

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-002116-MR

BARRY LYNN HAVENER

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT  
HONORABLE THOMAS O. CASTLEN, JUDGE  
ACTION NO. 99-CR-00337

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, DYCHE, AND JOHNSON, JUDGES.

BUCKINGHAM, JUDGE: Barry Lynn Havener appeals from an order of the Daviess Circuit Court denying his RCr<sup>1</sup> 11.42 motion to vacate his convictions and sentences. We affirm.

Havener was convicted of murder in connection with the beating death of a ten-year-old boy, was convicted of criminal attempt to commit murder in connection with the beating of an eight-year-old boy, and was convicted of being a second-degree persistent felony offender. Prior to pleading guilty to the

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

charges, he was examined at the Kentucky Correctional Psychiatric Center (KCPC), and a report was filed by a staff psychologist, Dr. Richard Johnson. A competency hearing was held, and the court entered an order determining that Havener was competent to stand trial.

On October 24, 2000, Havener appeared before the court with counsel and pled guilty to the charges. His guilty pleas were entered pursuant to a plea agreement signed by Havener, his attorney, and the Commonwealth's attorney. The agreement provided for a prison sentence of thirty years on the murder charge and twenty years on the attempted murder charge, enhanced to thirty years based on persistent felony offender status. The agreement stated that the two thirty-year sentences would run concurrently.

On November 8, 2000, Havener filed a *pro se* motion to withdraw his guilty pleas. Said motion was filed against the advice of counsel. In support of his motion, Havener stated that he was under the influence of medication when he entered his pleas and that he was coerced by counsel into pleading guilty to the offenses.

On November 17, 2000, the circuit court denied Havener's motion to withdraw his pleas. In its order denying the motion, the court made reference to Havener's competency to stand trial. Further, the court recalled its colloquy with

Havener when he entered his guilty pleas. The court noted that Havener indicated he was taking medication but that the medication was "helping my thoughts." The court denied the motion to withdraw the pleas based on its findings that the pleas were entered willingly, intelligently, and knowingly. On the same day, the court sentenced Havener to thirty years in prison pursuant to his guilty pleas and the plea agreement.

Havener then attempted to file a belated appeal with the Kentucky Supreme Court. That court remanded the matter to the circuit court for a hearing to determine whether Havener's counsel rendered ineffective assistance by failing to file an appeal. In an order entered on September 18, 2001, the circuit court found that Havener was aware of his right to appeal and that his counsel had no indication that he desired to appeal the court's ruling denying his motion to withdraw his guilty pleas. Further, the court concluded that Havener's counsel did not render ineffective assistance. Thereafter, the Kentucky Supreme Court denied Havener's motion for a belated appeal.

On August 8, 2002, Havener filed a *pro se* motion to vacate his convictions pursuant to RCr 11.42. He also moved the court to appoint counsel to represent him in connection with his motion and to grant an evidentiary hearing. As grounds for the RCr 11.42 motion, Havener alleged that he was taking psychotropic medications when he entered his guilty pleas, that

he was disoriented at the time, that he did not understand his constitutional rights, that he did not understand the possible applicability of lesser-included offenses and the element of intent, and that he received the ineffective assistance of counsel. Havener attached a report by Dr. Eric Y. Drogin, a clinical and forensic psychologist, to his motion.<sup>2</sup> Dr. Drogin's report stated that "Mr. Havener appears to display the rudimentary elements of competency to stand trial."

On August 20, 2002, the circuit court entered an order denying Havener's RCr 11.42 motion. Citing Stanford v. Commonwealth, Ky., 854 S.W.2d 742 (1993), the court held that the appointment of counsel and an evidentiary hearing were not required because the issues could be conclusively resolved by examining the record. The court further held that Havener's motion to vacate should be denied because his claim that he was not fully aware of the guilty plea proceedings and that he received the ineffective assistance of counsel were without merit. The court's conclusions were based on the guilty plea proceedings and the subsequent findings made by the court in its order denying Havener's motion to withdraw his guilty pleas. This appeal by Havener followed.

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<sup>2</sup> Dr. Drogin's report was dated August 5, 1999, one month before the murder and assault were committed. Thus, this report appears to have been based on observations and events prior to the crimes herein.

Havener raises four separate arguments, and we will separately address each of them. First, he argues that the trial court abused its discretion and erred in denying his RCr 11.42 motion "without any fact-finding or appointment of counsel." Because the trial court made fact findings when it denied Havener's motion, we conclude that his reference to "fact-finding" refers to his argument that he was entitled to counsel to assist him in making "further fact-specific pleading and development and preparation."

"If an evidentiary hearing is not required, counsel need not be appointed, 'because appointed counsel would [be] confined to the record.'" Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 453 (2001), quoting Hemphill v. Commonwealth, Ky., 448 S.W.2d 60, 63 (1969). For reasons which we will set forth below, an evidentiary hearing was not required in this case. Therefore, the trial court did not err or abuse its discretion in refusing to appoint counsel to represent Havener.

Havener's second argument is that his competency "was not factually or legally resolved." In connection with this argument, he asserts that he had no understanding of lesser-included offenses or that the possibility of extreme emotional disturbance would preclude a conviction for murder. He also asserts that he was unaware of his right to present an insanity defense. Further, Havener maintains that the trial court "was

not even aware of the psychotropic medications" and that he was entitled to a hearing so that he could be given the opportunity to fully develop his contention that his guilty pleas were made while under the influence of the medications.

"[A]n RCr 11.42 movant is not automatically entitled to an evidentiary hearing." Stanford, 854 S.W.2d at 743. "If the record refutes the claims of error, there is no basis for granting an RCr 11.42 motion." Id. "A 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, 59 S.W.3d at 452.

We are somewhat hampered in our review of this issue because the record as designated does not contain either a videotape or a transcript of the guilty plea proceedings. Havener's designation of the record did not include the videotape, and the proceedings were apparently not transcribed. When the complete record is not before us, we "must assume that the omitted record supports the decision of the trial court." Commonwealth v. Thompson, Ky., 697 S.W.2d 143, 145 (1985). We could uphold the court's determination that Havener's allegations were refuted on the record based on the fact that the record of the proceedings was omitted. Nevertheless, it is apparent from the court's recitation of the circumstances

surrounding the guilty plea proceedings that it did not err in denying an evidentiary hearing.

In its order denying the RCr 11.42 motion, the court made reference to its findings in its previous order denying Havener's motion to withdraw his guilty plea. Therein, the court noted that it engaged in a "lengthy colloquy" with Havener during the guilty plea proceedings. Further, the court noted that Havener stated that he was taking medication but that the medication was "helping my thoughts." Based on the lengthy colloquy and the fact that Havener was "extensively questioned," the court found that he was competent and that his guilty pleas were entered willingly, intelligently, and knowingly. Under these circumstances, we conclude that the record conclusively proved the nature of Havener's guilty pleas and that an evidentiary hearing was not required. See Beecham v. Commonwealth, Ky., 657 S.W.2d 234, 236 (1983); Glass v. Commonwealth, Ky., 474 S.W.2d 400, 401 (1971).

Havener's third argument is that his guilty pleas were involuntarily and unintelligently entered. He again asserts that he did not understand the element of intent and was unaware that lesser-included offenses might have been appropriate. We reiterate that the trial court did not err in making a determination from the record concerning the validity of Havener's pleas.

Havener's last argument is that his counsel rendered ineffective assistance and was unprepared for trial. To the extent the argument alleges that counsel was unprepared for trial, it is clearly without merit because no trial was held. To the extent the argument addresses the ineffective assistance of counsel, it is likewise without merit.

Havener argues that his counsel should have inquired as to the effects of medication on Havener's ability to enter valid guilty pleas and should have insisted that the court engage in a colloquy with him as to the elements of the offense and as to potential defenses based upon his mental condition or health. First, we note that the court did engage in a colloquy with Havener concerning his medications. He stated to the court that the medications assisted his thought processes, and the court determined, after extensive questioning, that Havener was competent to enter valid guilty pleas. In light of the acknowledgments made on the record by Havener, we fail to see how counsel could have rendered ineffective assistance by not further inquiring as to the effects of the medications on Havener. As to Havener's assertion that his counsel should have caused the court to question him concerning his understanding of potential defenses based on mental condition, he cites Ivy v. Caspari, 173 F.3d 1136 (8<sup>th</sup> Cir. 1999).

The facts in Ivy are distinguishable from the facts herein. In Ivy, counsel allowed his client to plead guilty to second-degree murder without advising the court that a report from a psychiatrist indicated that the client had a mental disease which caused him to be unable to appreciate the wrongfulness of his conduct and which caused him to be incapable of conforming his conduct to the requirements of the law and without discussing the report with the client. The Eighth Circuit of the U.S. Court of Appeals granted *habeas* relief to Ivy and held that "[c]ounsel's failure to advise Ivy of the possible defense of mental illness and his failure to bring the report to the trial court's attention are additional indicia of his ineffective assistance and provide additional grounds for the district court's finding that Ivy's plea was not knowingly and voluntarily entered." Id. at 1143.

In the case *sub judice*, Havener contends that his counsel should have caused the court to engage in a colloquy with him concerning the elements of the offense and potential defenses or the applicability of lesser-included offenses based on mental condition. The basis of this argument appears to be that Dr. Drogin stated in his report of August 5, 1999, that there were serious questions concerning Havener's criminal responsibility "on the date in question."

There are several problems with this argument. First, the report of Dr. Drogin was in letter form to an attorney named Jerry Johnson. This was not the attorney who represented Havener on these charges, and there is no allegation in Havener's RCr 11.42 motion that his attorney was aware of this report at the time of the guilty plea and sentencing proceedings. Second, the letter from Dr. Drogin was apparently drafted and sent one month before the crimes herein were committed. There is simply no evidence in the record, nor is there an assertion by Havener, that Dr. Drogin's report was known by either counsel or the court at the time. In fact, the court's ruling on Havener's competency stated that it was based on a report from Dr. Richard Johnson, the staff psychologist at KCPC. Under these circumstances, we conclude that the trial court did not err when it determined that Havener's counsel did not render ineffective assistance.

The order of the Daviess Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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