RENDERED: JUNE 24, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001621-MR

JAMES RAY LUDWICK — APPELLANT

v.

APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE ALLAN RAY BERTRAM, JUDGE
ACTION NO. 02-CR-00016

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER, HENRY, AND JOHNSON, JUDGES.

JOHNSON, JUDGE: James Ray Ludwick has appealed from an order entered by the Taylor Circuit Court on July 17, 2003, which denied his *pro se* motion, pursuant to RCr[1] 11.42, to vacate, set aside, or correct his five-year sentence, without holding an evidentiary hearing. Having concluded that the record conclusively resolves all of Ludwick's claims, we affirm.

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[1] Kentucky Rules of Criminal Procedure.

On February 5, 2002, Ludwick was indicted by a Taylor County grand jury on the charges of rape in the first degree,[2] sexual abuse in the first degree,[3] and being a persistent felony offender in the second degree (PFO II).[4] The Commonwealth entered into a plea agreement with Ludwick, which recommended, in exchange for Ludwick pleading guilty to sexual abuse in the first degree, that he receive a sentence of five years, probated for five years. According to the terms of the agreement, the rape in the first degree and PFO II charges were dismissed. Further, Ludwick was required to complete a state approved sexual offender treatment program, to have no contact with the victim or her immediate family, and to pay all court costs.

On May 7, 2002, the trial court accepted Ludwick's guilty plea pursuant to his agreement with the Commonwealth. Prior to the entry of the guilty plea, the trial court asked Ludwick's counsel if he had fully explained to Ludwick the terms of the plea agreement, his constitutional rights, and the factual basis for the guilty plea. Ludwick's counsel answered affirmatively. A lengthy discussion then ensued between the trial court and Ludwick in which Ludwick stated that he wished to plead guilty to the charge of sexual abuse in the first

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[2] Kentucky Revised Statutes (KRS) 510.040.

[3] KRS 510.110.

[4] KRS 532.080(2).

degree in reliance on the offer made by the Commonwealth. The trial court informed Ludwick that by entering a guilty plea, he would waive several of his constitutional rights. The trial court then reviewed each of the rights Ludwick would waive by entering into a plea agreement. Following this colloquy, the trial court accepted Ludwick's plea and determined that his plea was entered voluntarily and intelligently. Sentencing was postponed until the office of probation and parole prepared a pre-sentence investigation report and a comprehensive, sexual offender evaluation.

At the sentencing hearing, held on June 18, 2002, the Commonwealth's Attorney stated that after reviewing Ludwick's sexual offender evaluation, she did not believe the trial court would accept the recommended sentence which included probation. After its review of the sexual offender report which indicated that Ludwick had a high risk for recidivism, the trial court refused to probate Ludwick's sentence, but stated that a sentence imposing five years' imprisonment would be acceptable. The trial court gave the parties an opportunity to confer about the modified terms, and after a 30-minute conference with his attorney Ludwick accepted the modified terms and agreed to a sentence of five years' imprisonment.

When the hearing resumed, Ludwick's counsel made reference to the option of proceeding to trial on one occasion,

and the trial court referred to going to trial four separate times. During the discussion, Ludwick's attorney asked Ludwick if he agreed to the terms of the new plea agreement. Ludwick nodded his head affirmatively, despite the numerous references of having a trial, and stated that he intended to plead guilty. Prior to imposing a sentence, the trial court asked Ludwick if he needed additional time to speak with his attorney before he was sentenced. Ludwick replied that he and his attorney had spoken extensively and that he did not need to confer with him further. The trial court then sentenced Ludwick to serve five years for the conviction of sexual abuse in the first degree. The trial court entered its judgment and sentence on June 21, 2002.

On November 7, 2002, Ludwick filed a _pro se_ motion and affidavit for shock probation and a motion to compel enforcement of the original plea agreement. In his motion, Ludwick claimed that he could not obtain admittance in the sex offender treatment program, as required by the terms of the plea agreement, unless he was probated because he had completed a similar program in 1990. The trial court denied his motion in an order entered on April 9, 2003.

On June 23, 2003, Ludwick filed a _pro se_ motion to vacate, set aside, or correct his sentence, pursuant to RCr 11.42, and requested an evidentiary hearing. In his RCr 11.42

motion, Ludwick claimed that he was denied effective assistance of counsel "when his defense counsel and the Commonwealth['s] Attorney coerced him into entering into a plea agreement with the promise of probation with terms set by the court within the plea agreement, then both, the Commonwealth['s] Attorney and the judge were allowed to '[w]elsh on this plea agreement' after the judge had reviewed and approved the written and signed plea agreement . . . ."

Ludwick also claimed that his defense counsel was ineffective, whereby his guilty plea was not entered intelligently, knowingly, and voluntarily. Ludwick claimed that his counsel was ineffective "due to the following, but not limited to[ ] (a) [l]ack of preparation, (b) lack of [an] adequate investigation, (c) failed to interview prospective witnesses, (d) failed to study the facts regarding the Movants criminal past, (e) failed to challenge the indictment, (f) failed to question or investigate Det. David Tucker's involvement into his investigation and obtaining the victim's statements[ ] (g) [f]ailed to interview Mr. Kevin Dew, MD, the doctor who performed the evaluation on the victim, and who is also the victim's family doctor[ ] (h) failed to request an [e]xpert in the field of sexual abuse, (i) failed to file any type of pretrial motions, and failed to object to the government being allowed to welsh of its plea agreement, (j) and further

failed to inform the Movant of the true consequences of his guilty plead [sic]." On July 17, 2003, the trial court denied Ludwick's RCr 11.42 motion without holding an evidentiary hearing. This appeal followed.

Under RCr 11.42(5), an evidentiary hearing is required only if there is an issue of fact which cannot be determined on the face of the record.[5] "Where the movant's allegations are refuted on the face of the record as a whole, no evidentiary hearing is required."[6]

In Ludwick's motion, he alleged that the Commonwealth "welshed" on its agreement by withdrawing the offer he relied upon when entering his guilty plea. This is not an accurate statement concerning the facts and circumstances of this case. The record clearly shows that the Commonwealth stood by its plea bargain, but the trial court chose not to follow the recommended sentence contained in the agreement. A trial court's acceptance or rejection of a guilty plea is controlled by RCr 8.10, which provides, in relevant part as follows:

> If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court . . . that the court is not bound by the plea agreement, afford the defendant the

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[5] Stanford v. Commonwealth, 854 S.W.2d 742, 743-44 (Ky. 1993).

[6] Sparks v. Commonwealth, 721 S.W.2d 726, 727 (Ky.App. 1986)(citing Hopewell v. Commonwealth, 687 S.W.2d 153, 154 (Ky.App. 1985)).

> opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in that guilty plea the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.
>
> The court can defer accepting or rejecting the plea agreement until there has been an opportunity to consider the presentence report.

In Kennedy v. Commonwealth,[7] this Court stated:

> The language of RCr 8.10 is clearly mandatory and requires a court to permit a defendant to withdraw a guilty plea if the court rejects the plea agreement. We recognize that the trial court has ultimate sentencing authority and that it is not bound by the plea negotiations of the Commonwealth or the plea bargain itself. However, RCr 8.10 does not usurp nor does it infringe upon this discretionary power. The rule does not require the trial court to "rubber stamp" plea agreements; the decision to accept or reject the plea agreement remains the sole province of the trial court. However, RCr 8.10 does require the court to afford the defendant the opportunity to withdraw his plea when and if the court elects to deviate from the plea agreement [citation omitted].

In this case, pursuant to RCr 8.10 the trial court accepted Ludwick's guilty plea after making the determination that it was voluntarily entered, but it reserved sentencing Ludwick until after a pre-sentence investigation report and a sexual offender evaluation were prepared. From reviewing the entire record, it is apparent that Ludwick's argument that the

[7] 962 S.W.2d 880, 882 (Ky.App. 1997).

Commonwealth "welshed" on its agreement is without merit because the trial court provided Ludwick the opportunity to discuss the situation with his attorney and to reject the terms of the modified sentence.

Ludwick also argues that his counsel was ineffective, and due to that ineffectiveness his plea was not knowingly, intelligently, and voluntarily entered. When this Court analyzes a claim of ineffective assistance of counsel, the two-prong standard set forth in Strickland v. Washington,[8] is applied. However, the second prong of the test in Strickland is replaced with the standard provided in Hill v. Lockhart,[9] when a claim alleging ineffective assistance is asserted after a guilty plea is entered. To prevail on a claim of ineffective assistance of counsel on a guilty plea, the claimant must first show that counsel's performance was deficient relative to current professional standards, and secondly, but for this deficient performance, there is a reasonable probability that the claimant would not have pled guilty and would have insisted on going to trial.[10] It has long been recognized that advising a

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[8] 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

[9] 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

[10] Hill, 474 U.S. at 59. See also Taylor v. Commonwealth, 724 S.W.2d 223, 226 (Ky.App. 1987); Sparks, 721 S.W.2d at 726.

client to plead guilty to reduced charges to obtain a lesser sentence is not ineffective representation.[11]

In this case, Ludwick faced a potential sentence of ten to 20 years on the charge of rape in the first degree, and one to five years on the charge of sexual abuse in the first degree. Pursuant to the PFO II charge, the length of Ludwick's sentence could have been enhanced to life imprisonment. The plea agreement obtained by Ludwick's counsel dismissed the charges of rape in the first degree and PFO II, leaving only the charge of sexual abuse in the first degree. Thus, by entering into this plea agreement, the maximum sentence Ludwick could receive for the charges against him was five years' imprisonment instead of a possible life sentence. Without any support for his bare allegations of ineffective counsel, Ludwick's claims must be rejected on the face of the record.

Ludwick also claims that because of his counsel's ineffectiveness, he was precluded from entering the plea agreement intelligently, knowingly, and voluntarily. Pursuant to Boykin v. Alabama,[12] for a trial court to accept a guilty plea, it must meet the same standard that applies when an accused waives counsel. Therefore, in order to accept a guilty

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[11] Osborne v. Commonwealth, 992 S.W.2d 860, 864 (Ky.App. 1998)(citing Commonwealth v. Campbell, 415 S.W.2d 614, 616 (Ky. 1967)).

[12] 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

plea, the court must determine that the accused "intelligently and understandingly" entered the plea.[13] Thus, the record must reflect that the accused, upon entering a guilty plea, knowingly, intelligently, and voluntarily waived several protected constitutional rights.[14] "The validity of a guilty plea depends 'upon the particular facts and circumstances . . . including the background, experience, and conduct of the accused.'"[15] The determination that a plea is valid is not made through specific key words spoken at the time the plea was entered, instead the validity is determined after assessing the totality of the circumstances surrounding the entry of the plea.[16]

In the instant case, the trial court engaged in sufficient dialogue with Ludwick to ensure that he understood the constitutional rights he was waiving. Prior to his pleading guilty on May 7, 2002, Ludwick stated, during a lengthy discussion, that he wished to enter a guilty plea in reliance on the Commonwealth's recommendation. The trial court reviewed each of Ludwick's rights, including his right to a jury trial, his right against self-incrimination, his right to cross-examine

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[13] Boykin, 395 U.S. at 242.

[14] Id. at 243.

[15] Kotas v. Commonwealth, 565 S.W.2d 445, 447 (Ky. 1978)(quoting Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938)).

[16] Id. at 447(citing Brady v. United States, 397 U.S. 742, 749, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970)).

adverse witnesses, his right to present testimony on his behalf, and his right to appeal his conviction. Ludwick voluntarily waived each of these rights. Clearly, the trial court satisfied the requirements in Boykin, and prior to accepting Ludwick's guilty plea properly determined that he had intelligently and voluntarily waived his rights.

Accordingly, since Ludwick has failed to raise a genuine issue as to a material fact which cannot be determined on the face of the record, he was not entitled to an evidentiary hearing. Therefore, the trial court did not in err in denying Ludwick's RCr 11.42 motion without holding an evidentiary hearing.

For the foregoing reasons, the order of the Taylor Circuit Court is affirmed.

ALL CONCUR.

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