

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001042-MR

CHARLES DENTON

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 01-CR-00016

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: BARBER, DYCHE, AND McANULTY, JUDGES.

McANULTY, JUDGE. Charles Denton (hereinafter appellant) appeals the denial of his RCr 11.42 motion to vacate, set aside or correct his sentence pursuant to RCr 11.42. Appellant was charged with a murder and robbery committed on December 1, 2000, when appellant was under eighteen years of age. The Jessamine District Court, Juvenile Division, found probable cause that appellant had committed the felony offenses, that he had used a firearm in the commission of the offenses, and that he was

fourteen years of age or older at the time of the offenses, and so ordered that the charges be referred to the Jessamine Circuit Court pursuant to KRS 635.020 and KRS 640.010.

Appellant was indicted by a grand jury for one count of capital murder and one count of robbery in the first degree. On March 17, 2001, the Commonwealth gave notice that the prosecution believed a statutory aggravating circumstance existed, in that the offense of murder was committed while the offender was engaged in the commission of robbery in the first degree. The Commonwealth asserted it would seek the death penalty and life without parole as potential punishments. Appellant moved for a bill of particulars. The Commonwealth responded to the bill of particulars, but in doing so objected to questions asked in appellant's request as being beyond the information required. The Commonwealth further noted that it was providing open file discovery. On October 12, 2001, the court denied defense motions to suppress evidence and to exclude the death penalty, but agreed to reconsider the latter motion at the conclusion of the Commonwealth's evidence at trial.

On November 1, 2001, appellant filed a motion to enter a guilty plea based on the Commonwealth's recommended sentences of life without benefit of parole for twenty-five years on the murder count and twenty years for the robbery count, to run concurrently. Appellant entered his guilty plea in open court

on November 2, 2001. Appellant signed the Waiver of Further Proceedings and Petition to Enter Plea of Guilty and the Commonwealth's Offer on a Guilty Plea. In the trial court's order on guilty plea, entered on November 5, 2001, the court erroneously recorded the Commonwealth's recommended sentence on the murder count as twenty-five years. That same order suspended imposition of sentence pending a pre-sentence investigation by the Division of Probation and Parole. On December 7, 2001, the court adjudged appellant guilty of the crimes charged and sentenced him to concurrent sentences of life without parole for twenty-five years for murder and twenty years for robbery.

In May 2002, appellant filed a motion pursuant to RCr 11.42 to vacate, set-aside or correct his sentence. The trial court denied the motion without a hearing. It is from this order of the trial court that appellant appeals.

Appellant primarily argues that his guilty plea was not made knowingly, and his counsel's advice was ineffective, because the court "veered" from the twenty-five year sentence which he agreed to, and entered a sentence of life imprisonment without parole for twenty-five years, without affording appellant the opportunity to withdraw his plea. This contention is readily refuted by the record. The record reveals that the Commonwealth made its recommendation for a total sentence of

life without parole for twenty-five years in open court and in writing, and appellant accepted the offer and plead guilty. The only reference to a twenty-five year sentence was in the trial court's order entered after the guilty plea. There is nothing in the record to show that there was any other agreement between the Commonwealth and appellant. Therefore, appellant's claims that his attorney misadvised him and that the court changed the plea agreement are completely unsupported by the record.

Next, appellant makes claims that his counsel was ineffective in failing to prepare a defense and in using appellant "as a bargaining tool." These allegations were not made in the circuit court. Issues of ineffective assistance of counsel raised for the first time on appeal, rather than by a proper motion in the lower court, are not properly before the appellate court. Nickell v. Commonwealth, Ky., 565 S.W.2d 145, 149 (1978). Furthermore, it is clear that advice to enter a guilty plea in order to avoid the potential imposition of the death penalty is reasonable legal strategy and not any indication of constitutional ineffectiveness. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); Quarles v. Commonwealth, Ky., 456 S.W.2d 693 (1970).

Next, appellant argues that the Commonwealth did not make known the charges against him by its failure to file a bill of particulars. Ostensibly, appellant is suggesting that his

guilty plea was not knowingly and intelligently entered. Appellant makes no specific claim as to what the Commonwealth did not disclose. However, the Commonwealth responded to appellant's motion for bill of particulars by giving information it deemed proper. The Commonwealth also conducted open file discovery.

Moreover, the record shows that appellant's guilty plea was entered knowingly and willingly. The circuit court conducted an extensive plea colloquy. Appellant was informed of the charges against him by the indictment, the response to the bill of particulars, discovery, the guilty plea colloquy and the Commonwealth's offer on a guilty plea which set forth the facts of the case. All this was sufficient to enable appellant to know the charges against him and to prepare a defense, and so contradicts appellant's claims of prejudice. Brown v. Commonwealth, Ky., 378 S.W.2d 608 (1964).

Finally, we agree that no evidentiary hearing was required because appellant's claims could be refuted by resort to the record alone. It is unnecessary for the court to conduct a hearing if the material issues of fact can be fairly determined on the face of the record. Maggard v. Commonwealth, Ky., 394 S.W.2d 893, 894 (1965).

For all the foregoing reasons, we affirm the order of the Jessamine Circuit court which denied appellant's RCr 11.42 Motion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Charles Denton, pro se
Burgin, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky