RENDERED: MARCH 9, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

No. 2005-CA-002073-MR

TERRELL D. SALYERS APPELLANT

v. APPEAL FROM McCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
INDICTMENT NO. 02-CR-00338

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND STUMBO, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

STUMBO, JUDGE: This is an appeal from an order denying Appellant's RCr 11.42 motion alleging an involuntary guilty plea, ineffective counsel, and lack of knowledge to all the charges he was pleading to. This Court affirms the lower court.

On July 7, 2003, an order and judgment on a guilty plea was entered onto the record against Terrell Salyers (Appellant). In the guilty plea, the Appellant was deemed guilty of multiple counts of sodomy and sexual abuse. Two months later the

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

court sentenced Appellant to thirty (30) years imprisonment in accordance with a plea agreement made with the Commonwealth in exchange for his guilty plea.

On July 14, 2005, Appellant filed a motion to vacate the judgment pursuant to CR 60.02 and RCr 11.42. On July 25, an order was entered denying his motion saying that his allegations were refuted by the record. This appeal followed.

Appellant argues that the judgment against him should be vacated due to his lack of knowledge concerning all the charges against him, the guilty plea being involuntary, and his lack of effective counsel. Each of these will be dealt with in turn.

At the core of all Appellant's arguments is that he was unaware of all the charges against him to which he was pleading to. Appellant was first indicted for one count first-degree sodomy on November 8, 2002. A superceding indictment was issued on March 21, 2003 that included the original sodomy count and three additional counts of first-degree sodomy and four counts of first-degree sexual abuse. Appellant claims that he believed at the time of the plea bargain that he was pleading to only one count of sodomy. In fact, he was pleading to one count of first-degree sodomy, one count of second-degree sodomy, and four counts of first-degree sexual abuse. As the trial court found, the record on this matter shows clearly that there were multiple instances where Appellant was informed of all the charges against him. First, on April 17, 2003 Appellant appeared for an arraignment on the superceding indictment with counsel, received a copy of the indictment, and was informed of the charges contained in the indictment. Then, on June 30, Appellant appeared in open court with his attorney, withdrew his plea of not guilty, and entered a plea of guilty. During this time, Appellant

was interrogated by the court concerning his plea of guilty and found to have knowingly and voluntarily waived his rights. Upon this finding, the court accepted the guilty plea. Finally, on July 3, Appellant signed a Commonwealth's Offer on a Plea of Guilty form which set forth in detail all the charges he would be pleading to. These charges were the two counts of sodomy and four counts of sexual abuse. Also, that same day, Appellant signed a motion to enter a guilty plea.

These are all instances contained in the record of when Appellant was made aware of all the charges he was pleading guilty to. Nothing in the record supports Appellant's assertion that he was never made aware of the additional charges against him beyond the single count of sodomy contained in the first indictment.

Appellant also claims that the plea should be held invalid because he was incompetent at the time of making the plea agreement and therefore should not be held to it. The evidence he uses to support this claim is a 1981 physical exam record stating he was borderline mentally retarded and a pre-sentencing evaluation that found Appellant's IQ to be 73. Notwithstanding these documents, a psychiatric evaluation of Appellant was ordered on March 28, 2003 at his counsel's request and a competency hearing held on July 31. During this hearing, the court found Appellant to be competent. This Court finds that since Appellant was found to be competent after a competency hearing was held and that "[t]he presence of some degree of mental disorder in the defendant does not necessarily mean that he is incompetent to knowingly and voluntarily enter a plea as well as aid and assist in his own defense," *Wolf v. U.S.*, 430 F.2d 443, 445 (C.A.Okl. 1970), he was competent and knowingly entered his guilty plea.

Appellant also claims the plea agreement is invalid due to ineffective counsel. Appellant alleges that his counsel scared him into taking the plea by saying he could get life in prison or be indicted on further charges. Appellant Br. at 9-10.) Appellant also claims that the part of the plea agreement concerning the Commonwealth Attorney's promise not to pursue charges against him in other counties was invalid and Defense counsel should have known this.

In order to find that counsel's assistance was ineffective, Appellant must show,

> (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.

Kiser v. Com., 829 S.W.2d 432, 433 (Ky. App. 1992). This Court can find no instances of Appellant's counsel making such egregious errors as would constitute ineffective counsel. In fact, it seems that Appellant's counsel gave advice that any other counselor would give. Appellant was in fact facing a possible life sentence and could have been charged for similar crimes in other counties. A plea is not improper when motivated by fear. Influencing a defendant to plead to a lighter sentence when facing life imprisonment is sound advice. *See Harris v. Com.*, 456 S.W.2d 690 (Ky. 1970). Furthermore, the agreement that the Commonwealth Attorney would not prosecute Appellant in other counties is not invalid because a plea agreement is essentially a contract. As in this case, when a Commonwealth Attorney makes a plea bargain and promises something, that promise is binding on the state of Kentucky itself. "[I]f the

offer is made by the prosecution and accepted by the accused, either by entering a plea or by taking action to his detriment in reliance on the offer, then the agreement becomes binding and enforceable. Constitutional as well as contractual rights become involved." *Com. v. Reyes*, 764 S.W.2d 62, 65 (Ky. 1989). When the Commonwealth Attorney promised not to prosecute Appellant in Lyon and Marshall Counties, this constituted a valid term in the plea agreement and became an enforceable part of the contract. A plea agreement is made in the name of the Commonwealth, not in the name of the representative. *Com. v. Smith*, 244 S.W.2d 724 (Ky. 1951). This suggests that the agreement would be binding on the state and Appellant could use it to stop any future prosecution in Lyon and Marshall Counties should they arise.

Appellant also claims his counsel was ineffective because he was coerced into pleading guilty to two charges that he was not guilty of. Appellant does not discuss which charges he is referring to and offers no proof that he is not guilty of these charges beyond bald allegations in his motion for relief. The record demonstrates that his plea was freely and knowingly given and no need for a hearing was found by the trial court. The Court is required to accept factual findings in the absence of evidence in the record refuting them. *Fraser v. Com.*, 59 S.W. 3rd 448, 452 (Ky. 2001).

Appellant's counsel appears to have performed professionally throughout these proceedings and did not commit any serious errors that could be considered ineffective counsel. Since Appellant did not offer sufficient proof his counsel committed such acts as to fall into the first prong of the *Kiser v. Com.* two-part test cited above, there is no need to comment on the second factor.

Finally, Appellant claims that even if his arguments individually do not warrant relief, viewing them collectively does. We disagree. None of his arguments raise any points that would justify reversing the lower court because the record directly refutes them all. No instances of ineffective counsel could be found and Appellant was shown to have made the plea in a knowing and voluntary manner.

The judgment is affirmed.

LAMBERT, JUDGE, CONCURS.

BUCKINGHAM, SENIOR JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT:

Terrell Salyers, *pro se*
#169468
Kentucky State Reformatory
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Jeffrey A. Cross
Assistant Attorney General
Frankfort, Kentucky