

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-001197-MR

JONATHAN DYER

APPELLANT

v. APPEAL FROM GARRARD CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 03-CR-00054

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: KELLER AND VANMETER, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.

KELLER, JUDGE: Jonathan Dyer appeals from the Garrard Circuit Court's denial of his RCr 11.42 motion. Dyer raises the following issues in this appeal: (1) that he did not knowingly and willingly enter a guilty plea; (2) that the trial court erred when it did not let him withdraw his guilty plea; (3) that the trial court erred by failing to provide relief when Dyer's counsel did not appeal the denial of his motion to withdraw his guilty plea;

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

(4) that counsel failed to prepare a defense; (5) that his plea was obtained by duress from the Commonwealth Attorney; (6) that double jeopardy attached because he was convicted of four crimes that arose from one incident; (7) that the trial court erred when it denied his request for appointment of counsel and for a hearing on his RCr 11.42 motion; and (8) that the trial court failed to make a finding regarding the cumulative effects of these alleged errors. For the reasons set forth below, we affirm.

FACTS

On June 19, 2003, Dyer and Danny Poff entered the home of Burdette Earles and Sandra Jernigan through a window. Dyer struck Earles several times with a 2x4 board, killing him. Poff struck Jernigan with a 2x4 board, severely injuring her. Dyer and Poff then burglarized the home. In an attempt to destroy any evidence, Dyer and Poff then burned the 2x4s, their clothing, and the masks and gloves they had been wearing.

On June 4, 2004, Dyer, who was represented by counsel, entered a guilty plea to Murder, Assault in the First Degree, Burglary in the First Degree, two counts of Robbery in the First Degree, and Tampering with Physical Evidence. In exchange for his plea, the Commonwealth, which had indicated that it would seek the death penalty at trial, agreed to recommend a total sentence of 32 years' imprisonment. Prior to accepting Dyer's plea, the trial court conducted a hearing, during which Dyer stated that: he suffered from no mental illness; he was not under the influence of drugs; he had sufficient time to discuss his case with his attorneys and was satisfied with their

representation; he was aware of his rights and that he was waiving them; he had discussed the various defenses and the burden on the Commonwealth with his attorneys; and that he understood the Commonwealth's offer. Furthermore, Dyer admitted to the facts as outlined in Commonwealth's Offer on a Plea of Guilty, which are summarized above.

On July 9, 2004, Dyer's attorneys informed the trial court that Dyer, against their advice, wanted to withdraw his guilty plea. The trial court questioned Dyer about why he wanted to withdraw his plea. Dyer stated that he felt that the crime was not his fault; that a sentence of 32 years was too long; and that he had not been able to review the Commonwealth's response to his discovery requests. One of Dyer's attorneys stated that she believed that she took the discovery to Dyer and personally discussed it with him. Dyer's other attorney stated that he believed that the discovery had been sent to Dyer. Both attorneys stated that they had discussed every aspect of the case with Dyer. After hearing from Dyer and his attorneys, and taking into consideration Dyer's statements from June 4, 2004, the trial court denied Dyer's motion to withdraw his guilty plea.

On July 29, 2004, the trial court sentenced Dyer consistent with the plea agreement to a total of 32 years' imprisonment. Neither Dyer nor his trial counsel appealed from the trial court's order denying his motion to withdraw his guilty plea or the trial court's sentence.

In 2006, Dyer filed a motion pursuant to RCr 11.42 to set aside his conviction and for an evidentiary hearing. The trial court denied Dyer's motion. It is from this denial that Dyer appeals.

STANDARD OF REVIEW

Because there are different standards of review for the various issues raised by Dyer, we will set forth those standards in the analysis section for each issue.

ANALYSIS

A. Guilty Plea

Dyer has raised three issues with regard to his guilty plea: (1) that he did not knowingly and willfully enter into his plea; (2) that his counsel was deficient in preparing his case prior to advising him with regard to his plea; and (3) that the trial court should have permitted him to withdraw his plea. We will address each of these issues in turn.

"A guilty plea is valid only when it is entered intelligently and voluntarily." *Bronk v. Commonwealth*, 58 S.W.3d 482, 486 (Ky. 2001). To determine if a plea was valid, 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. 1986). Inquiry into the voluntariness of a plea is fact sensitive and the trial court will only be reversed if its decision was clearly erroneous. *Edmonds v. Commonwealth*, 189 S.W.3d 558, 566 (Ky. 2006).

The trial court conducted a full hearing prior to accepting Dyer's plea. During that hearing, Dyer stated that he was satisfied with his representation, that he had sufficient time to meet with and speak to his attorneys, and that he had discussed with his attorneys the various defenses available. In light of Dyer's testimony at the plea hearing and at the hearing on his motion to withdraw his plea, we hold that Dyer entered his plea knowingly and voluntarily.

Although not specifically delineated as such, Dyer's second issue involves a claim of ineffective assistance of counsel, which may be used to attack a guilty plea. *See Rodriguez v. Commonwealth*, 87 S.W.3d 8, 10 (Ky. 2002). To show ineffective assistance of counsel, Dyer 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, 58 S.W.3d at 486-87.

In considering ineffective assistance, 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. *See United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992); *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

With this standard in mind, we look to the record to see if the performance by Dyer's counsel fell outside the range of professionally competent assistance. At the hearing on his motion to withdraw his plea, Dyer complained that he had not seen all of the discovery produced by the Commonwealth and that the agreed to sentence was "too long." Dyer gave no other reasons to support his motion to withdraw his plea.

Dyer's attorneys stated that they had provided the discovery to Dyer. One of Dyer's attorneys stated that she had reviewed the discovery with Dyer, and the other stated that the discovery had been mailed to Dyer. Furthermore, the record contains a statement for services from a private investigator retained by Dyer's counsel. It is unclear what conclusions the investigator reached; however, the specific charges listed on the statement indicate that the investigator thoroughly reviewed this matter. Finally, Dyer's plea relieved him from a possible sentence of death. Taking these factors into consideration, we do not discern any evidence that Dyer's counsel acted outside the range of professionally competent assistance. Therefore, we hold that Dyer's counsel was not deficient in representing Dyer prior to the entry of his guilty plea.

Dyer next argues that the trial court should have permitted him to withdraw his guilty plea. RCr 8.10 provides that "[a]t any time before judgment the court may permit the plea of guilty or guilty but mentally ill, to be withdrawn and a plea of not guilty substituted." However, before permitting a defendant to withdraw a guilty plea, the trial court should determine on the record whether the plea was made voluntarily. *Rigdon v. Commonwealth*, 144 S.W.3d 283, 287 (Ky.App. 2004). If a plea was not

voluntary, the defendant must be permitted to withdraw it. *Rodriquez v. Commonwealth*, 87 S.W.3d 8, 10 (Ky. 2002). Inquiry into the voluntariness of a plea is fact sensitive and the trial court will only be reversed if its decision was clearly erroneous. *Edmonds v. Commonwealth*, 189 S.W.3d 558, 570 (Ky. 2006).

In light of Dyer's testimony when he entered his plea, and the fact that Dyer was facing a potential death sentence, we hold that the trial court was not clearly erroneous when it denied his motion to withdraw his plea. Therefore, we affirm the trial court's denial of Dyer's motion to withdraw his plea.

B. Failure to Appeal

Although it is not clear from his brief, it appears that Dyer is arguing that his counsel was also ineffective because he did not appeal the trial court's denial of his motion to withdraw his plea. As noted above, the trial court correctly denied Dyer's motion to withdraw his plea, and there were no legitimate grounds for appeal. Therefore, counsel's failure to appeal could not have been ineffective.

C. Duress by the Commonwealth Attorney

Dyer alleges that the Commonwealth's Attorney said that he was "gonna kill [Dyer] if he [did] not enter a plea." According to Dyer, this statement, along with his "tender years," caused him to enter a guilty plea under duress.

RCr 11.42(2) requires a motion to vacate to "state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds." Dyer has not set forth any facts, nor pointed to any place in the

record containing the statement attributed to the Commonwealth's Attorney.

Furthermore, based on the record before us, a statement by the Commonwealth's Attorney that Dyer faced a possible death sentence was correct. Therefore, the issue of duress has no merit.

D. Double Jeopardy

Dyer alleges that the charges against him violated the prohibition against double jeopardy because the charges all arose from an "uninterrupted chronic chain of events." We note that Dyer pleaded guilty to and was sentenced for Murder, Assault in the First Degree, Burglary in the First Degree, two counts of Robbery in the First Degree, and Tampering with Physical Evidence. As noted by the Commonwealth in its brief, the charges against Dyer arose from acts committed against two people, Mr. Earles (murder, first-degree robbery, and first-degree burglary) and Ms. Jernigan (first-degree assault and first-degree robbery).

In order to determine if Dyer has been exposed to double jeopardy, the court must determine whether the acts complained of constituted a violation of two distinct statutes and, if they did, if each statute requires proof of a fact the other does not. *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932) and *Commonwealth v. Burge*, 947 S.W.2d 805, 809 (Ky. 1996).

We can easily dispose of the double jeopardy argument regarding the charges against Dyer related to both Earles and Jernigan. Dyer was charged with murder, first-degree burglary, and first-degree robbery with regard to Earles. As noted by the

Supreme Court in *Mills v. Commonwealth*, 996 S.W.2d 473, 494 (Ky. 1999), the charges of murder, first-degree robbery, and first-degree burglary are three separate offenses for double jeopardy purposes. A murder charge requires proof of death, which is not required to prove either burglary or robbery. A robbery charge requires commission of theft, which is not required to prove either murder or burglary, and a burglary charge requires unlawful entry into a building, which is not required to prove either murder or robbery. Because the proof required for each charge differs, Dyer was not exposed to double jeopardy with regard to the charges related to Earles.

As to Jernigan, Dyer was charged with first-degree robbery and first-degree assault. As noted above, a charge of robbery requires proof of commission of theft, which is not required to prove assault. A charge of assault requires proof that a defendant intentionally caused physical harm to another, while a charge of robbery requires only the use or threat of physical force but no actual physical harm. *See Taylor v. Commonwealth*, 995 S.W.2d 355, 359 (Ky. 1999). Because the proof required for the charges related to Jernigan differs, Dyer was not exposed to double jeopardy with regard to those charges. Therefore, Dyer's argument regarding double jeopardy is without merit.

E. Failure to Hold a Hearing

Dyer argues that the trial court should have held an evidentiary hearing prior to ruling on his RCr 11.42 motion. A hearing is only required if an RCr 11.42 motion raises an issue that cannot be determined on the face of the record. RCr 11.42(5); *Stanford v. Commonwealth*, 854 S.W.2d 742, 743 (Ky. 1993). Having reviewed the

record, we have determined that it was more than sufficient to support the trial court's ruling. Therefore, we hold that the trial court had no obligation to conduct a hearing on Dyer's RCr 11.42 motion.

F. Appointment of Counsel

Dyer argues that the trial court erred when it did not appoint counsel to represent him with regard to his RCr 11.42 motion. RCr 11.42(5) provides that, if a material issue of fact cannot be determined from the record and the movant is without counsel and financially unable to employ counsel, the trial court shall appoint counsel. However, the trial court is not required to appoint counsel if it deems that a hearing is not necessary. *See Fraser v. Commonwealth*, 59 S.W.3d 448, 451 (Ky. 2001). Because the trial court was not required to conduct a hearing on Dyer's RCr 11.42 motion, Dyer was not entitled to appointment of counsel.

G. Cumulative Error

Finally, Dyer argues that the trial court did not make findings regarding the cumulative effects of the numerous errors he alleged. We hold that this argument by Dyer also is without merit. In *Sanborn v. Commonwealth*, 975 S.W.2d 905, 913 (Ky. 1998), the Supreme Court held that allegations of ineffectiveness of counsel held to be meritless when considered separately, do not become meritorious when considered cumulatively. Although Dyer has raised issues that are not solely related to ineffective assistance of counsel, the logic of *Sanborn* clearly applies. Dyer cannot take eight meritless issues and, by combining them, make them meritorious.

CONCLUSION

For the foregoing reasons, the judgment of the Garrard Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jonathan Dyer, *pro se*
Eddyville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Michael L. Harned
Assistant Attorney General
Frankfort, Kentucky