

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000293-MR

SAMMIE FRYERSON

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE EDWIN M. WHITE, JUDGE
ACTION NO. 03-CR-00655

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: TACKETT, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: Sammie Fryerson appeals from the Christian Circuit Court's judgment which was entered after the court denied his motion to withdraw his guilty plea to first-degree robbery. On appeal, Fryerson argues that the circuit court erred by failing to establish whether there was a factual basis for his guilty plea and by failing to conduct an evidentiary hearing. For the following reasons, we affirm.

On December 22, 2003, Fryerson was indicted on charges of first-degree robbery¹ and of being a first-degree persistent felony offender (PFO).² On May 26, 2004, Fryerson made a motion to enter an *Alford*³ plea in response to the Commonwealth's offer to dismiss the PFO charge. After conducting a plea colloquy pursuant to *Boykin v. Alabama*⁴ and determining that the plea was entered voluntarily, freely, intelligently, and understandingly, the circuit court accepted the plea and set final sentencing for August 11.

Prior to sentencing, Fryerson filed two pro se motions to withdraw his guilty plea, alleging, inter alia, that he had been afforded ineffective assistance of counsel. During the sentencing hearing, Fryerson asserted that he wished to withdraw his guilty plea because the victim had recanted his identification of Fryerson as the robber. The court instructed the Commonwealth to ascertain whether there was any merit to Fryerson's allegation and continued the hearing to a later date.

At the November 24 sentencing hearing, the attorney for the Commonwealth stated that he had contacted the victim, explained Fryerson's plea bargain, and informed the victim that

¹ KRS 515.020.

² KRS 532.080.

³ *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

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

he should attend the hearing if he wanted to deviate from his original testimony. When the victim did not attend the hearing, the circuit court sentenced Fryerson to serve ten years in prison. This appeal followed.

Fryerson asserts that the circuit court erred by failing to establish whether there was a factual basis for his guilty plea. Although Fryerson concedes that this issue is not preserved, he urges us to review it pursuant to RCr 10.26.

The United States Supreme Court has stated that the factual basis for a guilty plea may be developed in federal courts, "for example, by having the accused describe the conduct that gave rise to the charge."⁵ However, such language clearly does not rule out the use of other methods of developing the factual basis for a plea. Here, Fryerson responded affirmatively during his plea colloquy when asked whether he believed the following:

[T]hat the Commonwealth has sufficient evidence to convict you of the charge robbery, first degree, alleging on October 2, 2002, you used physical force upon John Jacob Spears in the course of committing a theft from him while armed with a deadly weapon?

Further, his counsel advised the court that Fryerson had been a legal aide while in prison, and that he understood the

⁵ *Santobello v. New York*, 404 U.S. 257, 261, 92 S.Ct. 495, 498, 30 L.Ed.2d 427 (1971).

proceedings. It is clear from a review of the plea colloquy and the surrounding circumstances that there was an adequate factual basis for Fryerson's plea and that no manifest injustice⁶ occurred.

Next, Fryerson argues that the circuit court erred by failing to conduct an evidentiary hearing regarding his claim of ineffective assistance of counsel. We disagree.

Fryerson's pro se motions to withdraw his *Alford* plea were based, in part, on his claim of ineffective assistance of counsel. As "[a]n *Alford* plea is a 'plea of guilty,' regardless of any denial of underlying facts,"⁷ the issue of whether Fryerson could withdraw his plea is governed by RCr 8.10, which states in relevant part that "[a]t any time before judgment the court may permit the plea of guilty . . . to be withdrawn and a plea of not guilty substituted." Although a court has the discretion to grant or deny a defendant's motion to withdraw a voluntary guilty plea, it must grant a defendant's motion to withdraw an involuntary guilty plea.⁸ Moreover, a

criminal defendant may demonstrate that his guilty plea was involuntary by showing that it was the result of ineffective assistance of counsel. In such an instance, the trial court is to "consider the totality of the

⁶ RCr 10.26.

⁷ *Pettitway v. Commonwealth*, 860 S.W.2d 766, 767 (Ky. 1993).

⁸ *Rigdon v. Commonwealth*, 144 S.W.3d 283, 288 (Ky.App. 2004).

circumstances surrounding the guilty plea and juxtapose the presumption of voluntariness inherent in a proper plea colloquy with a Strickland v. Washington[, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)] inquiry into the performance of counsel." To support a defendant's assertion that he was unable to intelligently weigh his legal alternatives in deciding to plead guilty because of ineffective assistance of counsel, he must demonstrate the following:

(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.⁹

"Generally, an evaluation of the circumstances supporting or refuting claims of coercion and ineffective assistance of counsel requires an inquiry into what transpired between attorney and client that led to the entry of the plea, *i.e.*, an evidentiary hearing."¹⁰ Here, Fryerson's pro se motion to withdraw his guilty plea alleged "grounds of insufficient representation, inadequate disclosure of relevant evidence on the part of the Commonwealth [sic] Attorneys [sic] office, and failure of Court appointed [sic] attorney to full [sic]

⁹ *Id.* at 288 (internal citations omitted).

¹⁰ *Rodriguez v. Commonwealth*, 87 S.W.3d 8, 11 (Ky. 2002).

interpret the requirements and obligation of a plea of Alford v. North Carolina [sic][.]” However, we believe that the same rationale should apply here as in RCr 11.42 motions alleging ineffective assistance of counsel, i.e., that defendants are not entitled to evidentiary hearings when their claims are based on “[c]onclusionary allegations which are not supported with specific facts[.]”¹¹ We conclude, therefore, that the circuit court did not err by failing to hold an evidentiary hearing regarding Fryerson’s conclusory allegations.

Next, Fryerson argues that the circuit court abused its discretion by failing to conduct an evidentiary hearing with regard to the witness identification issue. We disagree.

Although the circuit court did not hold a separate hearing specifically to address Fryerson’s allegation that the victim had recanted his identification of him, the circuit court twice continued Fryerson’s sentencing after he raised the issue. When the hearing was finally conducted on November 24, the identification issue was discussed but the victim was not present and Fryerson produced no evidence to support his bare allegation that the victim had recanted his earlier identification of him. As the three-month continuation provided Fryerson with ample opportunity to obtain and produce evidence, we are not persuaded that the circuit court abused its

¹¹ *Hodge v. Commonwealth*, 116 S.W.3d 463, 468 (Ky. 2003).

discretion by failing to conduct an evidentiary hearing after Fryerson failed to produce any evidence in support of his conclusory allegations.¹²

Finally, we are not persuaded by Fryerson's assertion that by requesting the Commonwealth to investigate his allegations prior to the hearing, the court somehow delegated its authority to the Commonwealth.

The judgment of the Christian Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lisa Bridges Clare
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Louis F. Mathias, Jr.
Assistant Attorney General
Frankfort, Kentucky

¹² *Id.*