

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002506-MR

RICKEY DALE RAILEY

APPELLANT

v. APPEAL FROM MARION CIRCUIT COURT
HONORABLE ALLAN RAY BERTRAM, JUDGE
ACTION NOS. 02-CR-00052 & 02-CR-00061

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, McANULTY, AND MINTON, JUDGES.

BARBER, JUDGE: Appellant, Ricky Dale Railey (Railey), appeals from the denial of his post-conviction RCr 11.42 request for relief from plea of guilty and sentence thereon. We affirm the trial court's denial of the request for post-conviction relief.

Railey and his girlfriend engaged in an altercation. Railey went out to target shoot afterwards. Railey claims that his pistol accidentally discharged while he was returning it to the closet after target practice. The shot struck and injured

his girlfriend. During questioning by the police, the girlfriend contended that Railey had assaulted her twice in the past. The girlfriend described an incident where Railey beat her severely with a belt, and a second incident in which he held a knife to her throat and cut her. The knife wound left scarring on the victim's neck. Railey claims that the prior incidents were merely "lover's play." Railey was charged with assault, first degree, for the shooting, and two counts of assault, second degree, for the prior actions. Railey contends that his counsel coerced him into pleading guilty to the charges against him. Following entry of a guilty plea, Railey filed a motion for post-conviction relief pursuant to RCr 11.42. The court denied the motion to vacate the judgment and sentence.

Railey argues that the trial court erred in denying him an evidentiary hearing on his claim of ineffective assistance of counsel. Railey contends that one of his co-counsel urged him to plead guilty, while the other wanted to take the case to trial. As the trial court noted in its order overruling the motion for post-conviction relief, the differing opinions of co-counsel educated Railey as to the options available to him prior to entry of the guilty plea.

Railey claims that the trial court erred in determining that he had not been denied effective assistance of counsel prior to entering his guilty plea. Railey asserts that

counsel failed to adequately investigate the charges against him, or to prepare an appropriate trial strategy. The trial court held that the record showed involvement and preparation by defense counsel, including a review of the Commonwealth's complete disclosure of evidence, and a bond hearing involving extensive testimony by the complaining witness.

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) provides the test for evaluating a claim of ineffective assistance of counsel. First, the defendant must show that counsel's performance was deficient, and that the errors resulting were so serious that it was as though defendant had no attorney. Next, the defendant must show that he was deprived of a fair trial as a result of counsel's errors. 466 U.S. at 688. Kentucky law requires a showing by the defendant that "absent the errors by trial counsel, there is a 'reasonable probability'" that the result would have been different. Norton v. Commonwealth, Ky., 63 S.W.3d 177 (2001). The trial court found that Railey had not made such a showing. A circuit court decision will not be reversed absent a finding that the decision was clearly erroneous. Commonwealth v. Paxton, Ky., 945 S.W.2d 424, 425 (1997). The Marion circuit court's ruling is not clearly erroneous. For this reason, the order denying relief is affirmed. Entry of a guilty plea waives all defenses except the claim that the indictment does not

charge a public offense. Hughes v. Commonwealth, Ky., 875 S.W.2d 99 (1994).

Railey asserts that the trial court erred in finding his guilty plea to have been educated and voluntary. The trial court noted that the court held a careful inquiry as required by Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969) prior to accepting the guilty plea. The statements made by Railey on the record show that his plea was voluntary, and made knowingly and intelligently. Railey informed the court of his mental state prior to entering the plea. He stated that he was not under the influence of any stimulants. Railey affirmed that he had ample opportunity to discuss the evidence and options available to him with counsel, and that nothing further remained to be discussed with counsel. Railey also stated that he believed his attorneys were fully informed regarding the case. The court reviewed Railey's constitutional rights with him and informed him of the possible penalties he was facing, and the sentence he was agreeing to if he entered the plea.

Where, as here, the record supports the finding that a plea was freely, knowingly and intelligently made, the conviction will not be reversed. Bronk v. Commonwealth, Ky., 58 S.W.3d 482 (2001). Further, as the Commonwealth notes, Railey signed a "Waiver of Further Proceedings with Petition to Enter

Plea of Guilty," and counsel signed a "Certificate of Counsel" showing that Railey had been notified of his rights prior to entry of the plea. The Kentucky Supreme Court has held that the signing of such documents is sufficient to prove that a plea is freely and intelligently entered into. Commonwealth v. Crawford, Ky., 789 S.W.2d 779, 780 (1990).

Railey claims that the court erroneously denied his request to proceed in forma pauperis. The record shows that the court permitted Railey to proceed in forma pauperis with regard to payment of fees and costs. Railey was required to pay no filing fee in circuit court, and was allowed to pay a reduced filing fee of \$50 on appeal. Railey contends that he was entitled to appeal as of right, and should not have to pay a filing fee for the appeal. The law permits imposition of fees in accordance with a defendant's ability to pay. Donovan v. Commonwealth, Ky. App., 60 S.W.3d 581, 584 (2001). We find no reversible error in the circuit court's determination. Railey also contends that he was improperly denied appointed counsel to handle his motion. The court denied Railey's request that counsel be appointed to prepare his motion and argument. Kentucky law does not require appointment of counsel where an evidentiary hearing will not be necessary. Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 453, citing Hemphill v. Commonwealth, Ky., 448 S.W.2d 60, 63 (1969). As the issues

before the court were all evident from the record, no need for counsel was shown. The circuit court's decision is affirmed.

Railey argues that there was a relationship between the trial court and the prosecution such that the judge should have recused himself. The record shows that the judge is the nephew of the Commonwealth's Attorney. This relationship was previously known to defense counsel, and was made known to all parties before trial. Railey was notified of the relationship, and waived the disqualification of the judge. The appellant must show bias on the part of the court such that the judge could not be impartial in the case. Brand v. Commonwealth, Ky. App., 939 S.W.2d 358, 359 (1997). No evidence of bias is presented by Railey, other than the contention that he was denied bail. The trial court is vested with the discretion to determine whether bail is appropriate. Abraham v. Commonwealth, Ky. App., 565 S.W.2d 152, 158 (1977). Railey has made no showing that the trial court abused its discretion. The claim that Railey's constitutional rights were prejudiced is unsupported by the record before this Court. We affirm the trial court's ruling.

Railey objects to the denial of his request for an evidentiary hearing. The law does not require such a hearing unless a material issue of fact cannot be conclusively proven or disproven from an examination of the record. Fraser v.

Commonwealth, Ky., 59 S.W.2d 448, 452 (2001). After review of the record, the trial court concluded that all issues raised by Railey could be determined based on the record. We agree.

The Order of the Marion Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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