

# Commonwealth Of Kentucky

## Court of Appeals

NO. 1999-CA-001781-MR  
AND  
NO. 2000-CA-001010-MR

BARRY BUSSELL

APPELLANT

v. APPEALS FROM CHRISTIAN CIRCUIT COURT  
HONORABLE JAMES E. HIGGINS, JR., JUDGE  
ACTION NOS. 95-CR-00320 & 96-CR-00144

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION

### AFFIRMING

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BEFORE: BARBER, McANULTY, AND SCHRODER, JUDGES.

McANULTY, JUDGE: Barry Bussell appeals the Christian Circuit Court's denial of his motion to vacate and set aside judgment and appoint counsel under RCr<sup>1</sup> 11.42 and his supplemental motion to the original RCr 11.42 motion. We affirm.

The Commonwealth charged Appellant with attempted murder, assault fourth degree, two counts of theft by unlawful disposition over \$300, and criminal mischief second degree,

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<sup>1</sup> Rules of Criminal Procedure.

after appellant committed a number of criminal acts in Christian County, Kentucky in May of 1995. On January 16, 1996, Appellant entered a plea of guilty to the amended charges of wanton endangerment (5 years), criminal mischief first degree (2½ years), and theft by unlawful taking under \$300 (12 months), with the initial recommendation being that Appellant serve five years. The Christian Circuit Court accepted the plea and scheduled the sentencing hearing for March 6, 1996. The court released Appellant on his own recognizance until the sentencing hearing.

Appellant failed to appear for sentencing and had to be rearrested, therefore, the Commonwealth placed an additional charge of bail jumping first degree against him. Appellant pleaded guilty to the additional charge of bail jumping first degree on July 3, 1996.

On July 3, 1996, the Court sentenced appellant to five years on wanton endangerment first degree, two and one-half years on criminal mischief first degree, twelve months concurrent on theft by unlawful taking under \$300 and one year on bail jumping first degree to be served consecutively to the original charges, for a total sentence of eight and one-half years.

After his sentencing, Appellant filed a pro se request for RCr 11.42 relief. The circuit court denied the motion.

Appellant's counsel from the Department of Public Advocacy supplemented Appellant's request for RCr 11.42 relief and requested an evidentiary hearing. The circuit court also denied this motion and request for an evidentiary hearing. This appeal followed.

Appellant presents three claims for our review. First, Appellant claims the trial court erred in denying his RCr 11.42 motion when his counsel provided ineffective assistance. Second, Appellant claims his guilty plea was not made in a knowing and intelligent manner. Finally, Appellant claims the trial court erred in denying his request for an evidentiary hearing to establish proof of his claims.

Appellant alleges that he was denied constitutionally effective assistance of counsel. The test for proving ineffective assistance of counsel is set out in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The Strickland test requires Appellant to show trial counsel's performance was deficient, and this deficient performance prejudiced his defense. Strickland, 466 U.S. at 687, accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985).

The two-prong Strickland test also applies to challenges to guilty pleas based on ineffective assistance of counsel. See Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366 , 88 L. Ed. 2d 203, 210 (1985). Appellant must show the attorney's

performance was deficient and the attorney's ineffective performance affected the outcome of the plea process. See id. "In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id; Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726, 728 (1986).

Appellant supports his claim for ineffective assistance of counsel with the assertions that his trial counsel advised him to enter a plea without making a proper factual investigation to explore any defenses. Appellant also alleges that his trial counsel failed to properly advise him about the offer he received and failed to allow adequate time to ensure that Appellant understood the plea agreement as it was committed to writing. In particular, Appellant's understanding of the amount of time he would have to serve differs significantly from that which he is actually serving. Moreover, Appellant's attorney was not present during sentencing and Appellant believes that any differences in sentencing may have been discovered if his attorney was present.

Appellant makes no specific assertions of error or hints of what defense or defenses he might have had. It seems that Appellant expected his attorney to read his mind. He does not allege that he ever told his attorney that he did not

understand what was happening or that he informed his attorney of any facts which might assist him in a defense. Moreover, Appellant has never expressed his understanding of what his sentence would be so that we have an idea of how significantly it differs. Without more, we find that the record refutes Appellant's claims that his representation was deficient, thus the first prong of the Strickland test is not satisfied.

Specifically, the record reflects that on May 8, 1995, three individuals, including defendant's mother, named Appellant in three criminal complaints alleging that, among other charges, Appellant broke into a van, struck one complainant with a pistol, then fired at her three times in an attempt to kill her, and finally sold his mother's car with the intent to permanently deprive her of it. On January 2, 1996, Appellant's attorney, James Carter, noticed a motion to reduce bond set for January 16, 1996. On January 16, 1996, Appellant signed a Motion to Enter a Guilty Plea. The Guilty Plea referred to the Commonwealth's Offer on Plea of Guilty which listed the amended charges and the sentencing recommendations as follows: wanton endangerment first degree (5 years); criminal mischief first degree (2 ½ years); and theft by unlawful taking under \$300 (12 months). Appellant signed this offer. The offer did not specify whether the sentences were to run concurrently or consecutively. In addition, Appellant was to pay \$1,180.92 to

Terry and Sharon Collins at or before the sentencing hearing as restitution for damage caused by him to their van. At the request of Appellant's attorney, the court set the sentencing hearing for March 6, 1996, to allow Appellant some additional time to obtain the restitution amount.

Appellant failed to appear at the sentencing hearing on March 6, 1996. The Trigg County Sheriff's Department arrested Appellant on May 9, 1996. On July 3, 1996, Appellant pleaded guilty to the additional charge of bail jumping first degree for which the Commonwealth recommended a sentence of one year to run consecutive with the earlier charges. Consequently, in the court's sentencing order dated July 9, 1996, the court sentenced Appellant to bail jumping first degree (1 year), making Appellant's total sentence for the two indictments 8 ½ years (5 years on wanton endangerment first degree, 2 ½ years on criminal mischief first degree to run consecutively with the wanton endangerment charge, 12 months in the county jail on theft by unlawful taking under \$300 to run concurrently with the foregoing, and 1 year to bail jumping first degree to run consecutively with the original indictment). Although it was not the same person that represented Appellant in January, Appellant was represented by counsel at the July 3, 1996, sentencing hearing. Throughout the proceedings, Appellant acknowledged that he had been represented by competent counsel,

and he understood the nature of the proceedings and all the matters contained in the documents he signed.

Because we find that Appellant failed to meet the first prong of the Strickland test, there is no need to analyze whether he met the second prong.

We move to Appellant's claim that his guilty plea was not made in a knowing and intelligent manner because he did not understand that his plea agreement was for 8 ½ years and his counsel failed to inform him of the correct laws and penalties to which he was subject. "The validity of a guilty plea depends 'upon the particular facts and circumstances . . . including the background, experience and conduct of the accused.' In other words, the validity of a guilty plea is determined not by reference to some magic incantation recited at the time it is taken but from the totality of the circumstances surrounding it." Kotas v. Commonwealth, Ky., 565 S.W.2d 445, 447 (1978) (internal citations omitted).

Appellant signed both of the Commonwealth's offers of January 16, 1996, and July 3, 1996, and both of his motions to enter guilty pleas, as did Appellant's attorney. On January 16, 1996, the trial court entered into a colloquy with Appellant pertaining to his guilty plea on the charges of wanton endangerment first degree, criminal mischief first degree and theft by unlawful taking under \$300. In response to the court's

questions, Appellant acknowledged that his attorney had explained his guilty plea to him and that he signed the plea voluntarily. By entering a plea of guilty, Appellant was aware that he was giving up his right to trial by jury and right to cross-examine witnesses. Further, Appellant acknowledged his understanding that the court was not bound by the plea agreement and could choose to give Appellant the maximum sentence allowed by the law for the charges to which he was pleading guilty. Appellant responded that his plea was not motivated by threats or promises. At the conclusion of the colloquy on January 16, 1996, the court made a finding of fact that the Appellant gave his plea willingly, freely, voluntarily and intelligently.

When Appellant appeared before the court again on July 3, 1996, the court advised Appellant as follows:

The court has considered probation, probation with conditional discharge and alternative sentencing, but they are not granted. The court is of the opinion that it would unduly depreciate the seriousness of this...these crimes to grant probation or conditional discharge at this time. Therefore, no sufficient cause having been shown why judgment should not be entered and sentence imposed, it is hereby adjudged that the defendant is guilty of the crime of wanton endangerment first degree. I sentence him to 5 years in the penitentiary on this charge. He is guilty of criminal mischief first degree. I sentence him to 2 ½ years in the penitentiary on this charge to run consecutive to the wanton endangerment felony. He is guilty of theft by unlawful taking under \$300. I sentence him to 12

months in the county jail to run concurrent,  
for a total of 7 ½ years.

After the court announced Appellant's sentence,  
Appellant's counsel requested that Appellant be allowed to serve  
his time in the auxiliary jail because Appellant had some  
medical issues of which Appellant had advised his attorney  
earlier that morning. At that point, Appellant interjected and  
said that he was suing the jail because he felt he had not been  
treated right.

Considering the totality of the circumstances and the  
background, experience and conduct of the Appellant, we find  
that his guilty plea was made in a knowing and intelligent  
manner. The court conducted a clear line of questioning of  
Appellant. Moreover, the sentence was announced in specific and  
understandable terms. These were not Appellant's first  
encounters with the criminal justice system as he also  
acknowledged to the court. Finally, the record reflects that  
Appellant established a dialogue with his attorney, at least on  
such matters as the time frame for paying the restitution amount  
and the conditions at the county jail. For that matter, the  
Appellant even established a dialogue with the court when he  
said he felt he had not been treated right at the jail. This  
indicates that Appellant was not afraid to speak up, fully  
understood the proceedings against him and comprehended the

sentence that the court announced to him, including the denial of probation.

Appellant's final claim is the trial court erred in denying his request for an evidentiary hearing to establish proof of his claims. An evidentiary hearing is required if there is a "material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record." Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 452 (2001). In support of Appellant's claim, Appellant argues that he was entitled to an evidentiary hearing because he raised issues regarding the voluntariness of the plea and the effectiveness of his counsel. However, as discussed in detail above, our examination of the record establishes that Appellant's plea was voluntarily entered, and he received effective assistance of counsel. As Appellant offers no other issues of fact in support of his claim, we affirm the trial court's denial of Appellant's request for an evidentiary hearing.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kim Brooks  
Covington, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III  
Attorney General of Kentucky

George G. Seelig  
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