

RENDERED: FEBRUARY 3, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000232-MR

SHANE BRIGHT

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 04-CR-001260
AND
ACTION NO. 03-CR-002248

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER AND DYCHE, JUDGES; MILLER, SENIOR JUDGE.¹

MILLER, SENIOR JUDGE: Shane Bright (Bright), *pro se*, brings this appeal of an order of the Jefferson Circuit Court, entered July 26, 2004, summarily denying his *pro se* motion to vacate his three-year sentence arising out of an unconditional guilty plea to first-degree wanton endangerment, first-degree stalking, first-degree criminal mischief, third-degree terroristic

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

threatening, and fourth-degree assault,² pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. We affirm.

Before Bright's jury trial began, an investigating officer in his case was disciplined and terminated for misconduct unrelated to Bright's case. This resulted in a ruling by the trial court pertaining to any mention of this officer during the trial, in order to keep the evidence away from collateral issues. During opening statements, because of a difference of understanding by the Commonwealth and the defense involving this ruling, both the Commonwealth and defense counsel moved separately for a mistrial. The trial court granted the defendant's motion for a mistrial only after receiving specific acknowledgement from Bright that he agreed with his counsel on the mistrial motion and that he understood that he was subject to retrial.

Within a month of the mistrial, Bright accepted the Commonwealth's offer on a plea of guilty pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). Following an extensive colloquy pursuant to Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), judgment was entered and Bright was sentenced on June 22, 2004.

² Kentucky Revised Statutes 508.060, 508.140, 512.020, 508.080, and 508.030 (Indictment No. 03-CR-002248). Bright was also indicted as a second-degree persistent felony offender. KRS 532.080. (Indictment No. 04-CR-001260). As a result of the plea, this charge was dismissed.

Less than three weeks later Bright asked the court to vacate his sentence pursuant to RCr 11.42(10). Bright asserted that, because of erroneous evidentiary rulings by the trial court, he could not get a fair trial and therefore was forced to plead guilty. Furthermore, he argued that had he been retried after the mistrial, he would have been subject to double jeopardy.

Before us, although not "contesting the validity of the plea agreement," Bright essentially argues that his plea was involuntary due to the trial court's evidentiary rulings.

As stated in Lynch v. Commonwealth, 610 S.W.2d 902, 905 (Ky.App. 1980):

Th(e appellate c)ourt is not to act de novo in determining the question of voluntariness. Rather it is to review the record before it to ascertain whether the court below acted erroneously in denying that appellant's pleas were made involuntarily.

A guilty plea is valid if it represents a voluntary and intelligent choice by a competent and counseled defendant to waive the several trial-related constitutional rights, and the record affirmatively establishes a knowing waiver. Boykin, supra; Centers v. Commonwealth, 799 S.W.2d 51 (Ky.App. 1990). Herein, Bright was before the trial court on another matter in his case when he indicated that he wanted to wrap up the charges by accepting the Commonwealth's plea offer. Because the case

was not on the docket at that time for a plea, the parties returned to court later that same day for entry of the plea. At that time, Bright affirmatively indicated to the trial court that he was pleading guilty voluntarily and giving up his appeal rights, despite his belief that the trial court's evidentiary rulings were erroneous. He also affirmatively acknowledged waiver of his constitutional rights and that he was pleading guilty because he believed that a jury could find him guilty based on the evidence. Accordingly, the trial court's denial of RCr 11.42 relief was not clearly erroneous.

Furthermore, Bright does not argue that his counsel was ineffective, but rather that he pleaded guilty because of erroneous evidentiary rulings by the trial court. These are, of course, direct appeal issues. An RCr 11.42 motion is "limited to issues that were not and could not be raised on direct appeal." Sanborn v. Commonwealth, 975 S.W.2d 905, 908-09 (Ky. 1998).³

It is important to note that in addition to arguing that the trial court improperly denied his RCr 11.42 motion, Bright also argues throughout his brief that he is also appealing this Court's denial of his request for a writ of prohibition. The same day that Bright's RCr 11.42 motion was

³ We are not, however, unaware that Bright's guilty plea precluded an appeal on evidentiary issues. See Porter v. Commonwealth, 841 S.W.2d 166, 167 (Ky. 1992): "the effect of a guilty plea is to waive all defenses except that the indictment charged no offense."

filed in the trial court, he made the same arguments in a writ of prohibition filed in this court. Bright v. Willett and Commonwealth of Kentucky, 2004-CA-001264-OA. A panel of this court denied Bright's request by order entered September 9, 2004. As Bright never appealed that decision, it is not subject to further review. Kentucky Rules of Civil Procedure (CR) 76.36(7).

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

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