

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-001339-MR

THOMAS ELZA, JR.

APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE PAUL E. BRADEN
INDICTMENT NO. 03-CR-00251

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: STUMBO, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.¹

BUCKINGHAM, JUDGE: Thomas Elza, Jr., appeals from an order of the Laurel Circuit Court denying his Kentucky Rule of Criminal Procedure (RCr) 11.42 motion to vacate his convictions and life sentence imposed on him pursuant to his guilty pleas to the crimes of murder and first-degree burglary. We vacate and remand for an evidentiary hearing.

On October 17, 2003, Elza was indicted on one count of murder, one count

¹ Senior Judges David C. Buckingham and Michael L. Henry sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

of first-degree burglary, one count of kidnapping, two counts of retaliating against a witness, and two counts of second-degree wanton endangerment² in connection with the murder of Pauline Rey.

The Commonwealth initially sought the death penalty against Elza. On July 1, 2005, pursuant to a plea agreement with the Commonwealth, Elza entered guilty pleas to murder and first-degree burglary. In exchange for Elza's pleas, the Commonwealth moved the court to dismiss the other charges and recommended that Elza be sentenced to life imprisonment for murder and 20 years for first-degree burglary, with the sentences to run concurrently. On August 1, 2005, the court sentenced Elza in accordance with the plea agreement.

On April 10, 2006, Elza filed an RCr 11.42 motion to vacate the judgment, alleging ineffective assistance of counsel. Elza also moved for the appointment of an attorney and for an evidentiary hearing. On May 22, 2006, the court entered an order denying the RCr 11.42 motion without an evidentiary hearing. This appeal followed.

Elza argues that the trial court erred when it denied his motion without conducting an evidentiary hearing. An evidentiary hearing on a defendant's RCr 11.42 motion is required only when the motion raises “an issue of fact that cannot be determined on the face of the record.” *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993).

Elza argues that his counsel rendered ineffective assistance because his counsel coerced, manipulated, and intimidated him into pleading guilty. He asserts that

² See KRS 507.020, 511.020, 509.040, 524.055, and 508.070, respectively.

these matters are not refuted by the face of the record and that he is thus entitled to an evidentiary hearing. We agree.

When Elza appeared before the circuit court to enter his pleas of guilty, the court conducted a guilty plea colloquy wherein it reviewed Elza's rights and made a determination that Elza had voluntarily waived them. Further, Elza signed the AOC forms entitled "Motion to Enter a Guilty Plea" and "Commonwealth's Offer on a Plea of Guilty".

The Commonwealth cites *Commonwealth v. Crawford*, 789 S.W.2d 799 (Ky. 1990), and maintains that the properly signed AOC forms are themselves sufficient evidence that the pleas were knowingly and voluntarily entered. The Commonwealth also notes that the statements and admissions made by Elza to the court during the guilty pleas colloquy indicate the voluntariness of his pleas. Nevertheless, we conclude that the court erred in not granting Elza an evidentiary hearing on his RCr 11.42 motion.

The voluntariness of a guilty plea is to be determined by the totality of the circumstances. *Rodriguez v. Commonwealth*, 87 S.W.3d 8, 10 (Ky. 2002). When a defendant disputes the voluntariness of a guilty plea, the court is required to consider the totality of the circumstances surrounding the plea "and juxtapose the presumption of voluntariness of a plea colloquy with a *Strickland v. Washington* inquiry into the performance of counsel." *Bronk v. Commonwealth*, 58 S.W.3d 482,486 (Ky. 2001). Further, the Kentucky Supreme Court in the *Rodriguez* case stated, "Generally, an evaluation of the circumstances supporting or refuting claims of coercion and ineffective assistance of counsel requires an inquiry into what transpired between attorney and client

that led to the entry of the plea, i.e., an evidentiary hearing.” *Rodriguez*, 87 S.W.3d at 10.

We agree with the Commonwealth that evidence that Elza signed the AOC forms and that the court entered into the guilty plea colloquy with him was sufficient evidence to support a finding of voluntariness of the pleas. *See Crawford, supra*.

However, although the evidence is sufficient to support the finding, it is not conclusive of the issue.³ On allegations of coercion, manipulation, and intimidation, an evidentiary hearing is generally required to determine what transpired between attorney and client that led to the entry of the pleas. *Rodriguez, supra*, and *Bronk, supra*. In other words, Elza must be given a chance to present evidence to support his allegations as to what he claims led him to sign the plea agreement and plead guilty. Thus, as Elza alleged coercion,

manipulation, and intimidation, the court should have granted his motion for an evidentiary hearing.

The order of the Laurel Circuit Court denying Elza's RCr 11.42 motion is vacated, and the matter is remanded for an evidentiary hearing on the motion.

STUMBO, JUDGE, CONCURS.

HENRY, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

HENRY, SENIOR JUDGE, DISSENTING. I must respectfully dissent. I disagree with the majority's conclusion that Elza's claims of coercion, manipulation and intimidation by his counsel are not refuted by the record. The circuit court's six-page

³ In *Crawford*, a hearing was held.

order overruling Elza's motions reviewed the overwhelming evidence of Elza's guilt, and then made a determination that each allegation in Elza's motions was refuted by the record. Although Elza now claims that his defense counsel coerced and manipulated him to plead guilty, when he entered his videotaped guilty plea he denied that anyone had threatened, intimidated or coerced him to plead guilty. I know of no requirement in the law that the allegations Elza makes now, must be accorded more credibility than the statements he made when he entered his guilty plea on the record. I feel that the circuit court made a sufficient finding that Elza's plea was voluntary, so as to distinguish this case from *Rodriguez v. Commonwealth*, 87 S.W.3d 8 (Ky. 2002). A voluntary plea of guilty waives all defenses except that an indictment charges no offense. *Quarles v. Commonwealth*, 456 S.W.2d 693, 694 (Ky.1970).

I do not believe that the Supreme Court in *Rodriguez* intended to make a rule that RCr 11.42 claims of coercion and intimidation by counsel, must automatically result in an evidentiary hearing. Some degree of discretion remains in the trial court. In my view the trial court here considered the totality of the circumstances as required by *Rodriguez* and made a considered and well-supported decision that no hearing was necessary. I would affirm.

BRIEF FOR APPELLANT:

Thomas Elza, Jr.
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Ken W. Griggs
Assistant Attorney General
Frankfort, Kentucky