

RENDERED: MAY 12, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000835-MR

CRAIG ALLEN CAGLE

APPELLANT

v. APPEAL FROM CARLISLE CIRCUIT COURT
HONORABLE WILLIAM LEWIS SHADOAN, JUDGE
ACTION NO. 86-CR-00004

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING

** ** * * *

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

TAYLOR, JUDGE: Craig Allen Cagle appeals from a March 3, 2005, order of the Carlisle Circuit Court denying his Ky. R. Crim. P. (RCr) 11.42 motion. We affirm in part, vacate in part, and remand.

On September 12, 1985, Cagle was indicted by the Fulton County Grand Jury upon two counts of murder, two counts

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 Kentucky Revised Statutes 21.580.

of first-degree burglary, three counts of second-degree assault, kidnapping, and first-degree sexual abuse. The first-degree sexual abuse charge was subsequently dismissed. Appellant entered a guilty plea to the remaining charges on March 20, 1986. Appellant was sentenced to two terms of life imprisonment without parole for twenty-five years on the murder convictions, to twenty years each on two counts of burglary in the first-degree, to ten years each on the three counts of second-degree assault, and to twenty years for the kidnapping. The sentences were ordered to run consecutively for a total of two life sentences plus ninety years.

On September 10, 1997, appellant filed a *pro se* RCr 11.42 motion to vacate the judgment. The Commonwealth filed a timely response. No activity of record occurred over the next seven years. On September 16, 2004, a letter written by a legal assistant at appellant's correctional facility was filed in the record. Therein, the assistant inquired as to the status of appellant's RCr 11.42 motion. On March 3, 2005, the court entered an order denying appellant's RCr 11.42 motion without an evidentiary hearing. This appeal follows.

When reviewing a denial of an RCr 11.42 motion without an evidentiary hearing, we must determine whether movant's allegations are refuted upon the face of the record. Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001). If material issues of

fact exist that could not be conclusively proved or disproved upon the face of the record, the circuit court erred by denying movant's motion RCr 11.42 without an evidentiary hearing. Id.

Appellant contends the circuit court committed reversible error by denying his RCr 11.42 motion to vacate sentence without an evidentiary hearing. Appellant specifically contends that his guilty plea was not knowingly, voluntarily, and intelligently made and he received ineffective assistance of counsel. Both contentions revolve around the existence and import of a psychiatric evaluation prepared by Dr. Thomas M. Cassidy of the Kentucky Correctional Psychiatric Center.

The record on appeal indicates Dr. Cassidy mailed the psychiatric evaluation to the circuit judge. Thereupon, the judge apparently wrote a letter indicating he was filing the report in the record. The letter was filed in the record but the evaluation was not. The evaluation was not entered into the record until appellant filed his RCr 11.42 motion and appended the evaluation as an attachment.

In the evaluation, Dr. Cassidy opined that appellant was not capable of recognizing the consequences of his actions at the time he committed the crimes. The evaluation reads, in relevant part, as follows:

The patient's inability to recognize the severe lack of judgment related to his decisions at the time certainly indicates a

rather severe degree of emotional deterioration and stress. **It also certainly indicates transient series of psychotic symptoms which, at the time of the alleged crimes, made it impossible for the patient to perceive or to recognize the consequences of his actions.** (Emphasis added).

Appellant asserts he would not have entered the guilty plea if he had known of Dr. Cassidy's evaluation. Thus, appellant contends his guilty plea was not knowingly, voluntarily, and intelligently entered. Additionally, appellant claims that his plea was not voluntary because of ineffective assistance of trial counsel.

To constitute a valid guilty plea, the plea must have been a "voluntary and intelligent choice among the alternative course[s] of action open to the defendant." Centers v. Commonwealth, 799 S.W.2d 51, 54 (Ky.App. 1990). A guilty plea may be rendered involuntarily if counsel rendered ineffective assistance and such deficiency so seriously affected the outcome of the plea process that absent such error there is a reasonable probability that defendant would have not pleaded guilty but would have insisted on going to trial. Sparks v. Commonwealth, 721 S.W.2d 726 (Ky.App. 1986). In reviewing a guilty plea, the totality of the circumstances surrounding entry of the plea must be considered. Kotas v. Commonwealth, 565 S.W.2d 445 (Ky. 1978).

In this case, the evaluation certainly raised questions concerning appellant's sanity at the time he committed the crimes. Appellant claims that he would not have entered the guilty plea if he had known of the contents of the evaluation. More importantly, there is nothing in the record to refute appellant's allegation that he was unaware of the psychiatric evaluation when he entered the guilty plea. If trial counsel failed to advise appellant of the psychiatric evaluation, as alleged, such failure might be argued as rendering ineffective assistance that so compromised the process as to render appellant's plea involuntary. This opinion does not address the merits of such an argument. However, pursuant to the mandates of Fraser, 59 S.W.3d 448, we are compelled to remand this matter to the circuit court for an evidentiary hearing upon this allegation.

Appellant raises various other allegations of error. We conclude that these remaining contentions are either substantively without merit or should have been raised on direct appeal. See Sanborn v. Commonwealth, 975 S.W.2d 905 (Ky. 1998).

For the foregoing reasons, the order of the Carlisle Circuit Court is affirmed in part, vacated in part, and this cause is remanded for proceedings not inconsistent with this opinion.

GUIDUGLI, JUDGE, CONCURS.

EMBERTON, SENIOR JUDGE, DISSENTS. I respectfully
dissent and would affirm the circuit court.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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