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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000525-MR

ERIC L. GIBSON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 16-CR-000661

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: LAMBERT, MAZE AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: Eric Gibson, *pro se*, appeals from an order of the Jefferson Circuit Court which denied his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion alleging ineffective assistance of counsel. He argues that the trial court should have held a hearing on his motion because his allegations could not be determined from the record. We agree and reverse and remand.

FACTS AND PROCEDURAL HISTORY

On March 14, 2016, Appellant was indicted for possession of a handgun by a convicted felon,¹ receiving a stolen firearm,² and of being a persistent felony offender in the first degree.³ On November 15, 2017, Appellant pleaded guilty to possession of a handgun by a convicted felon, receiving a stolen firearm, and of being a persistent felony offender in the second degree. He was sentenced to ten years in prison.

On October 4, 2018, Appellant filed an RCr 11.42 motion alleging ineffective assistance of counsel. He alleged that his trial counsel was ineffective for allowing him to plead guilty to receiving a stolen firearm because he could not have committed that crime as he did not know the firearm was stolen. He claimed counsel did not advise him on the elements of the crimes he was charged with. He also alleged that counsel might have been ignorant as to the elements of receiving a stolen firearm. In addition, Appellant alleged that his counsel did not go over possible defenses with him. He specifically mentions the possibility of a “choice

¹ Kentucky Revised Statutes (KRS) 527.040.

² KRS 514.110.

³ KRS 532.080.

of evils” defense. Finally, he alleged that his trial counsel failed to investigate the case, failed to interview witnesses, and failed to interview Appellant himself.⁴

The Commonwealth did not respond to the motion. On February 26, 2019, the trial court denied Appellant’s motion. The court held that Appellant’s plea colloquy was sufficient to show the plea was voluntarily entered and that his motion lacked specificity. The court also held that a “choice of evils” defense would not have been available to Appellant based on the evidence found in the record. This appeal followed.

ANALYSIS

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.

Evaluating the totality of the circumstances surrounding the guilty plea is an inherently factual inquiry which requires consideration of “the accused’s demeanor, background and experience, and whether the record reveals that the plea was voluntarily made.” While “[s]olemn declarations in open court carry a strong presumption of verity,” “the validity of a guilty plea is

⁴ Appellant raised other issues in his motion before the trial court; however, they were not raised on appeal. We will only address the arguments raised on appeal.

not determined by reference to some magic incantation recited at the time it is taken [.]” The trial court’s inquiry into allegations of ineffective assistance of counsel requires the court to determine whether counsel’s performance was below professional standards and “caused the defendant to lose what he otherwise would probably have won” and “whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory.” Because “[a] multitude of events occur in the course of a criminal proceeding which might influence a defendant to plead guilty or stand trial,” the trial court must evaluate whether errors by trial counsel significantly influenced the defendant’s decision to plead guilty in a manner which gives the trial court reason to doubt the voluntariness and validity of the plea.

Bronk v. Commonwealth, 58 S.W.3d 482, 486-87 (Ky. 2001) (citations omitted).

An RCr 11.42 hearing is only required 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).

Appellant argues on appeal that he is entitled to a hearing because counsel failed to investigate the case, failed to discuss the elements of the crimes of which he was charged, and failed to discuss a possible defense. We believe a hearing is necessary in this case. The arguments raised by Appellant are specific in that they claim trial counsel made no effort in this case. Appellant’s interactions with his counsel are not apparent from the record and would need to be investigated at a hearing.

As previously mentioned, the trial court relied heavily on Appellant's plea colloquy in denying his motion. While a trial court can rely on a defendant's plea colloquy in examining an RCr 11.42 motion, *see Harris v. Commonwealth*, 688 S.W.2d 338, 341 (Ky. App. 1984), it must not be the sole consideration. Generally, "an evaluation of the circumstances supporting or refuting claims of . . . ineffective assistance of counsel requires an inquiry into what transpired between attorney and client that led to the entry of the plea, *i.e.*, an evidentiary hearing." *Rigdon v. Commonwealth*, 144 S.W.3d 283, 289 (Ky. App. 2004) (citation omitted). Once a particularized claim of ineffective assistance of counsel is raised as it pertains to a guilty plea, the circuit court should "look beyond the plea colloquy to determine whether his plea was voluntarily entered under the totality of the circumstances surrounding his plea." *Id.* at 290.

Appellant's arguments can be boiled down to the allegation that trial counsel made no investigation into the case.

Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered. Determining whether an accused is guilty or innocent of the charges in a complex legal indictment is seldom a simple and easy task for a layman, even though acutely intelligent.

Von Moltke v. Gillies, 332 U.S. 708, 721, 68 S.Ct. 316, 322, 92 L.Ed. 309 (1948).

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable

decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984).

Appellant's interactions with his trial counsel can only be determined by a hearing. Appellant has alleged counsel did not investigate the case, interview witnesses or Appellant himself, discuss the elements of the crimes with which he was charged, or discuss possible defenses. Whether these allegations are true cannot be determined from the record as it is now.

CONCLUSION

Based on the foregoing, we reverse and remand with directions for the trial court to hold an evidentiary hearing on Appellant's RCr 11.42 motion.

LAMBERT, JUDGE, CONCURS.

MAZE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

MAZE, JUDGE, DISSENTING: Respectfully, I disagree with the majority's conclusion that Gibson was entitled to an evidentiary hearing on his claims of ineffective assistance of counsel. Even assuming that trial counsel was deficient in the manner alleged, Gibson fails to make the required showing of prejudice. Gibson admitted to being a convicted felon in possession of a stolen

firearm. As the trial court noted, it is unlikely that Gibson's defenses would have been successful. In exchange for the guilty plea, the Commonwealth amended the persistent felony offender (PFO) I charge to a PFO II. By virtue of that amendment, Gibson received a total sentence of fifteen years and is eligible for parole after serving 20% of his sentence, rather than the more severe PFO I eligibility. I find no reasonable probability that, but for the alleged errors by counsel, Gibson would have rejected the guilty plea and insisted on going to trial. Consequently, the trial court properly denied Gibson's RCr 11.42 motion without an evidentiary hearing.

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