

RENDERED: April 15, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001655-MR
AND
NO. 2004-CA-000088-MR

DIYUN D. BYARS

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE THOMAS B. WINE, JUDGE
ACTION NOS. 99-CR-000600, 99-CR-001441,
00-CR-000342, 00-CR-000586, AND 01-CR-000078

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AND ORDER
AFFIRMING
AND DENYING MOTION TO DISMISS

** **

BEFORE: GUIDUGLI AND MINTON, JUDGES; EMBERTON, SENIOR JUDGE.¹

GUIDUGLI, JUDGE: Diyun D. Byars appeals, pro se, from the Jefferson Circuit Court's opinions and orders denying his RCr 11.42 motion and his CR 59.05 motion. This Court has consolidated the appeals. Having thoroughly reviewed the record, applicable rules, statutes and case law, we affirm.

¹ Senior Judge Thomas D. Emberton, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 100(5)(b) of the Kentucky Constitution and KRS 21.580.

Following several separate incidences, Byars was indicted by the Jefferson County Grand Jury on the following charges: 1) indictment 99-CR-0600, assault, first degree (KRS 508.010); 2) indictment 99-CR-1441, robbery, first degree (KRS 515.020); 3) indictment 00-CR-342, wanton endangerment, first degree (KRS 508.060), trafficking in marijuana, less than eight ounces (KRS 218A.1421), and persistent felony offender, second degree (KRS 532.080); 4) indictment 00-CR-586, robbery, first degree (KRS 515.020); and 5) indictment 01-CR-78, illegal possession of a controlled substance (marijuana) while in possession of a firearm (KRS 218A.1422, KRS 218A.992). Two separate attorneys represented Byars. Honorable Dan Taylor represented Byars on indictments 99-CR-0600 and 99-CR-1441 and Honorable Eric Bachman represented him on the remaining indictments. Byars appeared in court on numerous occasions relative to the indictments, including a jury trial on indictments 99-CR-0600 (assault, first degree) and 99-CR-1441 (robbery, first degree) that resulted in a mistrial. Subsequently, a plea agreement was negotiated and Byars entered a guilty plea that resolved all the indictments on January 19, 2001. The court accepted Byars's plea to the following charges as set forth in the judgment:

IT IS HEREBY ORDERED AND ADJUDGED by the Court that Defendant is guilty of the following offenses and sentenced as follows:

fifteen years for Assault in the First Degree under Indictment No. 99CR0600; fifteen years for Robbery in the First Degree under Indictment No. 99CR1441; five years for Robbery in the Second Degree under Indictment No. 00CR0586; three years for Wanton Endangerment in the First Degree Under Indictment No. 00CR0342; and three years for Illegal Possession of a Controlled Substance (Marijuana) While in Possession of a Firearm under Indictment No. 01CR0078. The fifteen year sentences under 99CR0600 and 99CR1441 shall run concurrently with each other for fifteen years. The three year sentence under 00CR0342 and the three year sentence under 01CR0078 shall run concurrently with each other for three years, but consecutively with the fifteen year sentences (above), and consecutively with the five year sentence under 00CR0586, and for a total of TWENTY-THREE (23) YEARS. (Emphasis in original).

On November 16, 2001, Byars filed a pro se RCr 11.42 motion in all five cases, alleging ineffective assistance of counsel. At Byars's request, the court appointed counsel and permitted supplemental briefing on the issues. On April 5, 2002, appointed counsel filed a supplemental memorandum raising the following three issues: (1) Byars's guilty plea was not entered into knowingly and voluntarily because counsel failed to determine his mental condition at the time of the alleged offenses; (2) counsel failed to investigate the existence of a probable extreme emotional disturbance (EED) defense; and (3) counsel was ineffective in not requesting a competency hearing as required by KRS 504.100(3). Following the Commonwealth's

response and at Byars's request, the court ordered funds to be provided (up to \$4,000) to permit Byars to obtain the services of a clinical psychologist to "assist [Byars's] counsel with the investigation of, preparation for, and possible presentation of issues and evidence regarding issues raised in [Byars's] post-conviction proceedings. . . ." That order was entered May 22, 2002. No additional action was taken in the case and on February 10, 2003, the court entered an opinion and order denying Byars's RCr 11.42 motion.

Byars's counsel timely filed a CR 59.05 motion contending that the order was entered prematurely and without notice to counsel. In response, the court entered a new order giving Byars an additional ninety days to supplement the record. Specifically, the order stated, in relevant part:

On February 10, 2003, after eight months of waiting for [Byars's] counsel to advise of any new information, the Court ruled on the pending motions. Only then did [Byars's] assigned counsel make any effort to determine the status of the evaluation. The February 12, 2003[,] letter from Dr. [Drogin] [the expert hired by Byars] indicates that additional evaluation is necessary. [Byars] shall have an additional ninety (90) days to supplement the record. If not supplemented, the Order of February 10, 2003[,] shall be entered.

[Byars's] motion to vacate the Order of February 10, 2003[,] is **GRANTED**. However, this Court will not allow an open ended time period for counsel [to] supplement [Byars's] original *pro se* motion.

Following the entry of this order, Byars's appointed counsel filed a second supplemental memorandum in support of his RCr 11.42 motion raising three additional issues. Those new issues were: (1) original counsel's failure to investigate a victim's identification of Byars; (2) failure to argue that conviction on both the robbery first and assault first charges violated double jeopardy; and (3) failure of counsel to demand a competency hearing prior to entering a guilty plea. Following the Commonwealth's response and no additional information being provided by Byars as to his mental capacity, the court entered another opinion and order denying Byars's RCr 11.42 motion on July 21, 2003. In that opinion and order, the court stated:

This Court agrees the Commonwealth has failed to address any of the issues raised in the second supplemental brief, citing only cases which stand for the proposition that [Byars] is not entitled to multiple bites at the post Judgment relief apple.

However, those grounds discussed in the second supplemental motion filed by counsel are identical to those filed by [Byars] pro se and in the counsel assisted first supplemental motion. Counsel has supplemented the original motions with a memorandum dated February 17, 2003[,] from Bob Schildknecht which gives a brief description of the medications "referred to in the case of Diyun Byars". Schildknecht's identity and qualifications are unknown to the Court. There is no record in the file of the evaluation Dr. Drogin was hired to conduct, nor reference as to when these medications were prescribed, in what dosage,

for how long, nor their effect on the ability of [Byars] to comprehend events surrounding the allegation contained in these indictments. Drogin suggested in his letter of February 12, 2003, that [Byars] be referred to the Kentucky Correctional Psychiatric Center (KCPC) for further evaluation. Either that was done and the results did not support [Byars's] contentions or because of the treatment at the Green River Correctional Complex (also referred to in Drogin's February 13, 2003[,] letter) it was determined an additional evaluation was not necessary.

Regardless, there is nothing of substance, and only speculation in the pleadings filed in [Byars's] pro se and counsel assisted pleadings that he was not competent to stand trial or to enter a plea of guilty.

[Byars] and his counsel ignore the fact that this Court had ample opportunity to observe [Byars] on numerous occasions during pretrial hearings. Further, a jury was selected on August 15, 2000[,] for the purpose of trying the charges of Robbery I and Assault I under 99CR0600 and 99CR1441. Jury selection and the trial testimony lasted more than thirteen hours before a mistrial was declared. At no time did [Byars's] behavior suggest there were any physical or mental problems. Subsequently the co-defendant pled guilty [on] August 18, 2000.

On [January] 19, 2001, [Byars] pled guilty to Robbery I and Assault I pursuant to Alford vs. North Carolina. Thus, [Byars] knew most if not all the facts against him. While he disputed those facts, just as he does now, he pled guilty to avoid more serious consequences - forty (40) years under these indictments; five years under 00CR342 charging him with Wanton Endangerment I, twenty years under 00CR586;

charging him with Robber[y] I (later amended to Robbery II); and five years for Illegal Possession of a Controlled Substance while in Possession of a Fire Arm. [Byars] denied suffering from any mental or physical problems or taking any medication which would affect his ability to understand the proceedings.

He was competently represented by two different counsel, the Honorable Dan Taylor (99CR1441 and 99CR0600) and the Honorable Eric Bachman (00CR586, 00CR342 and 01CR0078). [Byars] faced as much as seventy (70) years in the penitentiary for two counts of Robbery I, Assault I, Wanton Endangerment I and Illegal Possession of a Controlled Substance while in Possession of a Firearm. The minimum sentence was twenty-two years (00CR342, 00CR586 and 01CR0078 were all committed while [Byars] was awaiting trial for the offenses under 99CR0600 and 99CR1441, so pursuant to KRS 532.060 they had to run consecutive). Thus [Byars] received one year more than the minimum.

The supplemental proceedings raise no new issues not previously addressed by this Court on February 7, 2003. Therefore, the Court again adopts the Findings and Conclusions of Law and **DENIES** [Byars's] motion for Post Judgment relief pursuant to RCr 11.42. The Court believes Byars knowingly, voluntarily and intelligently entered into pleas of guilty on January 19, 2001. (Emphasis in original).

Byars appealed that order, which is the basis for appeal number 2003-CA-001655-MR.

Thereafter, on October 27, 2003, Byars, acting pro se, filed a motion entitled motion for clarification of final judgment and sentence. In this motion, Byars contends that the

court should "clarify" his sentence and instruct the Kentucky Department of Corrections that he is not a violent offender under KRS 439.3401 in that his plea did not specifically designate him as a violent offender. On October 29, 2003, the circuit court denied his motion reasoning that it had no jurisdiction over the issue as more than ten (10) days had passed since the entry of the final judgment (January 19, 2001). Byars elected not to appeal that order, but instead filed a motion to alter, amend or vacate judgment pursuant to CR 59.05. On November 19, 2003, the circuit court entered an order denying Byars's CR 59.05 motion. Byars filed a timely notice of appeal designating the November 19, 2003, order denying his CR 59.05 motion as the order being appealed. This second appeal is case number 2004-CA-000088-MR. This Court consolidated both appeals and the Commonwealth's motion to dismiss appeal number 2004-CA-000088-MR was passed to the merits panel for determination.

We shall address the second appeal (No. 2004-CA-000088-MR) first. In this appeal, the Commonwealth moves to dismiss arguing that an order denying a motion pursuant to CR 59.05 is not a final and appealable order. In response to this motion, Byars argues that he is acting "pro se without the benefit of counsel" and "is a layman at law with no legal training whatsoever" and should be "held to a less stringent standard of review." While we agree with the Commonwealth that

a CR 59.05 motion is not final and appealable, it is clear that Byars intended to appeal the denial of his motion to clarify. As such, we deny the Commonwealth's motion to dismiss.

Addressing the issue raised by Byars, we believe the recent case of Jackson v. Taylor² to be factually similar and the opinion dispositive of the issues raised herein by Byars. In Jackson, this Court held:

Jackson's primary claim of error on appeal is that he could not have been considered a "violent offender" under KRS 439.3401. Specifically, Jackson notes that his final judgment and sentence does not expressly state that he was convicted of a Class B felony involving the death or serious physical injury of the victim. Hence, according to Jackson, since KRS 439.3401(1) states that "[t]he [trial] court shall designate in its judgment if the victim suffered death or serious physical injury," he could not have been considered a "violent offender" under the statute. We disagree.

Pursuant to KRS 439.3401(1), a person is considered a "violent offender" if, *inter alia*, that person has been convicted of or has pleaded guilty to the commission of a "Class B felony involving the death of the victim or serious physical injury to a victim[.]" As we mentioned above, Jackson pled guilty to three counts of assault in the first degree, which is a Class B felony. Under KRS 508.010, a person is guilty of assault in the first degree when:

(a) He intentionally causes *serious physical injury* to another person by means of a deadly weapon

² 153 S.W.3d 842 (Ky.App. 2004).

or a dangerous instrument
[emphasis added]; or

(b) Under circumstances
manifesting extreme indifference
to the value of human life he
wantonly engages in conduct which
creates a grave risk of death to
another and thereby causes *serious
physical injury* to another person
[emphasis added].

Therefore, under KRS 508.010, a
conviction for assault in the first degree
necessarily means that the victim suffered
"serious physical injury." Hence, when
Jackson pled guilty to three counts of
assault in the first degree, he effectively
admitted that the victims of those offenses
suffered serious physical injuries. []
Jackson is correct that KRS 439.3401(1)
requires trial courts to designate in its
(sic) judgment whether the victim of a Class
B felony "suffered death or serious physical
injury." However, since a conviction for
assault in the first degree necessarily
means that the victim suffered "serious
physical injury," a conviction for assault
in the first degree appearing on a
defendant's final judgment satisfies the
statute's designation requirement.
Accordingly, Jackson was properly considered
a "violent offender" under KRS 439.3401.

In addition to claiming that he could
not have been considered a "violent
offender" under KRS 439.3401, Jackson has
argued in his brief that his final judgment
and sentence may not now be amended to
specifically state that he was convicted of
a Class B felony involving the death or
serious physical injury of the victim. In
support of this argument, Jackson relies
upon the law of the case doctrine and
separation of power principles. However, as
we stated previously, even though Jackson's
final judgment did not expressly state that

he had been convicted of a Class B felony involving the death or serious injury of the victim, Jackson was still properly considered a "violent offender" under KRS 439.3401. Accordingly, since there is no need to amend Jackson's final judgment and sentence, we will not discuss these issues on appeal.^[3]

The Jackson case is the controlling law to be applied to this case. And based upon Jackson, we affirm the trial court's denial of Byars' motion to clarify his sentence.

Byars also appealed the denial of his RCr 11.42 motion (Appeal No. 2003-CA-001655). In that appeal, Byars raises numerous issues in his pro se appellate brief. We agree with the Commonwealth that it appears Byars has raised the following seven (7) areas of alleged error: (1) counsel was ineffective because of a merger of offenses (double jeopardy as to assault first and robbery first); (2) counsel failed to interview a potential witness; (3) counsel coerced Byars into pleading guilty; (4) counsel failed to explore Byars's alleged mental deficiencies; (5) counsel failed to explain the possibility of an extreme emotional disturbance (EED) defense; (6) counsel failed to request a competency hearing; and (7) counsel failed to challenge a witness's out-of-court identification (photo lineup).

³ Id. at 843-44. (Footnote omitted.)

Recently the Kentucky Supreme Court again addressed the standard of review to be applied in RCr 11.42 motions. In Hodge v. Commonwealth,⁴ our Supreme Court stated:

It is again necessary to set out the standard of review for claims raised in a collateral attack pursuant to RCr 11.42, alleging ineffective assistance of counsel at the trial. Such a motion is limited to the issues that were not and could not be raised on direct appeal. An issue raised and rejected on direct appeal may not be reconsidered in these proceedings by simply claiming that it amounts to ineffective assistance of counsel. Haight v. Commonwealth, Ky., 41 S.W.3d 436 (2001), citing Sanborn v. Commonwealth, Ky., 975 S.W.2d 905 (1998).

The standards which measure ineffective assistance of counsel have been set out in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985). In order to be ineffective, the performance of defense counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result. Strickland, supra. It must be demonstrated that, absent the errors by trial counsel, there is a reasonable probability that the jury would have reached a different result. See Norton v. Commonwealth, Ky., 63 S.W.3d 175 (2001). The purpose of RCr 11.42 is to provide a forum for known grievances, not to provide an opportunity to research for grievances. Gilliam v. Commonwealth, Ky., 652 S.W.2d 856 (1983); Haight, supra.

The RCr 11.42 motion must set forth all facts necessary to establish the existence of a constitutional violation. The court

⁴ 116 S.W.3d 463 (Ky. 2003).

will not presume that facts omitted from the motion establish the existence of such a violation. Cf. Skaggs v. Commonwealth, Ky., 803 S.W.2d 573 (1990).

. . .

Conclusionary allegations which are not supported with specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of discovery. Stanford v. Commonwealth, Ky., 854 S.W.2d 742 (1993). Our review of the record indicates that it conclusively disposes of the allegations.

. . .

The burden is on the movant to establish convincingly that he has been deprived of some substantial right which would justify the extraordinary relief afforded by post-conviction proceedings. Dorton v. Commonwealth, Ky., 433 S.W.2d 117 (1968); See also Haight.

. . .

As noted in Strickland, no particular set of detailed rules for counsel's conduct can satisfactorily take into account the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.

. . .

Judicial review of the performance of defense counsel must be very deferential to counsel and to the circumstances under which they are required to operate. There is always a strong presumption that the conduct

of counsel falls within the wide range of reasonable professional assistance because hindsight is always perfect. Cf. Bell v. Cone, 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002).

Technical errors which do not deprive a defendant of a substantive or procedural right to which the law entitles the defendant or a fair trial are not sufficient to establish prejudice under Strickland. Cf. Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 12 L.Ed.2d 180 (1993); Baze v. Commonwealth, Ky., 23 S.W.3d 619 (2000); Norton, supra.⁵]

With this standard of review in mind, we believe it unnecessary to address each of Byars's allegations individually. A review of the record, and specifically of the video tape of the plea on January 19, 2001, refutes Byars's contentions of ineffective assistance of counsel. Byars was represented by two seasoned defense counsel, who each pursued his defense professionally and aggressively. Attorney Taylor was prepared for and had begun a jury trial on the two more serious charges when a mistrial was declared. The plea was entered months after the indictments were issued and only after numerous court appearances, several motion hearings, a mistrial, entry of guilty pleas by co-defendants, review of the evidence, and in consultation with Byars. As the trial court stated in its July 21, 2003 order, there "is nothing of substance, and only speculation in the pleadings filed in [Byars's] pro se and

⁵ Id. at 467-69.

counsel assisted pleadings that he was not competent to stand trial or to enter a guilty plea.” The trial court and both attorneys had ample opportunity to observe Byars and there was no basis to believe a competency hearing under KRS 504.100 was indicated. Our review of Byars’s entry of the plea confirms the trial court’s finding that “[a]t no time did [Byars’s] behavior suggest there were any physical or mental problems.”

Byars received the benefit of a well negotiated plea that reduced a potential 70 year sentence to one year above the minimum he could have received if he went to trial on all the charges. This is because some of the sentences had to run consecutively since they occurred while he was awaiting trial.⁶ On the day of the plea, the trial court thoroughly and meticulously explained to Byars his constitutional rights, the various charges against him, and the effects of his plea. Byars freely acknowledged that he had discussed the plea with his attorneys, that he was pleased with their representation, that he was in fact guilty of the charges, and that he was voluntarily entering his plea. Byars has failed to overcome the strong presumption that counsel failed to render reasonably professional assistance and that he would not have entered his plea otherwise. Thus, the guilty plea was valid, and a valid

⁶ KRS 532.060.

guilty plea waives all defenses, except that the indictment does not charge a public offense.⁷

For the foregoing reasons, we affirm the orders of the Jefferson Circuit Court, which form the basis of these two appeals, and deny the Commonwealth's motion to dismiss in Appeal No. 2004-CA-000088-MR.

ALL CONCUR.

ENTERED: April 15, 2005

\s\ Daniel T. Guidugli
JUDGE, COURT OF APPEALS

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⁷ Bush v. Commonwealth, 702 S.W.2d 46 (Ky. 1986); Sanders v. Commonwealth, 663 S.W.2d 216 (Ky.App. 1984).