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RENDERED: SEPTEMBER 28, 2023
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2022-SC-0175-MR

EDDIE CARBON APPELLANT

V.

ON APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE KAREN LYNN WILSON, JUDGE
NO. 16-CR-00225

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This case is before the Court on appeal by Eddie Carbon, the appellant, from the judgment and sentence of the Henderson Circuit Court. Carbon was indicted on charges of capital murder, first-degree robbery, second-degree burglary, giving an officer a false name, and being a second-degree persistent felony offender (PFO). Carbon entered a plea agreement whereby he would plead guilty to all charges in exchange for a total sentence of thirty years. Three years after his plea, Carbon filed a pro-se motion to vacate his sentence pursuant to RCr[1] 11.42. Every claim was dismissed except one pertaining to his right to appeal. The trial court concluded that Carbon's counsel failed to file an appeal when it was requested. The trial court ruled Carbon could appeal

[1] Kentucky Rules of Criminal Procedure

any issues not waived by his guilty plea. Following this decision, Carbon's appointed counsel filed an *Anders* brief and requested withdrawal as counsel, as well as asking for extra time so Carbon could submit a pro se brief. *Anders v. California*, 386 U.S. 738, 744 (1967). In turn, Carbon submitted a pro se brief on December 16, 2022, leaving us in the current posture.

For the following reasons, we affirm the Henderson Circuit Court's judgment.

I. Factual and Procedural Background

On June 24, 2016, Eddie Carbon was indicted on charges of capital murder, first-degree robbery, second-degree burglary, giving an officer a false name, and being a second-degree persistent felony offender (PFO). The charges arose out of an incident where Carbon broke into the apartment of Luis Sedillo and assaulted him before taking various electronics from the apartment, including Sedillo's mobile phone. Sedillo suffered a fractured skull and a brain bleed and ultimately died in the hospital due to his injuries.

Following the initial pre-trial proceedings, Carbon was offered a plea deal where if he plead guilty, his sentence would only be thirty years total for all charges. The parties also agreed to amend the indictment to remove the second-degree PFO charge from the murder charge, but not as to first-degree robbery or second-degree burglary. On November 9, 2017, Carbon entered his guilty plea and was sentenced to thirty years in prison.[2]

[2] On November 28, 2017, a corrected amended judgment was entered after the realization that the first-degree robbery charge was entered twice.

On May 28, 2020, Carbon filed a pro se motion to vacate his sentence pursuant to RCr 11.42. Carbon was subsequently appointed counsel and argued three claims related to ineffective assistance of counsel. First, the trial counsel failed to file an immediate appeal. Second, the trial counsel failed to conduct a sufficient mental health investigation. Third and finally, the trial counsel misinformed Carbon in relation to his parole eligibility.

On April 15, 2022, the trial court denied all of Carbon's arguments except for one. The trial court found that Carbon had requested his counsel to file an appeal. However, Carbon's counsel refused to file an appeal stating Carbon had waived his right to appeal by pleading guilty. The trial court assumed prejudice and granted Carbon thirty days to file an appeal. Carbon now argues to this Court that: his indictment was void, his mental health investigations were insufficient, he was misinformed concerning his parole eligibility, and his sentence constituted double jeopardy. It must be noted that Carbon's initial plea was not made pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970); and any potential errors prior to or at the entry of his guilty plea are unpreserved and will be reviewed accordingly.

II. Standard of Review

Pursuant to RCr 10.26 the appellate court may review for palpable error. "A palpable error which effects the substantial rights of a party may be considered . . . even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." *Id.* Moreover:

> a palpable error must be so grave in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings. Thus, what a palpable error analysis 'boils down to' is whether the reviewing court believes there is a 'substantial possibility' that the result in the case would have been different without the error.

Brewer v. Commonwealth, 206 S.W.3d 343, 349 (Ky. 2006).

Concerning Carbon's due process claims, this Court has held that "an unconditional guilty plea waives the right to appeal . . . a finding of guilt on the sufficiency of evidence." *Windsor v. Commonwealth*, 250 S.W.3d 306, 307 (Ky. 2008) (citing *Taylor v. Commonwealth*, 724 S.W.2d 223, 225 (Ky. App. 1986). However:

> there are some remaining issues that can be raised in an appeal. These include competency to plead guilty; whether the plea complied with the requirements of *Boykin v. Alabama,* 395 U.S. 238, 244, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); subject matter jurisdiction and failure to charge a public offense; and sentencing issues.

Id. at 307 (internal footnotes omitted). Finally, when deciding if a plea was entered voluntarily, the Court will consider:

> (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.

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

III. Analysis

A. Carbon's indictment was not void.

Carbons initial claim is that his indictment was void due to a PFO charge being attached to his charge of capital murder. Concerning the law, a PFO

charge cannot be used to enhance a sentence for capital murder. *Offutt v. Commonwealth*, 799 S.W.2d 815, 816 (Ky. 1990). But a PFO charge being attached does not make the indictment void. *Id.* This Court has been clear: a defendant can be charged with both capital murder and being a PFO, so long as the PFO status does not enhance the sentence. *Id.* at 817. Therefore, Carbon's indictment was not void.

The record also reveals that the indictment was amended to dismiss the PFO charge in relation to the capital murder charge at the same hearing when Carbon pled guilty. Counsel for each party agreed to amend the indictment because they each believed that attaching the PFO charge to the capital murder charge was improper. Therefore, there is no palpable error.

B. Carbon's mental health investigation was sufficient.

Carbon's second claim, as cited in his brief, states "Appellant was denied due process and his Fourteenth Amendment was violated when Henderson County Circuit Court provided Appellant with a mental health expert that was inappropriate to meet due process." In other words, Carbon alleges that both his counsel and the Kentucky Correctional Psychiatric Center (KCPC) psychiatrist were not sufficient and should have done more to help him build defenses relating to his sanity at the time of his offense.

Carbon started his mental health examinations with KCPC on September 7, 2017. The examination was requested by Carbon's attorney to collect evidence relating to Carbon's mental health for the purpose of mitigating his sentence. The examinations revealed that despite some issues in relation to his

mental health, Carbon was competent to proceed with trial or a plea. Indeed, Carbon is not arguing he was incompetent to stand trial or to enter his plea.

"[D]efense counsel has an affirmative duty to make reasonable investigation for mitigating evidence or to make a reasonable decision that particular investigation is not necessary." *Hodge v. Commonwealth*, 68 S.W.3d 338, 344 (Ky. 2001) (citing *Strickland v. Washington*, 466 U.S. 668, 691 (1984)). Additionally, "[a] reasonable investigation is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited resources, but also with the benefit of hindsight, would conduct." *Haight v. Commonwealth*, 41 S.W.3d 436, 446 (Ky. 2001) (citing *Thomas v. Gilmore*, 144 F.3d 513, 515 (7th Cir. 1998) *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151, 158-159 (Ky. 2009).

While the record does show Carbon suffered from mental health issues involving hallucinations in his past, at no point in his brief does Carbon allege that he was suffering from such hallucinations at the time he committed his crimes. He does not allege he told his trial counsel he was suffering from hallucinations at the time the crime was committed and the KCPC psychiatrist did not find a basis for this belief either.

In *Binion v. Commonwealth*, we held when there is:

> a reasonable basis on which to determine whether the indigent defendant was suffering from insanity or acting from a diminished capacity during the commission of the crime . . . he was entitled to either the appointment of, or the funds necessary, to employ a competent mental health expert for assistance in the evaluation and presentation of his defense.

891 S.W.2d 383, 385 (Ky. 1995). *Binion*'s initial evaluation by the KCPC was necessary to aid the trial court "in determining whether the insanity defense is appropriate and whether further action is necessary." *Id.* The indigent defendant in that case had a KCPC evaluation which suggested the possibility that he was suffering from brain damage and schizophrenia at the time of his crime. *Id.* at 384. Despite such an evaluation, the KCPC had determined he was able to conform his conduct to the requirements of the law and the trial court denied an additional request for an independent mental health expert to assist him in preparing an insanity defense. *Id.* at 385. We reversed the verdict and ordered upon remand that an independent mental health expert, or funds to pay a mental health expert, be provided. *Id.*

In this case, the KCPC evaluation concluded Carbon was not suffering from mental illness or mental defect at the time the crimes occurred. Although it noted Carbon had reported suffering auditory hallucinations in the past and had previously been treated for that ailment as a child, the KCPC noted that Carbon's evaluation suggested he was presently exaggerating his psychological symptoms. The doctor concluded, according to the Miller Forensic Assessment of Symptoms Test, that Carbon scored a 15, where a score of 6 is the cutoff for concluding symptom exaggeration. Additionally, over a month of observation did not reveal behavior consistent with a person suffering from auditory hallucinations, such as being distracted, disorganized in thought, or otherwise responding to internal stimuli. The examiner also noted that "at no time, since his arrest has Mr. Carbon described symptoms of mental illness including

hallucinations that impacted his behavior or thinking on the day of the death of Mr. Sedillo." Even so, despite such findings, funds for an expert were provided for Carbon to retain the services of Dawn Jenkins, for purposes of mitigation evidence in the event Carbon went to trial and faced a potential death sentence. Her report is not included in the record, but Carbon's attorney did testify at the 11.42 hearing that he used her report in order to secure the plea deal with the Commonwealth.

In *Harper v. Commonwealth*, we affirmed the conduct of defense counsel who declined to seek an independent mental health expert based on the conclusions of the KCPC experts. 978 S.W.2d 311, 314 (Ky. 1998). In that case, the KCPC experts testified "that Appellant suffered from some form of a mental disorder, and . . . that if the disorder was present at the time of the murders, Appellant would not have been able to control his actions." *Id.* at 315. But "neither testified that in their opinion, Appellant, at the time of the murders, probably lacked substantial capacity to appreciate the criminal nature of the act or that he did not have the substantial capacity to conform his conduct to the requirements of law." *Id.* at 314. The Court held that based on this, "counsel could have reasonably concluded that testimony from an independent expert was unnecessary." *Id.* at 315. Similarly, given the KCPC report in this case, and the fact the Carbon does not allege in his brief, and apparently has never so asserted, that he was suffering from a mental defect or disorder at the time he committed his crimes, we believe the requirements of *Binion* are satisfied. Moreover, like in *Harper*, we conclude the investigation of his attorney

was reasonable based upon the available information at the time. Therefore, his conduct was within the "the wide range of professionally competent assistance." *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

C. Carbon is not correct in his belief about his parole eligibility.

Carbon claims he was never told nor made aware that he would be required to serve twenty years of his sentence before being eligible for parole. Contained in the video record, on November 9, 2017, during the plea proceedings, the trial court specifically informed Carbon that

> I also want you to understand that should you get a sentence that requires you to go to state prison, there is no one that can tell you when or if you're going to make parole. You might not. You might have to serve every day of this sentence. Do you understand that?

Carbon responded "Yes." Moreover, Carbon's attorney then stated

> I did explain to him [Carbon] my understanding of when he would be eligible for probation. However, I did make it clear to him that that decision is not the court's or mine, nor anyone else's other than the parole board. I did also make it clear to him that the parole board may choose not to grant it [parole].

Finally, Carbon's attorney then stated, "My understanding of parole eligibility in this particular case is that Mr. Carbon would be eligible for parole after service of twenty years." Therefore, nothing in the trial court record indicates that Carbon was unaware of his potential parole eligibility.

D. Carbon's sentence did not constitute double jeopardy nor did his sentence exceed the statutorily described maximum for his crimes.

Carbon claims that he was subjected to double jeopardy because his charges of murder, robbery, and burglary all arose out of the same incident. This is not the law. "Convictions of both robbery and burglary do not violate the

constitutional proscription against double jeopardy since each offense requires proof of an element that the other does not." *Caudill v. Commonwealth*, 120 S.W.3d 635, 677 (Ky. 2003) (citing *Jordan v. Commonwealth*, 703 S.W.2d 870, 873 (Ky. 1985)). Moreover, Courts have held that it is not "double jeopardy to convict a defendant of robbery or burglary and then use the same offense as an aggravating circumstance authorizing capital punishment." *Id.* (citing *Bowling v. Commonwealth*, 942 S.W.2d 293, 308 (Ky. 1997)).

Carbon also claims that his sentence of thirty years violated the statutorily described maximum sentence. Pursuant to KRS 515.020, first-degree robbery is a class B felony with a recommended sentence of ten-to-twenty years. Pursuant to KRS 511.030(2), second-degree burglary is a class C felony that carries a recommended sentence of five to ten years. Most significant, Carbon also pled guilty to being a second-degree PFO. Due to this guilty plea, pursuant to KRS 532.080(5), the first-degree robbery became a class A felony increasing his recommended sentence to twenty to fifty years or life; the second-degree burglary became a class B felony, subsequently increasing Carbon's potential sentence to ten-to-twenty years. Therefore, the trial court was well within its authority sentencing Carbon concurrently to thirty years in prison for his crimes.

IV. Conclusion

For the aforementioned reasons, we find no palpable error related to Carbon's right to due process. Therefore, the conviction of Eddie Carbon is affirmed.

All sitting. All concur.

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