

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000799-MR

JOEL BLACKBURN

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 01-CR-00014

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: TAYLOR AND VANMETER, JUDGES; EMBERTON, SENIOR JUDGE.¹

VANMETER, JUDGE: Joel Blackburn appeals from the Jessamine Circuit Court's order denying his motion seeking RCr 11.42 relief. For the following reasons, we affirm.

According to the Commonwealth's offer on a guilty plea, the matter now before us arose out of the following events:

The Defendant drove Charles Denton and Amber Foster to Burger King and let Denton out of the car for the purpose of committing a

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

robbery at the drive thru window. With the intention of promoting or facilitating the offense, Blackburn counselled [sic] with and aided Denton and provided Denton with a pistol to be used to commit the robbery. Blackburn ordered food and drove to the drive thru window while Denton approached on foot with the pistol. When Tim Peel Jr. came to the window to complete the sale, Denton came to the window and demanded that Peel give him the restaurant's money but Peel refused. Denton shot Peel with the pistol causing his death. Blackburn drove Denton away from the crime scene.

Blackburn was indicted on charges of murder/complicity to murder, first-degree robbery, being a convicted felon in possession of a handgun, and being a second-degree persistent felony offender (PFO). In exchange for Blackburn's guilty plea, the Commonwealth agreed to recommend a life sentence without the possibility of parole for twenty-five years on the murder count, a twenty-year sentence on the first-degree robbery count, a ten-year sentence on the convicted felon in possession of a handgun count, and dismissal of the PFO count. The circuit court thereafter entered Blackburn's guilty plea and on February 5, 2002, entered a judgment sentencing Blackburn as the Commonwealth recommended, with the sentences to run concurrently.

On December 20, 2004, Blackburn filed a motion to vacate, set aside, or correct his sentence pursuant to RCr

11.42. The circuit court denied Blackburn's RCr 11.42 motion on March 29, 2005, after it characterized his arguments as

(a) that the search of his vehicle and the confession that he gave the police should have been suppressed; (b) that certain jury instructions were inappropriate; and (c) that his counsel were ineffective in that they failed to investigate or offer guidance in the case.

This appeal followed.

Blackburn's first argument is that the penalty phase instructions in the matter were erroneous. As Blackburn pled guilty to the charges in the matter now before us, there was neither a penalty phase nor any jury instructions, and this claim is groundless.

Next, Blackburn argues that he was denied the effective assistance of counsel because his counsel did not adequately investigate the charges against him. As this court has explained:

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.²

We will not disturb the circuit court's decision as to the ineffective assistance of counsel unless that decision is clearly erroneous.³

In essence, Blackburn maintains that he was afforded ineffective assistance when counsel failed to conduct a thorough investigation and challenge the search and seizure. This contention is without merit, however, as on July 27, 2001, Blackburn's counsel in fact filed a motion to suppress the bullets and statements obtained as a result of the search and seizure. The record reflects that the circuit court overruled Blackburn's motion at a hearing on October 11.⁴

We also are not persuaded by Blackburn's assertion that his counsel did not adequately interview his codefendants in order to learn both that Denton was the "trigger man," and that Denton, Foster, and Blackburn consumed alcohol and cocaine before going to Burger King. In fact, Blackburn's "Fourth

² *Sparks v. Commonwealth*, 721 S.W.2d 726, 727-28 (Ky.App. 1986). See also *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 80 L.Ed.2d 203 (1985).

³ *Robbins v. Commonwealth*, 719 S.W.2d 742, 744 (Ky.App. 1986), overruled on other grounds by *Norton v. Commonwealth*, 63 S.W.3d 175 (Ky. 2001).

⁴ Further, we decline to review Blackburn's argument insofar as he argues that the trial court erred by failing to suppress evidence of two bullets and his and his codefendants' statements. A guilty plea, "made knowingly and voluntarily, waives all defenses to the original charges other than the defense that the indictment fails to charge an offense." *Corbett v. Commonwealth*, 717 S.W.2d 831, 832 (Ky. 1986).

Inventory of Discovery Materials Received from the Prosecution" indicates that he received audio and video tapes of several interviews, including those with Foster and Denton. Moreover, Blackburn's motion to exclude the death penalty alleged that Denton shot the victim. Further, with regard to Blackburn's allegation that he consumed alcohol and cocaine prior to the shooting, we note that

evidence of intoxication will support a criminal defense only if the evidence is sufficient to support a doubt that the defendant knew what she was doing when the offense was committed. In order to justify an instruction on intoxication, there must be evidence not only that the defendant was drunk, but that she was so drunk that she did not know what she was doing.⁵

Here, Blackburn is not entitled to relief since the evidence did not show, and he did not assert in his RCr 11.42 motion for relief, that he was so intoxicated during the events that he did not know what he was doing.

Blackburn also contends that he was afforded ineffective assistance because his counsel did not have him psychologically evaluated to see if he was competent to stand trial. However, as Blackburn concedes that he did not present this issue to the circuit court in his RCr 11.42 motion, it is "not the subject of appellate review."⁶

⁵ *Springer v. Commonwealth*, 998 S.W.2d 439, 451 (Ky. 1999).

⁶ *Brock v. Commonwealth*, 479 S.W.2d 644, 646 (Ky. 1972).

Further, Blackburn contends that he is entitled to a new trial because his codefendants' statements included inadmissible hearsay evidence. Again, a knowing and voluntary guilty plea "waives all defenses to the original charges other than the defense that the indictment fails to charge an offense."⁷ In any event, this contention is without merit because there was no trial in this matter.

Finally, as Blackburn's arguments could be resolved by an examination of the record, he was not entitled to an evidentiary hearing.⁸

The Jessamine Circuit Court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joel Blackburn, *pro se*
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Clint E. Watson
Assistant Attorney General
Frankfort, Kentucky

⁷ *Corbett*, 717 S.W.2d at 832.

⁸ See *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001).