasquez

[9] "He had asked about whether he would have any difficulty with the 20%. I explained to him there is a certain requirement of – they do an evaluation and then do sex offender treatment. They will require that at least be begun before they will consider parole. I don't know if they still require it be completed or not, but it's up to the parole board. OK? They decide those questions." (VR 9/24/14, 9:33:00 – 9:33:26).

could have received and what he received is too vast to believe he would have insisted on going to trial.

Vasquez's remaining claims of ineffective assistance of counsel are equally meritless. In sum, Vasquez claims that his trial counsel should have properly investigated, prepared a defense, hired an expert, subpoenaed witnesses, filed pre-trial motions to suppress statements, and asserted spousal privilege on his behalf. Again, these are contrary to the statements Vasquez made on the record during his plea colloquy. The trial court informed Vasquez of the duties of trial counsel and asked him if he was satisfied with the services of counsel. While under oath, Vasquez responded affirmatively. He cannot now claim otherwise.

Additionally, there is no merit to Vasquez's contention that counsel should have filed motions to suppress statements. There is no suggestion of a violation of a constitutional right in the manner in which these statements were obtained and Vasquez provides no specific reasoning nor evidence as to how a motion to suppress would have been successful. He fails to provide specific reasoning for how subpoenaing witnesses and hiring an expert would have changed his decision to plead guilty and sentencing following a guilty plea is not an appropriate setting for mitigation witnesses. Vasquez's spousal privilege claim is also not persuasive because of the KRE 504(c)(2)(B) exception that disallows use

of the privilege where the spouse is charged with wrongful conduct against the minor child of either.

Finally, Vasquez seeks relief pursuant to RCr 10.26. RCr 10.26 states: "A palpable error which affects the substantial rights of a party may be considered . . . by an appellate court on appeal . . . and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." Vasquez asserts that allowing his guilty plea to stand will result in manifest injustice. Having reviewed the record we have failed to identify any error, and certainly not one that has resulted in any manifest injustice.

CONCLUSION

Based on the foregoing analysis, we affirm the order of the Hardin Circuit Court denying Vasquez's motion for post-conviction relief under RCr 11.42 and 10.26.

JONES AND NICKELL, JUDGES, CONCUR IN RESULT ONLY.

BRIEFS FOR APPELLANT:

Francisco J. Vasquez, *pro se*
Burgin, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Lauren R. Massie
Assistant Attorney General
Frankfort, Kentucky