

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-000100-MR

BOBBY GREEN

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 02-CR-00018-01

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: DIXON AND TAYLOR, JUDGES; KNOPF,¹ SENIOR JUDGE.

DIXON, JUDGE: Appellant, Bobby Green, appeals *pro se* from the denial of his motion for RCr 11.42 post-conviction relief in the Laurel Circuit Court.

In January 2002, Appellant and another defendant, Nicole Nantz, were indicted in the Laurel Circuit Court on two counts of attempted murder, two counts of first-degree wanton endangerment, and two counts of third-degree trafficking in a

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

controlled substance. In March 2002, Appellant entered a plea of guilty to both attempted murder charges, as well as one count of trafficking. The remaining charges were dismissed. In April 2002, the trial court sentenced Appellant to a total of thirteen years' imprisonment.

On July 13, 2004, Appellant filed an RCr 11.42 motion in the Laurel Circuit Court claiming that: (1) trial counsel was ineffective, (2) the trial court erred by denying his motion to withdraw his guilty plea at the sentencing hearing; (3) the prosecutor abused his discretion by charging him with murder instead of wanton endangerment; (4) the trial court erred by sentencing him to two years on the misdemeanor trafficking charge; and (5) the prosecutor manipulated the grand jury proceedings. By order entered August 5, 2005, the trial court summarily denied Appellant's motion.² This appeal ensued.

Because the trial court denied Appellant's RCr 11.42 motion without an evidentiary hearing, our review is "whether the [RCr 11.42] motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967). See also *Baze v. Commonwealth*, 23 S.W.3d 619 (Ky. 2000), *cert. denied*, 531 U.S. 1157 (2001). We are of

² The trial court did agree that trafficking in controlled substance should have been classified as a misdemeanor charge and corrected the sentence accordingly.

the opinion that Appellant's RCr 11.42 claims are clearly refuted from the face of the record.

Appellant first claims that trial counsel was ineffective by misleading him to accept a plea bargain under the belief that the plea was for two counts of wanton endangerment. However, during the plea colloquy, the trial court read the plea agreement and asked Appellant if he understood the charges against him contained therein. He answered "yes." When asked if his attorney explained the nature of the charges and the penalties they carried, he also answered "yes." In fact, Appellant even specifically acknowledged that he was guilty of the facts supporting the attempted murder charges.

In addition to the oral exchanges concerning the charges, the attempted murder charges appeared multiple times on paper and in numerous documents that Appellant himself signed. Moreover, Appellant stated that he was satisfied with the services provided by his attorney and did not believe there was anything additional that his attorney could have done in his defense. Thus, we agree with the trial court that Appellant's claim of ineffective assistance of counsel is clearly refuted by the record. See *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Nor do we find any merit in Appellant's argument that he was denied due process when the trial court denied his motion

to withdraw his guilty plea before sentencing. RCr 8.10 provides, "At any time before judgment the court may permit the plea of guilty to be withdrawn and a plea of not guilty be substituted." In *Rigdon v. Commonwealth*, 144 S.W.3d 283, 287-88 (Ky. App. 2004), this Court enunciated the following rule:

When a criminal defendant pleads guilty, Rule 8.10 of the Kentucky Rules of Criminal Procedure (RCr) requires the trial court receiving the guilty plea to determine on the record whether the defendant is voluntarily pleading guilty. Whether a guilty plea is voluntarily given is to be determined from the totality of the circumstances surrounding it. The trial court is in the best position to determine the totality of the circumstances surrounding a guilty plea. Once a criminal defendant has pleaded guilty, he may move the trial court to withdraw the guilty plea, pursuant to RCr 8.10. If the plea was involuntary, the motion to withdraw it must be granted. However, if it was voluntary, the trial court may, within its discretion, either grant or deny the motion. Whether to deny a motion to withdraw a guilty plea based on a claim of ineffective assistance of counsel first requires "a *factual* inquiry into the circumstances surrounding the plea, primarily to ascertain whether it was voluntarily entered." The trial court's determination on whether the plea was voluntarily entered is reviewed under the clearly erroneous standard. A decision which is supported by substantial evidence is not clearly erroneous. If, however, the trial court determines that the guilty plea was entered voluntarily, then it may grant or deny the motion to withdraw the plea at its discretion. This decision is reviewed under the abuse of discretion

standard. A trial court abuses its discretion when it renders a decision which is arbitrary, unreasonable, unfair, or unsupported by legal principles. (Citations omitted).

As previously noted, the trial court conducted a lengthy plea colloquy pursuant to *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). The record establishes that the trial court carefully considered Appellant's plea at the time it was made and again in response to Appellant's RCr 11.42 motion, and concluded that it was knowing and voluntary. As such, we cannot find that the trial court abused its discretion by denying Appellant's subsequent request to withdraw that plea. See *Rodriguez v. Commonwealth*, 87 S.W.3d 8, 9 (Ky. 2002).

Finally, we agree with the trial court's finding that Appellant's plea waived the remaining issues raised in his RCr 11.42 motion. As our Supreme Court noted in *Quarles v. Commonwealth*, 456 S.W.2d 693 (Ky. 1970), "the effect of entering a guilty plea is to waive all defenses other than the indictment charges no offense."

Similarly, in *Ford v. Commonwealth*, 453 S.W.2d 551 (Ky. 1970), the defendant claimed, among other things, that his appointed counsel refused to prepare a defense because of lack of compensation. The trial court, having engaged the defendant in a *Boykin* plea colloquy at the time he entered his plea,

denied the defendant's RCr 11.42 motion. On appeal, the trial court's decision was affirmed on the grounds that the plea colloquy "enable[d] the trial court in post-conviction proceedings to refute from the record charges like the ones presented here." *Id* at 552.

In the instant case, the record refutes any claim that Appellant's plea was not voluntary. As such, his guilty plea waived all defenses and all claims of error raised in his RCr 11.42 motion.

For the foregoing reasons, the Laurel Circuit Court's order denying Appellant RCr 11.42 relief is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Bobby Green, *Pro Se*
Pineville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Robert Prather
Assistant Attorney General
Frankfort, Kentucky