

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001436-MR

DERRICK O. WILLIAMS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 03-CR-001506

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON AND KELLER, JUDGES; GRAVES,¹ SENIOR JUDGE.

KELLER, JUDGE: Derrick O. Williams (Williams) entered a guilty plea in Jefferson Circuit Court and was sentenced to ten years' imprisonment. Subsequently, Williams filed a motion to vacate pursuant to RCr 11.42 claiming ineffective assistance of counsel; that he did not understand the consequences of his plea; and that he, therefore, did not

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

knowingly plead guilty. The circuit court denied Williams's motion and it is from this order of denial that Williams now appeals. For the reasons set forth below, we affirm.

FACTS

Williams has a rather lengthy criminal record. In 1990, he was convicted of Facilitation to Commit Robbery in the First Degree and sentenced to one year imprisonment. In 1993, Williams was convicted of Possession of a Handgun by a Convicted Felon and sentenced to two years' imprisonment. In 1998, Williams was convicted of Trafficking in a Controlled Substance in the First Degree and sentenced to seven years' imprisonment.

As to the crimes at issue herein, the police received a Crime Stoppers tip that Williams was selling cocaine from his residence and motel room. Thereafter, the police determined that Williams was wanted in connection with a parole violation, and they arrested him. At the time of his arrest, Williams had several grams of cocaine in his right front pants pocket and was driving a pick-up truck that had a gun in the driver's side armrest. The Jefferson County grand jury indicted Williams for Trafficking in a Controlled Substance While in Possession of a Firearm; Possession of a Firearm by a Convicted Felon; Carrying a Concealed Weapon; and with being a Persistent Felony Offender in the First Degree (PFO I).

The trial court appointed a public defender, Angela Rae (Rae), to represent Williams. Rae filed motions to reduce bond, to suppress evidence seized when Williams was arrested, and to try the various charges separately. The court granted the motion to

sever, stating that the possession of a firearm by a convicted felon charge would be tried last and the remaining charges would be tried first. For reasons not clear from the record, Williams obtained private counsel, Scott Barton. Approximately six months later, the trial court re-appointed Rae to represent Williams.² After being re-appointed, Rae filed a motion to dismiss the indictment.

On the day before the first trial, December 13, 2004, a second private attorney, Ramon McGee (McGee), filed a motion to substitute as counsel for Williams and a motion to re-schedule trial. On the day the first trial was set to begin, the Commonwealth objected to re-scheduling the trial, noting that it was prepared to go forward. Rae also indicated that she was prepared to proceed to trial. The court noted that McGee was involved in another trial that day and, therefore, could not try the Williams case. Noting that Williams's trial had been re-scheduled a number of times and that a jury panel was waiting, the judge stated that he would not re-schedule the trial. He stated that Williams could proceed *pro se* or with the assistance of Rae and that McGee could represent Williams in the second trial.

Following the judge's denial of the motion to re-schedule the trial, the parties entered into plea negotiations and, approximately three hours later, advised the court that they had reached an agreement that would dispose of all charges. Pursuant to that agreement, Williams entered an *Alford* plea to Trafficking in a Controlled Substance

² It is not clear from the written record why Rae was re-appointed to represent Williams. However, at the sentencing hearing, Williams stated that he became disenchanted with Barton's representation and discharged Barton because he believed that Barton was working more toward reaching a plea agreement than toward winning Williams's case.

I, Possession of a Firearm by a Convicted Felon, Carrying a Concealed Deadly Weapon, and to being a Persistent Felony Offender I. The Commonwealth agreed to recommend a total sentence of ten years' imprisonment without the possibility of probation or parole.

After receiving notification that a plea agreement had been reached, the judge questioned Williams at length regarding his understanding of the plea agreement and its implications. Williams stated that he understood that, by entering an *Alford* plea, he was not admitting guilt but was recognizing that there was a substantial chance that a jury could find him guilty on all charges. Furthermore, Williams stated that he understood that a conviction on all charges could result in a sentence of life imprisonment. Finally, Williams stated that he understood what rights he was relinquishing, that he had sufficient time to discuss the plea with his counsel, that he had not been threatened or coerced, that no one had made any special promises, and that he was acting of his own free will with full knowledge of the consequences. Following that discussion, the court accepted Williams's plea. At Williams's request, the court delayed sentencing until after the first of the year so that Williams could visit with family members at the jail and over the Christmas holiday.

On January 7, 2005, Rae stated that Williams had changed his mind and wanted to withdraw his guilty plea. The court then conducted an *ex parte* hearing with Williams and Rae. During that hearing, Williams stated that he had wanted to be represented by McGee, his retained counsel, rather than Rae. The court noted that it had ruled that Williams was entitled to be represented by McGee during the second trial but

that Williams entered his plea before either trial began. When the court asked Williams what problems he had with his representation by Rae, Williams stated that he did not feel that he had been able to explain the "whole situation" to the court. Furthermore, Williams stated that he did not believe that Rae had been prepared to "give her all" at trial and that he had pled guilty, in part, because of that belief. The judge stated that he could discern no legal reason sufficient to support Williams's motion to withdraw his plea; therefore, he denied that motion and sentenced Williams pursuant to the plea agreement. Williams then filed a motion to vacate pursuant to RCr 11.42, which the trial court denied. It is from the trial court's order denying that motion that Williams appeals. For the reasons set forth below, we affirm.

STANDARD OF REVIEW

Williams argues before us, as he did before the trial court, that he would not have entered a guilty plea but for the ineffective assistance of his counsel. Furthermore, Williams argues that, because of his counsel's deficiencies, he did not knowingly enter a plea. Therefore, we must analyze this appeal from two perspectives. First, whether counsel was deficient and second, whether Williams intelligently and voluntarily entered his plea.

To show ineffective assistance of counsel, Williams must establish:

(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.

Bronk v. Commonwealth, 58 S.W.3d 482, 486-87 (Ky. 2001). In considering ineffective assistance of counsel, the reviewing court must focus on the totality of evidence before the judge and assess the overall performance of counsel throughout the case in order to determine whether the identified omissions overcome the presumption that counsel rendered reasonable professional assistance. *Kimmelman v. Morrison*, 477 U.S. 365, 381-82, 106 S.Ct. 2574, 2586-87, 91 L.Ed.2d 305 (1986).

As to the second issue, "[a] guilty plea is valid only when it is entered intelligently and voluntarily." *Bronk v. Commonwealth*, 58 S.W.3d 482, 486 (Ky. 2001). When reviewing a guilty plea for validity, the court must look at the totality of the circumstances to determine whether the plea was a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Id.* at 486; *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky.App. 1987). Inquiry into the voluntariness of a plea is fact sensitive and we will only reverse the trial court if its decision was clearly erroneous. *Edmonds v. Commonwealth*, 189 S.W.3d 558, 566 (Ky. 2006).

We will address the ineffective assistance of counsel issue first.

ANALYSIS

In his brief, as he did before the trial court, Williams argues that his counsel "failed to interview, subpoena or depose the key witness or any witnesses for the defense, failed to file any pretrial motions to suppress evidence, or conduct any pretrial investigation." Additionally, Williams argues that he only met with his attorney twice

and that, to this day, he is uncertain why his attorney recommended that he accept the plea bargain.

A review of the record indicates that the majority of Williams's allegations are incorrect. His attorney did file a number of pre-trial motions, including a motion to sever, a motion to suppress, and a motion to dismiss. Furthermore, prior to accepting Williams's plea, the judge carefully explained to Williams the meaning of an *Alford* plea and pointed out to Williams that, if convicted on all charges, he faced a possible sentence of life imprisonment. Williams stated that he understood the risks inherent in going to trial and that he understood that his prior record "makes it bad for me," a clear indication that Williams understood why Rae recommended the plea agreement. As to witnesses, Williams's attorney indicated on the day of trial that she had subpoenaed a witness to testify on Williams's behalf, but that the witness had not arrived. Therefore, the only allegation by Williams that has any possible support in the record is that his attorney did not meet with him enough prior to trial. However, that allegation is belied by Williams's testimony that he had sufficient time to meet with and discuss his case with counsel before entering his plea. Therefore, Williams has failed to establish any deficiency on the part of his counsel or that there is any reasonable probability that he would not have pleaded guilty, but would have insisted on going to trial had he been differently represented.

As to whether Williams entered into his plea knowingly and voluntarily, we adopt the findings of the trial court as set forth below:

A review of the video record of Mr. Williams's plea and sentencing hearings clearly shows that this Court examined him thoroughly, as required under Boykin v. Alabama, 395 U.S. 238 (1969). As is common with each defendant that comes before this Court, Mr. Williams was advised of his constitutional rights, including the right to a jury trial and the right to remain silent. Additionally, during his plea, Mr. Williams was questioned extensively by the Court to ensure that he made a voluntary, knowing and intelligent decision in pleading guilty, waiving the aforementioned rights and in signing the AOC plea documents. The video record shows that Mr. Williams answered in the affirmative to each of the Court's questions, including indicating that he had been given enough time to discuss his case with each of his attorneys and was satisfied with the advice the attorneys had given him. During the plea, the Court outlined the terms of his plea and Mr. Williams made no indication that he required further time to consider the consequences of his plea before accepting the Commonwealth's offer. Additionally, Mr. Williams answered affirmatively when asked by the Court if he believed there was a substantial likelihood that the Commonwealth could prove its case beyond a reasonable doubt to a jury.

As the Court noted on the record at the sentencing, a conviction by a jury on just one of the felony offenses, enhanced by his PFO I status, would have likely subjected Mr. Williams to the same prison sentence he agreed to serve in the plea. A conviction on both felonies, enhanced by PFO status, could have possibly subjected him to a life sentence. On the day in which a jury waited outside the Court, ready to hear his case and render a verdict, Mr. Williams made the decision to accept an offer and told this Court he knew what he was doing when accepting the plea and its consequences. Although Mr. Williams disputes the preparedness of Ms. Rea on the day of trial, on the video record she clearly stated that she was ready to go forward as counsel, with the exception of waiting for one subpoenaed witness to arrive. In his 11.42 motion, Mr. Williams argues that Ms. Rae did not adequately and completely apprise him of the rights he gave up by accepting a plea. Based on this Court's familiarity with Ms.

Rae's work in representing other defendants, the likelihood of that having occurred is minimal. And whatever Ms. Rae may not have conveyed to Mr. Williams regarding a waiver of his rights this Court certainly did during its Boykin examination. Ultimately, it was Mr. Williams who chose to accept the Commonwealth's offer, despite the fact that a pool of jurors was waiting outside the courtroom, expecting to come inside to hear and decide his case.

We have reviewed the entire video and written record in this matter, and have determined that the trial court's findings, as set forth above, are accurate. We discern no error, clear or otherwise. Therefore, we hold that Williams knowingly and willingly entered his guilty plea and affirm the trial court's denial of Williams's motion to be relieved of that plea.

CONCLUSION

For the foregoing reasons, we hold that Williams has failed to establish that his counsel was ineffective or that he did not knowingly and willingly enter a guilty plea. Therefore, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

Derrick Williams, *pro se*
Beattyville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Michael A. Nickles
Assistant Attorney General
Frankfort, Kentucky