

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000245-MR

ISREAL DUNBAR SMITH

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
INDICTMENT NO. 01-CR-00439

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, HENRY, AND KNOPF, JUDGES.

HENRY, JUDGE: Israel Dunbar Smith appeals from a January 12, 2005 order of the Fayette Circuit Court denying his petition for RCr¹ 11.42 relief. Upon review, we affirm.

On April 24, 2001, Smith was indicted by the Fayette County grand jury on multiple counts of first-degree robbery² and second-degree robbery,³ along with one count of being a first-

¹ Kentucky Rules of Criminal Procedure.

² Pursuant to Kentucky Revised Statutes ("KRS") 515.020.

³ Pursuant to KRS 515.030.

degree persistent felony offender.⁴ On April 26, 2001, Smith appeared in court by video and entered a plea of "not guilty" to the charges set forth in the indictment.

On September 21, 2001, upon agreement with the Commonwealth Attorney, Smith filed a "Waiver of Further Proceedings with Petition to Enter Plea of Guilty," pursuant to RCr 8.02 and 8.08, as to a number of the counts in the indictment (including the persistent felony offender count, which had been amended down to a second-degree charge). On September 24, 2001, the trial court entered a "Judgment on Guilty Plea" accepting Smith's plea as being knowing, voluntary, and having an actual basis in fact, and consequently adjudging him guilty of the applicable charges. On October 16, 2001, the trial court entered a "Final Judgment Sentence of Imprisonment" sentencing Smith to a total of 35 years imprisonment, with two counts running consecutively rather than concurrently. The remaining counts of the indictment that were not part of Smith's guilty plea were dismissed.

On October 12, 2004, Smith filed a "Motion for Relief Pursuant to RCr 11.42 and Motion to Set Aside Guilty Plea Pursuant to *Boykin*."⁵ The basis for both motions was ineffective

⁴ Pursuant to KRS 532.080.

⁵ "*Boykin*" is a reference to the United States Supreme Court's decision in *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

assistance of counsel. Specifically, Smith claimed that his trial counsel “[f]ailed to properly investigate his case prior to guilty plea” and “[i]nformed the Movant, by guilty plea form, that the maximum he could receive on all charges was twenty (20) years and whereby the Movant actually received a sentence of thirty-five (35) years without counsel discussing this development with him.” Smith consequently claimed that, because of these deficiencies, he “was deprived of entering a guilty plea that was understanding and voluntary,” and he was therefore seeking to rescind his guilty plea and be allowed a trial by jury.

On January 12, 2005, the circuit court entered an order denying Smith’s motions without a hearing. The court first stated that the colloquy between the trial judge and Smith at the guilty plea proceedings was “text book” proper procedure pursuant to Boykin v. Alabama. The court also noted that Smith made no mention during the colloquy about any confusion on his part as to the Commonwealth’s recommendations or the punishments that could be imposed by the trial court, stating: “Even at the Sentencing Hearing, after hearing the Court’s pronouncement of sentence of thirty-five (35) years, the Movant was silent and nothing else was done in this case for three (3) years until the filing of this Motion.” The court then referenced as “particularly significant” two separate exchanges between Smith

and the trial judge in which Smith was asked if he understood that the court may order his sentences to run consecutively or concurrently with one another and Smith answered that he did. The circuit court concluded that these facts demonstrated that all of Smith's constitutional rights had been satisfied and met.

The court further held that Smith was not entitled to relief simply because the sentencing judge did not officially sign the filed "Waiver of Further Proceedings with Petition to Enter Plea of Guilty," and that Smith's trial counsel "exceeded the objective standard of reasonableness in negotiating a very favorable plea agreement and recommendation from the Commonwealth in light of the numerous and serious Counts of the Indictment." The court also indicated its belief that Smith had been advised on multiple occasions in open court and in writing about the potential punishments that he faced. His arguments rejected, Smith filed this appeal.

We first address Smith's contention that the trial court was in error in denying his petition for RCr 11.42 relief without conducting an evidentiary hearing. In Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001), our Supreme Court summarized the procedure for circuit courts to follow in determining whether to conduct an evidentiary hearing under RCr 11.42. "After the answer is filed, the trial judge shall determine whether the allegations in the motion can be resolved

on the face of the record, in which event an evidentiary hearing is not required. A hearing is required if there is a material issue of fact that cannot be conclusively resolved, i.e., conclusively proved or disproved, by an examination of the record." Id. at 452. After reviewing the briefs and the record, we believe that the trial court did not err in finding that the allegations in question could be resolved without the need of an evidentiary hearing, and we therefore focus our attention on Smith's other arguments.

Smith's primary contention is that he did not knowingly and voluntarily enter into his guilty plea due to the ineffective assistance of his counsel. Specifically, he argues that he believed that he could receive a maximum prison sentence of only 20 years, and that his trial counsel was ineffective in failing to advise him that - even in pleading guilty - he could receive a sentence of 45 years, 70 years, or even life.

In determining whether counsel rendered ineffective assistance in connection with a defendant's guilty plea, this court has stated:

A showing that counsel's assistance was ineffective in enabling a defendant to intelligently weigh his legal alternatives in deciding to plead guilty has two components: (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected

the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial.

Sparks v. Commonwealth, 721 S.W.2d 726, 727-28 (Ky.App. 1986); see also Russell v. Commonwealth, 992 S.W.2d 871, 874 (Ky.App. 1999). "The trial court's inquiry into allegations of ineffective assistance of counsel requires the court to determine whether counsel's performance was below professional standards and 'caused the defendant to lose what he otherwise would probably have won.'" Bronk v. Commonwealth, 58 S.W.3d 482, 487 (Ky. 2001), quoting Foley v. Commonwealth, 17 S.W.3d 878, 884 (Ky. 2000). It also requires an evaluation of "whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory." Id., quoting Foley, supra.

The general question involved in analyzing the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 164, 27 L.Ed.2d 162 (1970). The voluntariness of a guilty plea can only be determined by examining the "totality of the circumstances surrounding the guilty plea." Bronk at 486; see also Rodriguez v. Commonwealth, 87 S.W.3d 8, 10-11 (Ky. 2002). "These circumstances include the accused's demeanor, background and

experience, and whether the record reveals that the plea was voluntarily made." D.R. v. Commonwealth, 64 S.W.3d 292, 294 (Ky.App. 2001). We also note that declarations in open court carry a strong presumption of verity. Centers v. Commonwealth, 799 S.W.2d 51, 54 (Ky.App. 1990).

The voluntariness of a guilty plea also depends on whether the advice given to a defendant was within the range of competence required of attorneys in criminal cases. Hill, 474 U.S. at 55. Our Supreme Court has mandated that "[j]udicial 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." Hodge v. Commonwealth, 116 S.W.3d 463, 469 (Ky. 2003). Moreover, simply advising a client to plead guilty, in and of itself, does not constitute evidence of ineffective assistance of counsel. Rigdon v. Commonwealth, 144 S.W.3d 283, 288 (Ky.App. 2004).

From our review of the record, Smith's guilty plea appears to be knowing, intelligent, and voluntary. As noted by the Commonwealth, Smith signed a "Waiver of Further Proceedings with Petition to Enter Plea of Guilty" acknowledging that he understood his Constitutional rights and that he intended to

waive them. Smith also acknowledged that he and his attorney fully discussed his case, and that he understood "the charges and any possible defenses to them." He also indicated that his guilty plea was being entered into freely, knowingly, intelligently, and voluntarily, and his attorney verified his belief that this was, in fact, the case. Furthermore, as acknowledged by the circuit court below, Smith also engaged in a lengthy and detailed plea colloquy with the trial judge in which he took full responsibility for his actions and reiterated that his guilty plea was a knowing and voluntary act on his part. Moreover, the trial judge advised Smith on multiple occasions that she did not have to follow any sentencing recommendations made by the Commonwealth, and that she was bound by no deals that the Commonwealth might offer. Smith answered these statements in a manner indicating full understanding.

Smith argues, however, that his guilty plea should not be considered voluntary because his trial counsel failed to advise him that he could be imprisoned for a term of more than 20 years and because the guilty plea petition indicates that he could only receive a maximum of 20 years imprisonment. We find these arguments to be unavailing.

Paragraph 9 of Smith's guilty plea petition reads as follows:

My attorney has advised me as to the maximum punishment which the law provides for the offense charged in the indictment as follows: A maximum of 20 years imprisonment and a fine of \$ ___ for the offense of Rob 1 20 yrs - 2 cts Rob 2 - 10 yrs & 15 yrs PFO 2d of the indictment and that the Court may order the sentence on each count to run either concurrently or consecutively with each other

While this paragraph is certainly not crystal clear, it does set forth the multiple counts to which Smith was pleading guilty, their possible penalties (which came to a combined 45 years), and the fact that the court may order the sentence on each count to run consecutively. Furthermore, Paragraph 17 of the petition again sets forth that Smith is pleading guilty to "Rob 1 - 20 yrs - 2 cts Rob 2 10 yrs & 15 yrs PFO 2d." Consequently, we seriously question Smith's argument that the petition led him to believe that he could only receive 20 years imprisonment, as it sets forth on multiple occasions the additional penalties with which he was faced on each count.

Moreover, as the circuit court recognized, Smith was twice told by the trial judge that his sentences could run concurrently or consecutively and that she was not obligated to follow any sentencing recommendation of the Commonwealth; as noted above, the guilty plea petition also stated these same facts. In addition, when Smith was finally sentenced to a total of 35 years imprisonment, the record indicates that he failed to voice any protests or questions about the length of his

sentence. Instead, he said nothing whatsoever other than thanking the judge. As the circuit court noted, Smith was a "person of experience" in the criminal system who had entered guilty pleas before. Moreover, we agree with the court's characterization of Smith as "a person of obvious intelligence as a high school graduate who had attended at least one year of college" after reviewing his plea colloquy with the trial judge. Indeed, on a previous occasion in court, Smith was quick to speak up and voice his concerns when someone mistakenly indicated that he was pleading guilty to being a first-degree persistent felony offender instead of a second-degree offender. Consequently, we think it telling that he failed to say anything about his sentence at the time it was read. In sum, we believe that these facts refute Smith's contention that he was relying on a 20-year maximum sentence in pleading guilty.

Perhaps more importantly, our Supreme Court has long held that a knowing, intelligent, and voluntary guilty plea does not require that a defendant be informed of every possible consequence and aspect of the plea. See Jewell v. Commonwealth, 725 S.W.2d 593, 594 (Ky. 1987). Of particular relevance here, there is no requirement that a defendant be informed of the entire range of sentences that may be imposed in order for his or her guilty plea to be valid. Id. Consequently, even assuming that Smith's counsel did fail to inform him that he

could be sentenced to more than 20 years imprisonment, such a failure does not give rise to a conclusion that Smith's guilty plea was automatically involuntary. Indeed, we believe that the record before us strongly indicates otherwise. Accordingly, having concluded that Smith's guilty plea was voluntarily made, we must reject his ineffective assistance of counsel claim, as a valid guilty plea waives all defenses other than that the indictment charges no offense. Centers, 799 S.W.2d at 55.

We finally turn to Smith's contention that the circuit court erred in finding that the trial judge had accepted his guilty plea when she did not actually sign the "Waiver of Further Proceedings with Petition to Enter Plea of Guilty." Smith cites to RCr 9.26(1), which reads: "Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the Commonwealth". He contends that a guilty plea form must be signed by a trial judge in order for it to be "accepted" in accordance with the rule. Smith also argues that, had the trial judge reviewed the form, she would not have approved his plea because of the purported statement within indicating that he could only receive a maximum sentence of 20 years.

After reviewing the record, we believe that these arguments lack merit. First, there is nothing within the record

to suggest that the trial judge failed to review Smith's guilty plea petition. Moreover, as noted above, we believe that the guilty plea petition sets forth that Smith was potentially subject to more than 20 years imprisonment on the charges for which he was pleading guilty. Furthermore, as noted above, the form sets forth that the trial court may order sentences to run consecutively or concurrently. Accordingly, we do not believe that there is anything within the guilty plea petition that would have given the trial judge pause and made her reject Smith's guilty plea.

We also do not agree with Smith that RCr 9.26(1) mandates that a trial judge sign a guilty plea petition before a guilty plea can be accepted, as the rule itself contains nothing to this effect. Instead, it only requires that the defendant waive a jury trial in writing and that the trial court approve the waiver - there is nothing suggesting that a trial judge's signature is required for "approval" to take place. Instead, we believe that the trial court clearly expressed its approval of Smith's jury trial waiver by accepting his guilty plea both in open court and in its "Judgment on Guilty Plea" entered on September 24, 2001.

However, even assuming that the trial court erred in failing to sign Smith's guilty plea petition, we do not believe that any such error would rise to the level of a constitutional

deprivation of due process, as is required by RCr 11.42. See Johnson v. Commonwealth, 180 S.W.3d 494, 498 (Ky.App. 2005).

Instead, we would categorize it as a mere technical error that is insufficient to establish prejudice under the standards required by RCr 11.42. See Hodge, 116 S.W.3d at 469.

Therefore, Smith's arguments in this respect are without merit and must be rejected.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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