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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002524-MR

KENNETH RAY GORDON — APPELLANT

v.

APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NO. 00-CR-00075 & 02-CR-00053

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; ACREE, JUDGE; HENRY,[1] SENIOR JUDGE.

COMBS, CHIEF JUDGE: Kenneth Gordon appeals the denial of a motion filed pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 seeking to vacate, set aside, amend, and/or correct his sentence as well as the denial of an evidentiary hearing. After our review of the record, we affirm the Shelby Circuit Court.

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

FACTS

On November 9, 2000, appellant, Kenneth Gordon, pled guilty to a D.U.I. (driving under the influence), fourth offense; operating a motor vehicle on a suspended or revoked license for D.U.I., second offense; and a persistent felony offender, second-degree offense. (The PFO II charge was originally a PFO I charge that was amended in the plea agreement. It arose from previous felony convictions for flagrant non-support, receiving stolen property, and second-degree burglary.) In exchange, Gordon was sentenced to eight-years' incarceration and was granted five years in shock probation.

In May 2003, Gordon again pled guilty to a D.U.I., fourth offense; operating a motor vehicle on a suspended or revoked license for D.U.I., second offense; and persistent felony offender, first-degree, a charge that resulted from an arrest in March 2002. He was sentenced to ten-years' incarceration and was again granted five years of shock probation.

On July 20, 2004, the Shelby Circuit Court revoked Gordon's probation after he was arrested and indicted for a D.U.I., fourth offense; operating a motor vehicle on a suspended or revoked license for D.U.I., second offense; persistent felony offender, first degree; and failing to notify his parole officer within 72 hours of the arrest.

On October 11, 2005, Gordon filed an RCr 11.42 motion to vacate, set aside, amend and/or correct the sentence. On July 26, he supplemented the motion with a request for an evidentiary hearing. The Shelby Circuit Court denied both motions in August 2006. Gordon appeals that order.

APPELLANT'S RCr 11.42 MOTION AND THE APPLICABLE STATUTE OF LIMITATIONS

Kentucky RCr 11.42 directs: "any motion under this rule shall be filed within three years after the judgment becomes final." The Commonwealth argues that Gordon's motion is based on his conviction of December 2000, which became final in January 2001. Since he filed his RCr 11.42 motion in October 2005, the Commonwealth argues that the motion is barred by the three-year statute of limitations. However, under Kentucky Rules of Civil Procedure (CR) 8.03, as applied to the criminal context through RCr 13.04, a statute-of-limitations defense must be asserted affirmatively rather than belatedly on appeal. In this case, the record does not contain any response by the Commonwealth to Gordon's motion – much less its affirmative use of the statute-of-limitations defense. This omission to respond by the Commonwealth constitutes a waiver of its ability to assert the defense of the statute of limitations on appeal. Therefore, we have proceeded to consider the merits of Gordon's RCr 11.42 motion.

APPELLANT'S GUILTY PLEA WAS VALID

Gordon claims that his guilty plea in 2000 was involuntarily and unknowingly entered because of ineffective assistance of counsel. The Kentucky standard for determining the validity of a guilty plea is *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky.App. 1986):

> The test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. *North Carolina v. Alford*, 400 U.S. 25 (1970). There must be an affirmative showing in the record that the plea was

> intelligently and voluntarily made. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). However, "the validity of a guilty plea is determined not by reference to some magic incantation recited at the time it is taken but from the totality of the circumstances surrounding it."

Kotas v. Commonwealth, 565 S.W.2d 445, 447 (Ky. 1978), (citing *Brady v. United States*, 397 U.S. 742, 749 (1970)).

The Supreme Court of Kentucky has endorsed the use of written forms to enter a guilty plea in order to satisfy the *Sparks* and *Boykin* concerns as to due process. *Commonwealth v. Crawford*, 789 S.W.2d 779, 780 (Ky. 1990). The *Crawford* court noted that the "Certificate of Counsel" had been signed by counsel, indicating that the defendant had voluntarily and freely waived his rights. When juxtaposed with that Certificate, the waiver form signed by the defendant created a record that was "adequate to show that the petitioner intelligently and knowingly pleaded guilty." *Id*.

In this case, Gordon signed a "Motion to Enter Guilty Plea" in which he attested that he was not impaired by drugs, alcohol, or medication. In the next item, he asserted that he fully informed his attorney of the facts of the case and that they had fully discussed the case. Thereafter followed a list of Constitutional rights being waived – such as the right to trial, testimony, and appeal. The form then set forth the consequences of the guilty plea. Finally, the motion recited:

> I declare my plea of 'GUILTY' is freely, knowingly, intelligently, and voluntarily made, that I have been represented by competent counsel, and that I understand the nature of this proceeding and all matters contained in this document.

Gordon's signature is dated November 9, 2000. The form also includes a signed Certificate of Counsel in which Gordon's attorney attested that to the best of his knowledge, Gordon was fully informed and aware of the implications of a guilty plea. It was signed by Gordon's attorney.

Gordon verbally reinforced his written acknowledgment that his guilty plea was made knowingly, intelligently, and voluntarily in court on November 9, 2000. Under these circumstances, we can find no doubt that his guilty plea was validly entered.

APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

Gordon argues that his conviction is a result of ineffective assistance of counsel because his attorney encouraged him to enter a guilty plea. In assessing the issue of adequacy of counsel, the United States Supreme Court has held:

> Judicial scrutiny of counsel's performance must be highly deferential. . . .Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Strickland v. Washington, 466 U.S. 668, 689 (1984). In placing the burden of proof on the defendant, the Court observed:

> A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.

Id. at 690. Thus, specific examples rather than generalized complaints about counsel's performance must be demonstrated.

Kentucky applies a two-part test in scrutinizing counsel's representation in harmony with *Strickland, supra*:

> (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.

Sparks v. Commonwealth, 721 S.W.2d at 727-8, citations omitted.

Gordon argues that his attorney's advice that he plead guilty constituted ineffective assistance of counsel. In considering this very argument, we have observed: "It has remained the policy of this Commonwealth that where a plea of guilty may result in a lighter sentence than might, otherwise, be imposed should the defendant proceed to trial, **influencing a defendant to accept this alternative is proper**." *Osborne v. Commonwealth*, 992 S.W.2d 860, 864 (Ky.App. 1998), citations omitted. (Emphasis added.) Gordon's guilty plea resulted in a sentence for a Persistent Felony Offender second-degree conviction (PFO II), a lesser charge than the PFO I for which he was originally indicted.

In its Opinion and Order concerning Gordon's RCr 11.42 motion, the trial court noted that Gordon has multiple convictions for driving on a suspended license while intoxicated. The record contains various arrest records detailing the numerous incidents – as well as his statements in court proceedings relating to the guilty pleas.

> Considering the evidence against him on the DUI charges and the additional PFO charges ... there is not a reasonable

> probability that had Gordon been given access to all of the records and materials regarding his case that he would have proceeded to trial rather than plead guilty.

APPELLANT HAS WAIVED ALL DEFENSES BY PLEADING GUILTY

Furthermore, Gordon has not borne his burden of identifying specific acts or omissions as required of a defendant by the courts of this state or by the United States Supreme Court. However, regardless of the arguable existence of such acts or omissions, we must observe that Gordon's guilty plea precludes his ability to assert the defense of ineffective assistance of counsel. In fact, "the effect of a plea of guilty is to waive all defenses other than that the indictment charges no offense." *Quarles v. Commonwealth*, 456 S.W.2d 693, 694 (Ky. 1970). Gordon has not shown that he received ineffective assistance of counsel as a matter of fact; as a matter of law, he is not entitled to raise the claim.

Gordon has also raised evidentiary issues in his RCr 11.42 motion in an attempt to void his persistent felony offender conviction. Once again, the same reasoning of *Quarles* applies. Additionally, the Supreme Court of Kentucky has addressed a PFO charge directly in the context of an RCr 11.42 motion:

> When a defendant is charged with PFO, it is incumbent upon the defendant to challenge the validity of the prior conviction within the PFO proceeding. If a defendant fails to do so, the validity of the conviction is final and cannot be challenged in a subsequent RCr 11.42 proceeding.

Graham v. Commonwealth, 952 S.W.2d 206, 208 (Ky. 1997). The trial court did not err in denying the evidentiary hearing.

We affirm the Shelby Circuit Court's decision.

ALL CONCUR.

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