

RENDERED: OCTOBER 15, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002323-MR

JOEY HART

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 97-CR-00340

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: DYCHE, GUIDUGLI, AND McANULTY, JUDGES.

McANULTY, JUDGE: Joey Hart (Hart) appeals *pro se* from an order of the McCracken Circuit Court denying his motion to vacate his sentence pursuant to the Kentucky Rules of Criminal Procedure (RCr) 11.42. We affirm.

On December 1, 1997, Hart was indicted by the Grand Jury on one count of Capital Murder and one count of Robbery in the First Degree, for killing a woman at the Gold Exchange in the course of a robbery. On December 19, 1997, Hart, with

counsel, pled not guilty. Hart was represented by two attorneys from the Department of Public Advocacy throughout the proceedings. On January 20, 1998, the Commonwealth filed a "Notice of Intent to Seek [the] Death Penalty." After filing a series of motions, on December 11, 1998, Hart's counsel filed a "Motion to Suppress [Hart's] Statements." This motion related to the confession and incriminating statements Hart made to the police. After the suppression hearing, the trial court denied this motion in an order entered March 16, 1999.

Thereafter, Hart, with counsel, pled guilty to murder and robbery in the first degree in open court on April 7, 1999. In exchange for Hart's plea, the Commonwealth agreed to recommend a sentence for Count 1 (murder) of life without the possibility of parole for 25 years and for Count 2 (robbery in the first degree) 20 years, the sentences to run concurrently. Hart, with counsel, executed the "Motion to Enter Guilty Plea." On May 13, 1999, the trial court imposed a sentence consistent with the Commonwealth's recommendations.

On July 16, 2001, Hart filed a *pro se* request for RCr 11.42 relief. The trial court entered an order denying Hart's motion on July 20, 2001. Hart then filed a Motion for Reconsideration on August 29, 2001. The trial court granted Hart's motion for appointment of counsel on December 18, 2002. Following that, Hart's counsel filed a Supplement to Hart's *pro*

se RCr 11.42 motion on June 5, 2002. On October 4, 2002, the trial court entered an order denying the RCr 11.42 motion, and this appeal followed.

Hart asserts six issues on appeal. First, Hart claims the trial court erred in failing to suppress the confession he made to the police, as he claimed it violated his Miranda¹ rights since he had requested an attorney and an attorney was not present. Second, Hart claims that by failing to suppress the statements made to the police, the trial court violated his due process and equal protection rights under the U.S. Constitution and his rights under Section 11 of the Kentucky Constitution. Third, Hart claims his due process and equal protection rights and rights under Section 11 of the Kentucky Constitution were violated because had he not been threatened to plead guilty by the police, he would not have pled guilty but would have instead gone to trial. Fourth, Hart claims ineffective assistance of counsel, claiming his counsel rendered "weak" legal advice, failed to advise him not to plead guilty, and failed to sufficiently consult with him. Fifth, Hart claims the trial court failed to establish the intent element on the record when Hart gave his guilty plea. Finally, Hart claims his guilty plea was not voluntarily, knowingly, or intelligently entered,

¹ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

thereby violating Section 11 of the Kentucky Constitution and the 14th Amendment of the U.S. Constitution.

Since the first three issues raised by Hart involve the statements he made to the police, we will address them together. Hart specifically claims after he requested an attorney, the police turned off the videotape, whereupon the police coerced and threatened him into confessing. He claims, had his request for an attorney been honored, he would have made a voluntary decision in whether to speak to the police, but since the police threatened him with "death threats", he felt he had no other choice but to confess. He also claims that had the police not made the "threat on his life," he would have retained his plea of not guilty and gone to trial. He asserts that the trial court abused its discretion by failing to suppress the confession under Miranda. He also alleges that this failure to suppress the coercion violates his due process and equal protection rights under the U.S. Constitution, as well as his rights under Section 11 of the Kentucky Constitution.

"A conviction after a plea of guilty normally rests on the defendant's own admission in open court that he committed the acts with which he is charged." McMann v. Richardson, 397 U.S. 759, 766, 90 S. Ct. 1441, 1446, 25 L. Ed. 2d 763 (1970), citing Brady v. United States, 397 U.S. 742, 748, 90 S. Ct. 1463, 1468, 25 L. Ed. 2d 747 (1970); McCarthy v. United States,

394 U.S. 459, 466, 89 S. Ct. 1166, 1170-1171, 22 L. Ed. 2d 418 (1969). "[A] convict was not entitled to an evidentiary hearing upon a post-conviction motion attacking a judgment of conviction based on a guilty plea, merely on the assertion that the guilty plea (made with advice of counsel) had been motivated by a coerced confession." Wheeler v. Commonwealth, Ky., 462 S.W.2d 921, 922 (1971), citing McMann, 397 U.S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763. ". . . [T]he admissibility of the allegedly coerced confession could have been tested at the original trial. When the defendant voluntarily enters a plea of guilty, he waives his right to challenge the admissibility of the confession." Id. "A guilty plea constitutes a break in the chain of events, and the defendant therefore may not raise independent claims related to the deprivation of constitutional rights occurring before entry of the guilty plea." Centers v. Commonwealth, Ky. App., 799 S.W.2d 51, 55 (1990), citing White v. Sowders, 644 F.2d. 1177 (6th Cir. 1980).

By simply claiming his coerced confession caused him to plead guilty, Hart cannot now try to challenge the admissibility of that confession. His conviction was based on his open court admission of committing the crimes, not on the alleged coerced confession. Furthermore, during the plea colloquy with the trial judge, Hart agreed he was voluntarily, freely, willfully, knowingly and intelligently entering his

guilty plea. When Hart pled guilty to the crimes, he waived all of his defenses to the charges (other than the indictment did not charge an offense), including a defense related to coerced confessions made to the police. Quarles v. Commonwealth, Ky., 456 S.W.2d 693, 694 (1970).

Hart's fourth issue is he claims he had ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) provides us with the test to prove ineffective assistance of counsel. Under this test, the appellant must show not only that his trial counsel's performance was deficient, but that this deficient performance prejudiced his defense. Strickland, 466 U.S. at 687. This two-prong test also applies in this situation, where the appellant has pled guilty and challenges his plea based on an ineffective assistance of counsel allegation. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). In this situation, the appellant must show (1) that his attorney gave a deficient performance such that the performance fell outside the wide range of professionally competent assistance and (2) the plea process was affected by the deficient performance because the appellant would not have pled guilty had he received competent assistance. Taylor v. Commonwealth, Ky. App., 724 S.W.2d 223, 226 (1986), citing Hill, 474 U.S. at 58-59, 106 S. Ct. at 370. To meet the prejudice requirement, the defendant must show that

there was "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59, 106 S. Ct. at 370.

Under his fourth allegation, Hart specifically alleges his counsel was deficient in (1) not obtaining the discovery in order to prepare his defense, (2) failing to investigate whether Hart's confession violated his Miranda rights, (3) failing to suppress his confession, (4) failing to advise Hart to not plead guilty, and (5) advising Hart to plead guilty one day before trial and having only met with Hart twice. We find the record refutes Hart's allegations. To begin with, Hart had not one, but two attorneys representing him throughout the proceedings who filed numerous motions prior to Hart's guilty plea, including (1) a motion to suppress the confession given to the police, (2) a motion to suppress evidence and (3) several discovery motions. As to Hart's first ineffective assistance of counsel allegation, Hart's counsel filed numerous discovery motions on December 11, 1998. As to Hart's second and third ineffective assistance of counsel allegations, Hart's counsel effectively handled the suppression issue. Hart's counsel filed a motion to suppress the confession and litigated the issue at the suppression hearing. Failing to get the confession suppressed does not mean that his counsel was ineffective, especially since the confession was not used because Hart pled

guilty. As to Hart's fifth ineffective assistance of counsel allegation, Hart entered a guilty plea to the charges of murder and robbery in the first degree. In doing so, Hart stated in open court that he was voluntarily, freely, and willingly pleading guilty to the charges. When trial counsel asked Hart at the guilty plea proceeding whether he had conferred with his attorneys and whether he was satisfied with the advice of his counsel, Hart stated, "yes." Also, Hart was facing the death penalty and by pleading guilty, his counsel secured a lesser sentence, to which Hart admitted he understood. When counsel, after investigating the case, advises his client to plead guilty in order to receive a lesser sentence, this is not ineffective assistance of counsel. Commonwealth v. Campbell, Ky., 415 S.W.2d 614, 616 (1967).

There is no need to analyze whether Hart has met the second prong of the Strickland test since Hart has failed to meet the first prong of the test.

Under his fifth issue, Hart specifically alleges that his plea agreement did not apprise him of the elements of the crimes he had been charged with, specifically the intent element. Although parts of his argument are missing from his submitted brief, Hart admits that the trial court asked him if he had been made aware of his Constitutional rights and the elements of the crime, yet he claims the plea agreement does not

do so. After viewing the videotape of the proceedings, it is clear the trial court asked Hart if he understood the nature of the charges and Hart replied, "Yes." The trial court asked Hart whether he understood the nature of the charges, to which Hart replied he understood the nature of the charges and that he had engaged in those crimes. Trial counsel also asked Hart's counsel if he had gone over the plea agreement with Hart, to which his counsel said, "Yes." Hart also claims that because he had to sign the plea agreement twice, he was not apprised of the circumstances surrounding the charges. Having to sign the plea agreement twice does not alter the information Hart had relating to these crimes. If anything, signing the agreement twice would have ensured that Hart read the agreement and had two opportunities to speak to his counsel regarding the circumstances surrounding the crimes. Hart's counsel mistakenly had Hart sign the plea agreement on April 2, 1999, in his presence but not in the presence of open court. The videotape of the April 5, 1999 proceedings show that at the proceeding, the Prosecutor pointed this out and requested for Hart to sign the plea agreement in open court, which he did. This double-signing did not prevent Hart from being made aware of the crimes he was pleading guilty to.

Hart's sixth, and final, issue generally alleges that since the trial court did not engage in a colloquy with him and

that his counsel told him only at that moment to agree with the plea agreement, his guilty plea was not voluntarily, knowingly and intelligently entered into. These allegations directly conflict with the record. After viewing the videotapes of the proceedings, it is obvious that the trial court did engage in a sufficient colloquy to ensure that Hart was pleading voluntarily, knowingly and intelligently. Hart stated he had attended up to the twelfth grade and that he was satisfied with the advice from his attorney. He also stated he understood the charges brought against him and that he did in fact engage in those crimes. Furthermore, the trial court asked Hart and his counsel if Hart was under any drugs, alcohol and any other substance which would impair his judgment, to which they both answered in the negative. The trial court also asked Hart if he understood the rights he was waiving and that he could have faced the death penalty had he not pled guilty, to which Hart answered in the affirmative.

Clearly, the trial court engaged in sufficient dialogue with Hart to ensure his understanding of the plea he was making. See Centers, 799 S.W.2d at 54. Therefore, this argument is also without merit.

For the foregoing reasons, the judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joey Hart, Pro se
Fredonia, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

Elizabeth A. Heilman
Assistant Attorney General
Frankfort, Kentucky